

PETITIONER:  
SAMARESH BOSE AND ANR.

Vs.

RESPONDENT:  
AMAL MITRA AND ANR.

DATE OF JUDGMENT 24/09/1985

BENCH:  
SEN, AMARENDRA NATH (J)  
BENCH:  
SEN, AMARENDRA NATH (J)  
PATHAK, R.S.

CITATION:  
1986 AIR 967                      1985 SCR Supl. (3) 17  
1985 SCC (4) 289                1985 SCALE (2)1225

ACT:

Indian Penal Code, section 292, ingredients and scope of Obscenity, concept of - Duty of the Court in judging the question of obscenity, explained - Whether the novel under the caption 'Prajapati' published in "Sarodiya Desh" in the Bengali Journal Desh contains matters which are obscene attracting liability under section 292 read with section 109 I.P.C. Of the author and the printer and the publisher.

HEADNOTE:

Samaresh Bose, the first appellant, is a well-known writer of Bengali Novels and stories. He is the author of a novel which under the caption "Prajapati" came to be published in "Sarodiya Desh" (the- annual pooja number of the Bengali Journal 'Desh') for the Bengali year 1374 B.S. The novel centres round one Sukhen who figures as the main character and seeks to express the feelings, thoughts and actions of Sukhen and to portray his character. This the author seeks to do through Sukhen himself who narrates his own experience. , feelings, thoughts and actions in his own words what he has seen in others, which he despised and what he himself did and how he fell a victim to wine and women and later gradually slid into slimy life from that of the atmosphere he earlier experienced, bereft of any love and affection and proper guidance. "Desh" is a journal of repute with wide circulation and the puja number is read by lovers of Bengali' literature of all age groups all over India, Sitangshu Kumar Dasgupta, the second appellant is the publisher and the printer of the journal containing the said publication.

On the 2nd of February, 1968, Amal Mitra, the second respondent, and a young Advocate, made an application in the Court of the Chief Presidency Magistrate at Calcutta complaining; (a) that the said novel "Prajapati" contains matters which are obscene; (b) that both the accused persons have, sold, distributed, printed and exhibited the same which has the tendency to corrupt the morals of those in whose hands the said "Sarodiya Desh" may fall and the reading public as well"; and (c) that therefore, both the accused persons have committed an offence punishable under section 292 Indian Penal Code read with section 109 thereof.

On the basis of the said complaint and after compliance with the necessary formalities, a Criminal Case No. 353/68 against both the accused persons came to be started and disposed of by the then Chief Presidency Magistrate of Calcutta by his judgment dated 11th February, 1968. During the trial on behalf of the accused Shri Budhadev Bose, (a whole time writer in Bengali, Professor of various institutions, the Chairman of the Comparative Literature at Jadavpur University, visiting professor of various universities in United States of America) and one Dr. Naresh Chandra Guha (the Professor and Head of the Department of Comparative Literature at Jadavpur University who had delivered lectures on Bengali literature before various literary gatherings, over the radio and also in the University of Chicago on the works of Rabindra Nath Tagore) were examined. When various passages which are alleged to be obscene by the complainant were put to them, both the witnesses emphatically refuted that there was any obscenity in any of those passages. According to them, the words used by the accused author may have been unknown in literature but they were very widely current in speech; that by introducing these forceful words into literature the author has done a service to Bengali Literature the author has done a service to Bengali Literature and language making the book praiseworthy; that the passages were necessary as they bring about the moral aspects of the hero's character and that the novel has great social and moral value.

The Trial Judge did not place any reliance on the testimony of these two eminent witnesses and proceeded to make his own assessment after reading the book and that too "with an open mind and a number of times" for the reason that expert knowledge has nothing to do with such cases and whether a book is obscene or not depends on the interpretation of section 292 I.P.C. Only. After setting out in his judgment the gist of the story and referring to various aspects and incidents and at length for considering whether the book can be said to be obscene, he found that the novel in question was obscene within the mischief of section 292 I.P.C. Both the accused were, therefore, found guilty by the Trial Judge under section 292 I.P.C.. read with 109 I.P.C. The Trial Judge accordingly convicted both the accused and sentenced both of them to a fine of rupees 201 each and in default to undergo simple imprisonment for two months each. The Trial Judge also directed that the pages from 174 to 226 of the journal be destroyed under the provisions of section 521 Criminal Procedure Code after the period of appeal was over.

19

Against the judgment and order passed by the Trial Judge both the accused preferred an appeal to the High Court at Calcutta. The complainant also filed a criminal revision in the High Court for enhancement of the sentence imposed by the Chief Presidency Magistrate on the two accused persons. The Criminal Appeal Number 106/1969, and the Criminal Revision Number 299 of 1969 were heard together and disposed of by a Single Judge of the High court by a common judgement delivered on 27.6.1972. The High Court discharged the rule in the Criminal Revision No. 299/1969 and dismissed the appeal affirming the conviction and sentences imposed on both the accused persons. The High Court, however, modified the order regarding the destruction of pages from 174 to 226 of the Journal under section 521 Cr. P.C. by observing that in as much as the said novel which appear at those pages has been published in the form of a book also the Chief Presidency Magistrate should take

appropriate steps under section 521 in respect of the copies of the novel published separately in a book form. Hence the appeal by the accused person, after obtaining special leave of the Court.

Allowing the appeal, the Court

^

HELD: 1.1 The question whether a particular book is obscene or not, does not altogether depend on oral evidence because it is the duty of the Court to ascertain whether the book offends the provisions of section 292 I.P.C. It may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading literatures on that aspect particularly when the book is in a language with which the Court is not conversant. [53 D-F]

Ranjit D. Udeshi v. State of Maharashtra, [1965] 1 S.C.R. 65; Chandrakant Kalyandas Kakodar v. State of Maharashtra, [1970] 2 S.C.R. 80 relied on.

1.2 Unlike England where the decision on the question of obscenity rests with the jury, in India, however, the responsibility of the decision rests essentially on the Court. In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of

20

in the book, story or article. 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 and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. [47 D-H; 48 A-B]

The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. Therefore, including the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the Judge should try to understand what is it that the author seeks to convey and whether what the author convey has any literary and artistic value. The Judge should, thereafter, place himself in the position of a reader of every age group in 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 in question can be said to be obscene within the meaning of section 292 I.P.C. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate case, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognized authors of literature on such questions if there be any for his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment. [48 B-F]

21

Ranjit D. Udeshi v. State of Maharashtra, [1965] 1 S.C.R. 65, Chandrakant Kalyandas Kakodar v. State of Maharashtra, [1970] 2 S.C.R. 80 relied on.

Queen v. Read (11 Mod. 205 Q.B.); Hicklin 's case [1868] L.R. 3 Q.B. 360; Roth's case 354 U.S. 476; R. v. Penguin Books Ltd. Crl. Law Review 1961 P Quoted with approval.

2.1 The novel "Prajapati" cannot be considered to be obscene on any count, whether considered in the position as an author or that of the reader. Sarodiya Desh is a very popular journal and is read by a large number of Bengalis of both sexes and almost of all ages all over India by teenagers, young boys, adolescents, grown-up youngmen and elderly people and the novel published in the Journal did not affect the moral character of the complainant as well. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to Lasciviousness. [51 F-H]

2.2 A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. [52 C-D]

2.3 In the instant case; (i) the character like Sukhen, Shikha, the father and the brothers of Sukhen, the business executives and others portrayed in the book are not just figments of the author's imagination. Such characters are often to be seen in real life in the society; (ii) the author who is a powerful writer has used his skill in focussing the attention of the readers on such characters in society and to describe the situation more eloquently he has used unconventional and slang words so that in the light of the author's understanding, the appropriate emphasis is there on the problems; (iii) some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents any

22

suggestion which is depraving or Lascivious; and (iv) the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for

the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and "will have to read books which are purely religious." [52 D-H; 53 A-D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 174 of 1973.

From the Judgment and Order dated 27.6.1972 of the Calcutta High Court in Crl. A. No. 106 of 1969.

G.L. Sanghi, Sukumaran and Ms. Ratna Kapur for the Appellants.

U.R. Lalit, R.K. Jain, D.S. Mehta, M.M. Israilly, Dilip Sinha, J.R. Das and D.N. Mukharji for the Respondents.

The Judgment of the Court was delivered by AMARENDRA NATH SEN, J. Samaresh Bose, the first appellant, is a well-known writer of Bengali Novels and stories. He is the author of a novel which under the caption 'Prajapati' came to be published in 'Sarodiya Desh' (the annual pooja number of the Bengali Journal 'Desh') for the Bengali year 1374 B.S. 'Desh is a journal of repute with wide circulation and the puja number is read by lovers of Bengali literature of all age groups all over India, Sitangshu Kumar Dasgupta, the second appellant was the publisher and the printer of the journal at the relevant time.

On the 2nd of February 1968, Amal Mitra, a young Advocate, made an application in the Court of the Chief Presidency Magistrate at Calcutta complaining that the said novel 'Prajapati' contains matters which are obscene and both the accused persons have, sold, distributed printed and exhibited the same which has the tendency to corrupt the morals of those in whose hands the said 'Sarodiya Desh' may fall and the reading public as well and both the accused persons have committed an offence punishable under . 292 Indian Penal Code (I.P.C.- for short) and under S. 292 read with S. 109 I.P.C.

23

On the basis of the said complaint and after compliance with the necessary formalities, a criminal case being ca e No. 353/68 against both the accused persons was started and the said criminal case was disposed of by the then Chief Presidency Magistrate of Calcutta by his judgement dated 11th February, 1968. The Learned Chief Presidency Magistrate for reasons recorded in the judgement held:-

"Two persons are facing their trial, accused No. 1, Shri Samaresh Basu, a modern writer of repute and accused No. 2, Shri Sitangshu Kumar Das Gupta, the Printer and Publisher of a very important magazine like 'Desh'.

The novel in question has been found to be obscene and as such accused No. 1 Shri Samaresh Basu cannot escape liabilities. The same is also the condition with accused No. 2 - Shri Sitangshu Kumar Das Gupta. He has got special responsibilities to see that his publication may not affect the readers of the same.

For the reasons stated above, though the accused No. 1 Shri Samaresh Basu, is a powerful writer, I cannot but strike down the impugned novel, after declaring the same as obscene.

The result of my above findings, is to find both the accused guilty u/s 292 I.P.C. and I convict both of them accordingly.

Next question arises as to what punishment should be inflicted.

Considering the facts and other connected matters I sentence both of them to pay a fine of Rs. 201/- each in default to undergo S. 1 for two months each.

Let the pages from 174 to 226 of Ext. 1 be destroyed under the provisions of Section 521 Cr. P.C. after the period of appeal be over."

Against the judgment and order passed by learned Chief Presidency Magistrate both the accused preferred an appeal to the High Court at Calcutta. The complainant also filed a criminal revision in the High Court for enhancement of the sentence

24  
imposed by the Chief Presidency Magistrate on the two accused persons. On the criminal revision application which was numbered as Criminal Revision No. 299 of 1969 rule was issued by the High Court. The criminal appeal which was filed by the two accused persons was numbered as Criminal Appeal No. 106/69. The Criminal Appeal No. 106/69 and also the Criminal Revision No. 299/69 were disposed of by a single Judge of the High Court by a common judgement delivered on 27.6.1972. The High Court discharged the rule in the Criminal Revision No. 299/69 and dismissed the appeal affirming the sentences imposed on both the accused persons with the following further observations :-

"In the Petition of complaint only the publication of the novel in the Sardiya Sankha of Desh of the Bengali Year 1374 at pp. 174 to 225 was mentioned. Only one copy of that journal Desh was marked Ext. 1 in the court of the Magistrate. The learned Chief Presidency Magistrate has directed that the pages from 174 to 226 of Ext. 1 be destroyed under the provisions of Sec. 521 Cr. P.C. but serves no purpose unless all the printed copies of that issue of Desh are forfeited and in every copy thereof pages from 174 to 226 be destroyed. The Magistrate also failed to notice that during evidence it has come out that this novel has been published also as a book. But publication in the form of a book of this novel need also be forfeited under Sec. 521 Cr.P.C. While I affirm that the learned Magistrate's decision to destroy the offending pages should be upheld. I direct that the learned Chief Presidency Magistrate shall take appropriate steps under S. 521 in respect of the other copies of Ext. 1 and also in respect of the novel if published in book form. The appeal fails and is dismissed."

Against the judgment of the High Court both the accused persons have preferred this appeal with special leave granted by this Court.

The question for consideration in this appeal is whether the two appellants can be said to have committed an offence under S. 292 I.P.C. and the answer to this question will necessarily depend on the finding whether the novel 'Prajapati' is obscene or not.

25

It may be noted that in the trial before the Learned Chief Presidency Magistrate the complainant and one Kalobaran Ghosh a businessman, had deposed; accused Samaresh

Bose and accused Sitangshu Kumar Das Gupta were both examined, and two well-known persons in the literary field, (1) Shri Budhadev Bose and (2) Dr. Naresh Guha had given evidence on behalf of the accused. Amal Mitra, the complainant, in the course of evidence stated that he was an Advocate of the Calcutta High Court and was a reader of Bengali Literature and he considered it to be his duty to uphold the purity of Bengali Literature. It is his evidence that the book is obscene and has got no literary value and the book, if read by any person and particularly young persons, may corrupt the morals of the readers. He marked various portions in the book which according to him were obscene. In the course of his cross-examination, Shri Mitra was asked about various other Bengali novels written by other eminent writers, namely, Probodh Kumar Sanyal, Budhadev Bose and Ananda Shankar Roy and he admitted that he had not read any book by them. He also stated in his cross-examination that though he had gone through the book his moral character had not been affected in any way. The other witnesses examined on behalf of the complainant was Kalobaran Ghosh, a businessman carrying on the business of manufacturing engineering goods. He has stated in his evidence that he has a family and he is interested in Bengali literature. It is his evidence that after going through the novel 'Prajapati' he formed an opinion that the novel was absolutely obscene meant to pollute the minds of the younger generation and was written with a view to earn money and he could not hand over the book to his children for reading the same. In the course of his cross-examination, this witness stated that he had read the writings of late Sarat Chandra Chattopadhyay, Rabindra Nath Tagore and Ananda Shankar Roy and he would not say that any of their writings was obscene. This witness further stated in the course of cross-examination that he had not read all the books written by Budhadev Bose, Probodh Sanyal, Achintya Kumar Sengupta. This witness admitted that with the passing of time, the standards of the literature were going down and so also the standards of obscenity.

The first witness called on behalf of the accused was Shri Budhadev Bose. In his evidence Shri Budhadev Bose stated that he was a whole time writer and in addition to that he was a Professor of various institutions and he had also been the Chairman of the Comparative Literature at Jadavpur University for seven years and he had also been the visiting professor of various universities in United States of America. He further

26

stated that he had at least written about 200 books and also many critical works and the books written by him were mostly in Bengali excepting two books which were in English. He stated in the course of his evidence-

"I can unhesitatingly say that Shri Basu is one of the most important Bengali Novelists of the generation after mine. I might be 20 years older to Shri Basu. Some sort of restraint should be there to regulate the obscene writings. I mean to say that in certain special cases it may be necessary to impose some restraint on literature. I have read the novel 'Prajapati' as published in the Sarodiya Desh issue of the Year 1374 and subsequently published in book form. That is the book which is being considered in this trial.

Q. Do you consider that book or the novel 'Prajapati' to be an obscene writing?

A. Not at all.

Q. Would you say any portion of that writing to be obscene?

A. No."

In the course of his evidence, his attention was drawn to various passages in the book which were alleged to be obscene and he categorically stated that there was nothing obscene in any of these passages. This witness was cross-examined at length. Various passages in the book alleged to be obscene were put to this witness and it was suggested to him that these passages were obscene. Shri Basu emphatically and categorically denied that those passages or any part thereof could be characterised as obscene. When asked what was his concept of obscenity, Shri Basu in his answer stated In my opinion, if a piece of writing can be called literary in the special sense, it cannot be obscene. Literature in the technical sense means an imaginary piece of writing. When asked in the course of cross-examination to cite an example in support of the proposition that a writing vividly describing a sexual act and sexual perversity, was of literary and moral value, Shri Basu answered as follows:

27

"Anybody who knows the works of Rabindra Nath Tagore, knows that throughout his life he was a great advocate of freedom, we can say, also of social and sexual freedom. May I remind everyone here of his novel 'Chokher Bali' where he describes a love relationship between a young Hindu widow and a youngman. May I remind everybody here of 'Ghare Baire' where a married woman, a very highly respected woman falls in love with her husband's friend. May I remind everyone here of Tagore's novel 'Chaturanga' where an actual sexual act is described in a very poetic and moving language."

In cross-examination with regard to a particular passage at p. 178 which is alleged to be obscene, this witness was asked what was it that the author was describing in that passage. The following answer to this question followed by further questions and answers may be noted:-

"A. He is describing some pictures that he had at one time seen.

Q. Mr. Bose, do you say that this sort of writing is unconventional?

A. It is not very unconventional in 1968.

Q. Mr. Bose would you like to say that teenagers reading this portion would not be affected in any way?

A. I have already said that they will be repelled.

Q. I put it to you that this passage is obscene and it would pollute their minds?

A. I do not think it is obscene at all, nor is it liable to corrupt the young or older people.

Q. Mr. Bose do you agree that in this novel 'Prajapati', the writer has chosen many words which perhaps are unknown to the Bengali Literature?

A. These words may have been unknown in literature but they were very widely current in speech. By

28

introducing these new and forceful words into literature the author has done a service to Bengali literature and language and that is one of the reasons why the book is praise-worthy. That passage was necessary because this passage brings out the moral aspects of the hero's character."



It was put to this witness that this novel 'Prajapati' has no moral value and in answer the witness stated. In my opinion, it has great social and moral value. When a further suggestion was put to him in the course of cross-examination that the book 'Prajapati' had been written only with commercial motive, the witness categorically denied the suggestion saying certainly not. In answer to the suggestion made to Mr. Bose that he was not capable of judging what is good and what is bad in literature his evidence was:

"Many people think both in India and abroad that I am an excellent Judge of literature and I agree with them. On the strength of the reputation I have been invited several times to teach at American Universities and to lecture on literature in many famous Universities in Europe and in Asia."

The other witness called on behalf of the accused was Dr. Naresh Chandra Guha who at the time of giving his evidence was the Professor and Head of the Department of Comparative Literature at Jadavpur University. Dr. Guha in the course of his evidence said that as part of his duty he had to deliver lectures on Bengali Literature and in addition to that he addressed various literary gatherings and had spoken over the radio and he had also addressed a meeting in the University of Chicago on the works of Rabindra Nath Tagore. This witness stated that he had written two books till then, one in English and the other in Bengali. It was the evidence of this witness that he had read quite a few books written by Samaresh Bose and he considered him to be a very powerful writer. It is his categorical evidence that he has read the novel 'Prajapati' and he does not consider that book as an obscene one and this novel is not obscene either in part or as a whole. When certain passages of the book alleged to be obscene by the complainant were pointed out to him to ascertain his views as to whether those passages were obscene, this witness stated that he did not consider the same to be obscene as in his view it is a necessary part of the scheme of the novel which scheme was social criticism with a moral purpose.

29

When asked whether the moral purpose of the novel will come through to the general reader, this witness said in his evidence-

"If the reader is one who is used to literature, by which I mean who does not read once a while a book in his life, the moral purpose of the book will be very obvious. I feel as a man whose profession is teaching literature in M.A. classes this is how I could look to them for this book. Here is a young man Sukhen, a small town man, who never had the occasion to experience human love."

Dr. Naresh Chandra Guha was also cross-examined at length. Various passages which were alleged to be and were considered to be obscene by the complainant were put to this witness. Dr. Naresh Chandra Guha clearly and emphatically refuted that there was any obscenity in any of those passages. The following questions put to the witness and the answers given by him may also be noted:-

"A. No Sir, My answer entirely goes against your suggestion.

Q. Mr. Guha, I put it to you that the novel 'Prajapati' in question in general and the portions marked with red lines in particular are obscene?

A. I do not think so.

Q. I put it to you that the novel 'Prajapati' has the tendency to corrupt the morals of those whose minds are open to immoral influence.

A. No, it is not 80.

Q. I put it to you that the novel Prajapati would pollute the minds of those readers who are young adolescent and of impressionable age?

A. I have got some students. They have read the book. I know, they have not been corrupted. They are of the age group between 18 upwards. They are college students or university students."

It may be noted that the learned Chief Presidency Magistrate had placed no reliance on the testimony of these two witnesses.

30

In fact, he has placed no reliance on the oral testimony which was adduced before him. The learned Chief Presidency Magistrate has proceeded to make his own assessment after reading the book, and as stated by him, with an open mind and a number of times. He has observed "Moreover expert knowledge has nothing to do with such cases. Whether a book is obscene or not depends on the interpretation of S. 292 I.P.C. and not on expert evidence". The learned Chief Presidency Magistrate has set out in his judgment the gist of the story and has referred to various aspects and incidents at length for considering whether the book can be said to be obscene. Dealing with the statement made on behalf of the a. used author, that the passages complained of are not obscene and even if it may be said that there is some amount of indecency in those passages and the words used therein are vulgar, it has to be appreciated that they became necessary to put the scheme of the novel in its right perspective, the learned Chief Presidency Magistrate has observed:-

"It may have exposed the hypocrisy of the people, exposed the politicians who live on others, exposed the teachers who do not care to look after the interests of the students, exposed the big officers of the workshops and factories and their most ultra modern wives who do not take care of their children No doubt, such a thing has been said and such characters have been depicted, but to me it seems, it has 80 been depicted in a very veiled way. The character of Sukhen as offered to be a noble one, has got to be established by argument. So also the character of Sikha. A plain reading of the novel will no doubt raise pity in The mind of the readers for Sukhen and Sikha, but that will not heighten the importance of the novel in question. As a forceful writer, Shri Samaresh Basu has depicted those character in his own way, but unfortunately the purpose has been frustrated by his bringing some slang and unconventional words and for his depiction of some incidents which cannot be tolerated in a society like ours.

He further observed:-

"It was said that Sukhen is a goonda and a street boy having no sufficient education and culture. As such in the fitness of things those words and incidents had to

31

be mentioned like this through his mouth. Sukhen might be of a character of that type but the writer ought to be a little but cautious. The writer must know that the story of Sukhen will not

remain written and preserved in the safe. The writer has got his duty onwards his readers as well. Their writings have got their social implications as there is a right of the author to give his very best free from any restraint from any quarter and that too fearlessly. So there is his responsibility to the society as well. As his freedom is great so must be the responsibility as well. With that end in view the social control has been imposed on the writers through the help of legislation. Accordingly, I hold that no writer should be allowed to take recourse to vulgarity under the pretence of writing some novel with some social purpose."

The Chief Presidency Magistrate ultimately held:-

"I find that this book has got no literary merit, nor educational or sociological value. An attempt, however, was made on behalf of the writer to show that the novel in question has served those purposes, but a simple reading of the same will show that it was nothing but a camouflage to introduce obscenity in this book and this has played prominent part. Under the pretence of doing good to the society the novel in question has done greater mischief."

On the basis of the findings on his own appreciation and assessment of the novel on the question of obscenity, the learned Chief Presidency Magistrate came to the conclusion that the novel was obscene within the mischief of S. 292 I.P.C. and the learned Chief Presidency Magistrate imposed the conviction and the sentence which we have earlier recorded.

The learned Single Judge of the High Court has affirmed the view expressed by the learned Chief Presidency Magistrate that the novel in question is obscene and comes within the mischief of s. 292 I.P.C. It may be appropriate to note some of the observations made by the learned Judge. He observed :-

"I have read the whole novel. It is remarkable for many reasons, more so because the author Samaresh Basu who is the Principal accused in this case is a well

32

known writer of contemporary Bengali literature and has published works in the past which have often been in the background of that strata of society where manual labour is often victim of exploitation and sweating, resulting in continuation or even perpetuation of poverty, illiteracy....In those works Samaresh Basu has employed language of his hero in the particular literary work as such character would do in real life. This Sri Basu has done with courage and deftness that have not only served his purpose well in those writings but also earned reputation for him as a remarkable Bengali writer of present age. Both the defence witnesses have spoken of that well known fact."

The learned Judge has further observed :-

"It cannot be questioned that the problem has grown in its bulk because of the complete break down of moral fibre of the society in general and individual members of the society in particular, and also in the family units and that can by no means be denied also. The causes that have led to

the reasons of the problem need to be carefully discerned. To my mind it is also in the fitness of things that thinkers and literatures have a function to deal with the problem by use of the strength of their pen for giving expression to their thoughts and suggestions. Yet literature as an art is one of certain technique and conscious caution. When the subject is virulent, that provides all the more reason for subdued caution, lest in the attempt to locate the virus and disclosure of its causes, the treatment itself spreads the poison to contaminate many more who are yet uncontaminated that is why the quality of the writer and quality of the languages employed by the writer is relevant. His purpose may be good but his language may betray his purpose and bring about a completely reverse affect. Mere goodness of purpose, therefore, does not offer justification for employment of bad language-but in the larger sense including lascivious and vulgar. In matter of technical interest and for the concern of technically trained minds a language may be not only inevitable but also useful. But the same language when employed

33

as a vehicle for treatises which are not for the technical purpose becomes obscene due to its vulgarity.

By reading this novel printed in Ex. 1 in the whole I have come to the definite conclusion that the author Samaresh Basu has lapsed into that fault in 80 far he appears to have intended it for the purpose of getting a market for the journal in which it has been printed amongst the young section of the society. Whether he has unintentionally lapsed into that vulgarity of language as the vehicle of expression in this writing is irrelevant. What is relevant is that it definitely tends to, not only tends but in my view, it does, deprave and corrupt persons who are likely to read, see or hear the matter contained in it."

The learned Judge held:

"I am of the view that successful description of reality is not a good defence against charge of obscenity in literature published for general reader. Students of obstetrics read in the medical treatise and get full explanation of all the detail of female anatomy that helps in the cause of science Of medicine. But such description of the female anatomy offered as literature for the general public with all the good qualities of successful realism remains obscene punishable under S. 292 I.P.C. It can not be whittled down by merely saying it is bad taste. By the law of our country it is a crime. In the present case, I am of the view that the episodes and the use of so much slang are all deliberately included, not to serve any purpose of art of literary value, but only for getting the seller's market of pornography. Pornography it is and with all the gross taste not because it has sacrificed the art of restraint in the description of female body and also because in some part it has indulged in complete description of sexual act of a male with

a female and also of Lower animal."

The learned Judge on the basis of his aforesaid findings and other reasons stated in the judgment affirmed the view of the learned Chief Presidency Magistrate that the novel in question was obscene and the learned Judge passed an order which we have earlier noted, upholding the conviction and sentence, while discharging the Rule.

34

The correctness of the decision holding the novel to be obscene is the subject matter of challenge in this appeal by special leave before us.

Mr. Sanghi, learned Counsel appearing on behalf of the appellants, has contended that neither the novel as a whole nor any part thereof can be considered to be obscene within the meaning of S. 292 I.P.C. It is his contention that in various portions of the novel and in particular the marked portions which were considered by the Chief Presidency Magistrate and also the High Court, various slang words might have been used and the description of the incidents including the description of various parts of female body may be verging on vulgarity and may offend sophisticated minds, but the same cannot be considered to be obscene, as the same cannot have any tendency of depraving and corrupting the minds of persons whose minds are open to such immoral influences and the same cannot also suggest to the minds of the young people of either sex or to persons of more advanced years thoughts of any impure and libidinous character. Mr. Sanghi has submitted that the novel depicts the feelings, thoughts, actions and the life of Sukhen who is the hero of the novel and is its main character; and through the speeches, thoughts and actions of Sukhen the novel seeks to condemn and criticise various aspects of life in society now prevailing in its various strata. It is his submission that slang words and almost vulgar language had to be used in keeping with the character of Sukhen who was accustomed to the use of only such language. He argues that if different kinds of words, cultured and sophisticated, were to be used in the thoughts, speeches and actions of Sukhen, the entire portrayal of Sukhen's character would become unreal and meaningless. It is his argument that true art and literature require that the character sought to be portrayed must be so depicted as to make it real and artistic; and, if for achieving that purpose the language which the kind of person sought to be portrayed indulges in is put into his mouth it does not become obscene. The contention of Mr. Sanghi is that persons brought up in a particular atmosphere or belonging to a particular class of society choose to use particular types of words to which they are accustomed and if any author has to portray the life of any person belonging to any such strata of the society or brought up in that particular environment, the author for appropriately depicting the character of such a person must necessarily employ as a matter of art and literature the words and expressions that such a person whose character is sought to be depicted uses. Mr. Sanghi has argued that in literature as also in life there is a

35

good deal of distinction between obscenity and vulgarity though both may be offensive to any sophisticated mind. It is his submission that it is obscenity in literature which attracts the provisions of S. 292 I.P.C. Mr. Sanghi has argued that the word 'obscenity' which is not defined in the Code has come up for consideration in various cases and has been judicially interpreted by various courts including this Court. It is his argument that this book has a social

purpose to serve and has been written with the main object of focussing the attention of persons interested in literature to the various ills and maladies ailing and destroying the social fabric and the author who is a powerful writer has used his talents for achieving the said purpose; and in this connection Mr. Sanghi has referred to the evidence of Budhadev Bose and Dr. Naresh Chandra Guha. In support of the submissions made, Mr. Sanghi has referred to decisions of this Court and other authorities.

Mr. Mukherjee, learned counsel appearing for the State, has supported the judgment of the Chief Presidency Magistrate and the High Court affirming the judgment of the Chief Presidency Magistrate. Mr. Mukherjee has submitted that the novel has to be judged in the background of the conditions prevailing in the society at the time when the novel was written. It is his submission that the learned Chief Presidency Magistrate and the learned Judge of the High Court have both read the novel carefully a number of times and on their own appreciation of the merits of the novel they have both come to the conclusion after considering all the submissions which were made on behalf of the accused persons that the novel in question was obscene.

Mr. Lalit, learned counsel, appeared as an Amicus curiae at the request of the Court. When the matter had earlier been called, nobody had appeared on behalf of the respondents which included the complainant and the State. At that time the Court had requested Mr. Lalit to assist the Court. It appears that the matter had been adjourned and the counsel for the State had appeared thereafter at the subsequent hearing. Nobody, however, had appeared on behalf of the complainant at the hearing of the appeal. Mr. Lalit has rendered useful assistance to the Court and he has aptly pointed out with reference to authorities that the position in law appears to be well-settled. He rightly contends that the real question is the proper application of the well-settled legal principles to the facts of any particular case. Mr. Lalit has drawn our attention to various passages complained of as obscene and noticed in the judgments and has

36  
fairly submitted that it will be for this Court to decide finally on a proper appreciation of the novel itself as a whole and in parts whether the novel or any part thereof is obscene within the meaning of S. 292 I.P.C. The Court expresses its appreciation for the assistance given by Mr. Lalit.

S. 292 I.P.C. as it stood at the relevant time was in the following terms :-

"Whoever-

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has

reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any persons, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months or with fine, or with both.

37

Exception - This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

This section came to be amended in 1969 by Act 36 of 1969 and the amended Section reads as follows :-

"(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene if it is lascivious of appeals to the prurient interest or if its effect, or (whether it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever

(a) sells, lets to hire, distributes, publicly exhibits, or in any manner puts into circulation or for purposes of sale, hire, distribution, public exhibition or circulation, makes produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figures or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

38

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an

offence under this section. shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees-  
Exception - This section does not extend to-  
(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure-  
(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or  
(ii) which is kept or used bona fide for religious purposes:  
(b) any representation sculptured, engraved, painted or otherwise represented on or in-  
(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or  
(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

It may be noticed that the amended Section to which reference has been made by the High Court in the judgment does not appear to be of any material consequence in deciding this

39

particular case. The amended provision seeks to clarify what may be deemed to be obscene within the meaning of the section, as the word 'obscene' appearing in the section has not been defined in the Section or in any provision in the Act. The amended provision embodies to an extent in the section itself the import, effect and meaning of the word 'obscene' as given by courts on interpretation of the word 'obscene'.

In the case of Ranjit D. Udeshi v. State of Maharashtra, [1965] 1 S.C.R. 65 this Court had to decide the question of constitutional validity of S. 292 I.P.C. and had also to interpret the word 'obscene' used in the said Section. This Court upheld the constitutional validity of the Section and the question of validity of the said section is, therefore, no longer open and has not been very appropriately challenged in the present case. On the question of interpretation of the word 'obscene' in S. 292 I.P.C. this Court observed at pp. 73-74 :-

"We shall now consider what is meant by the word 'obscene' in 8. 292, Indian Penal Code.

The Indian Penal Code borrowed the word from the English Statute. As the word 'obscene' has been interpreted by English Courts something may be said of that interpretation first. The Common law offence of obscenity was established in England three hundred years ago when Sir Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts because it was so held down to 1708 in which year Queen v. Read, 11 Mod. 205 Q.B., was decided. In 1717 in the case against one Curl it was ruled for



the first time that it was a common Law Offence (2 Stra. 789 K.B.) In 1857 Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute (20 & 21 Vict. C. 83) in Hicklin's case, (1868) L.R. 3 Q.B. 360, case. The section of the English Act is long (they were 80 in those days), but it used the word 'obscene' and provided for search, seizure and destruction of obscene books etc. and made their sale, possession for sale, distribution etc. a misdemeanour. The section may thus be regarded as substantially in pari materia with S. 292 Indian Penal Code, in spite of some

40

difference in language. In Hicklin's case the Queen's Bench was called upon to consider a pamphlet, the nature of which can be gathered from the title and the colophon which read: The Confession Unmasked, showing the depravity of Romish Priesthood, the iniquity of the confessional and the questions put to females in confession. It was bilingual with Latin and English texts on opposite pages and the latter half of the pamphlet according to the report was 'grossly' obscene; as relating to impure and filthy acts words or ideas'. Cockburn, C.J. laid down the test of obscenity in these words :

'....I think the test of obscenity is this, whether the tendency of the matter charged as obscenity 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'.

This test has been uniformly applied in India."

This Court further observed at p. 75 :-

"It may be admitted that the world has certainly moved far away from the times when Pamela, Moll Flanders, Mrs. Warren's Profession, and even Mill on the Floss were considered immodest. Today all these and authors from Aristophanes to Zola are widely read and in most of them one hardly notices obscenity. If our attitude to are versus obscenity had not undergone a radical change, books like Caldwell's God's Little Acre and Andhre Gide's If It Die would not have survived the strict test. The English Novel has come out of the drawing room and it is a far cry from the days when Thomas Hardy described the seduction of Tests by speaking of her guardian angels. Thomas Hardy himself put in his last two novels situations which 'were strongly disapproved of under the conventions of the age', but they were extremely mild compared with books today. The world is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled.

41

Curiously, varying results are noticeable in respect of the same book and in the United States the same book is held to be obscene in one State but not in another (See A suggested solution] to

the Riddle of Obscenity) (1964) 112 Penn. L. Rev. 834.

But even if we agree thus far, the question remains still whether the Hicklin test is to be discarded. We do not think that it should be discarded. It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentially of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases."

This Court held at pp. 76-77:-

"The Court must, therefore, 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, but the obscene matter, must be considered by itself and separately to find out whether it is so 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 books is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc. On it must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw our attention to one fact. Today our national and regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support. Only an obscure will deny the need for such caution. This

42

consideration marches with all law and precedent on this subject and so considered we can only say that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give away.

We may now refer to Roth's 354 U.S. 476 case to which a reference has been made. Mr. Justice

Brennan, who delivered the majority opinion in that case observed that if obscenity is to be judged of by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating with sex and might become - unduly restrictive and so the offending book must be considered in its entirety. Chief Justice Warren on the other hand made 'substantial' tendency to corrupt by arousing lustful desires' as the test. Mr. Justice Harlan regarded as the test that must 'tend to sexually impure thoughts'. In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case."

In holding the book Lady Chatterley's Lover which had come up for consideration before this Court to be obscene this Court held at p. 81:-

43

"There is no loss to society if there was a message in the book. The divagations with sex are not a legitimate embroidery but they are the only attractions to the common man. When everything said in its favour we find that in treating with sex the impugned portion viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above."

The question of obscenity of a book within the meaning of S. 292 I.P.C. again fell for consideration before this Court in the Case of Chandrakant Kalyandas Kakodar v. State of Maharashtra, [1970] 2 S.C.R. 80. In this case a complaint had been filed against the appellant who was an author of short-story entitled Shama which came to be published in the year 1962 Diwali Issue of Rambha, a monthly magazine. On the basis of the complaint criminal proceedings were started under S. 292 I.P.C. but the Magistrate dealing with the complaint acquitted the accused of the charge. The complainant and the State filed appeals against this judgement of acquittal by the Magistrate. The High Court, however, held the accused to be guilty of the charge and imposed in convicting the accused a fine. Against the judgement of the High Court, an appeal had been preferred to this Court. While dealing with the question of obscenity within the meaning of S. 292 I.P.C. this Court relied on the earlier decision in Ranjit D. Udeshi's case (supra) and referred to various observations made therein. This Court observed at p. 82 :-

"It is apparent that the question whether a particular Article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions of S. 292.

Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as

44

it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the courts and ultimately by this Court."

This is Court held that the book in question was not obscene within the meaning of S. 292 I.P.C.. and observed at p. 87:-

"We do not think that it can be said with any assurance that merely because adolescent youth read situations of the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situations is given in a setting emphasising a strong moral to be drawn from it and condemn the conduct of the erring party as wrong as loathsome it cannot be said that they have a likelihood of corrupting the morals of those in whose hands it is likely to fall particularly the adolescent.

In the passage at pp. 113-114 Nishikant takes Neela out to show the sights of the city of Bombay but instead takes her to a picture where after the lights go off, seeing a soldier and his girl friend in front kissing, they also indulge in kissing. Then as we said earlier, when the love between them develops Nishikant wanted to marry but the father of the girl was unwilling. Neela realising that their love could never be consummated encourages him to bring it to a culmination. In this way they enjoy unmarried bliss for a few days until Neela's father takes her away.

We agree with the learned Judge of the High Court that there is nothing in this or in the subsequent passages relating to Neela, Vanita and Shama which amounts to pornography nor has the author indulged in a description of the sex act or used any language which can be classed as vulgar. Whatever has been done in a restrained manner though in some places there may

45

have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient to suggest to the adolescent anything which is depraving or lascivious. To the literate public there are available both to the adults and the adolescents

innumerable books which contain reference to sex. Their purpose is not, and they have not the effect of stimulating sex impulses in the reader but may form part of a work of art or are intended to propagate ideas or to instil a moral.

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a place 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 our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex, or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expressions to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of contemporary society in India are also fast changing. The adults and adolescents have available to them, a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in Udesb's case if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook

46

or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect.

These two decisions of this Court lay down the legal principles to be observed in deciding the question of obscenity within the meaning of S. 292 I.P.C. As these two decisions of this Court settle the legal principles involved, it does not really become necessary to refer to the other authorities cited from Bar. We may, however, note that the novel *Lady Chatterleys Lover* which came to be condemned as obscene by this Court was held to be not obscene in England by Central Criminal Court. In England the question of obscenity is left to the Jury and the Jury decides whether the book in question is obscene or not. It is of interest to note the summing up of Byrne, J., the learned Judge who presided over the Central Criminal Court which was deciding the question of obscenity of the novel *Lady Chatterley's Lover*. In the summing up by the learned Judge in the case of *B. v. Penguin Books Ltd.*, as reported in *Criminal Law Review* 1961 may be reproduced.

"In summing up his lordship instructed the Jury that: They must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was: was the book obscene? Was its effect taken as a whole to stand to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to prevent, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only

47

those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if the defendant had established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit."

In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As laid down in both the decisions of this Court earlier referred to, the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of S. 292 I.P.C. In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own

conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passage complained of in the book, story or article. 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 and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to

48

influence of this sort and into whose hands the book is likely to fall. Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries- In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in 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 in question can be said to be obscene within the meaning of S. 292 I.P.C. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment.

In the light of the above discussions we now proceed to consider whether the novel in question is obscene or not.

The novel centres round one Sukhen who can be called the hero in this book and who figures as the main character. The novel seeks to express the feelings, thoughts and actions of Sukhen and to portray his character. This the author seeks to do

49

through Sukhen himself who narrates his own experiences, feelings, thoughts and actions in his own words. It is Sukhen who mainly tells the readers his own story in his own words.

Sukhen is the youngest son of his parents. The picture

of his family life is, indeed, in the nature of a reflection of what is commonly now found in very many families in the society. Sukhen's father holds a good job and the only interest he has in life is to make money. He takes bribes from every source and he manages to see that bribes are paid to him. Office, money and bribes are the only things Sukhen's father appears to be concerned with. Sukhen's mother who is painted as a delicate and beautiful woman mixed with his father's friends freely and also would not hesitate to bestow favours on them. Sukhen, it appears, was fond of his mother and his mother was also fond of Sukhen. Unfortunately, Sukhen's mother died very earlier when Sukhen was only a child. Sukhen had two elder brothers. Both of them are painted as men of affairs and men of the world. They belonged to different political parties on which each of them had gained sufficient hold and they exploited their position in the political parties for their personal ends. They do not practise what they preach and they have both a good deal of weakness for drinks and women. Sukhen indeed developed a hatred for the two brothers for their hypocrisy. Though Sukhen had a soft corner for his father, he had neither great love nor respect for him and he would often accuse him for bringing him into the world. There was an old servant in the family who used to look after Sukhen and it appears that Sukhen had some affection for him. Brought up in such an atmosphere at the house bereft of any love and affection and proper guidance, Sukhen gradually slid into slimy life. He with other students participated in a fast which was organised by the students of the College in which he was studying as a protest against some high-handed and arbitrary action of the college authorities and had, in fact, come into lime-light, as the fast had succeeded in achieving the object for which fast was undertaken after the fast had lasted for five days. While he was on fast he came in close contact with a girl called Shikha, who was a college student and who appears to be the other important personality in the novel. Sukhen developed a weakness for Shikha. The fast undertaken by Sukhen and his association with Shikha in the initial stage did not bring about any marked change in his character. He had started leading the life of a desperate youngman who was considered to be a Goonda, dreaded by the community, particularly the richer section. Sukhen got addicted to wine and women. Shikha with whom Sukhen has come in contact

50

developed a living for Sukhen in spite of the kind of life Sukhen led. The recklessness on the part of Sukhen, his boldness, his hatred for hypocrites, political leaders who thrive on others and frank and candid criticism of social evils appear to have attracted Shikha to Sukhen. Various incidents are narrated mostly in Sukhen's words to depict various traits of Sukhen's character. As already indicated, Sukhen had hatred for hypocrites and false political leaders who participated in politics for their own personal ends. He had also hatred for teachers who seek to keep hold on the student community for serving their own ends by creating rift amongst the students and by completely ignoring the interests of the student community, for businessmen and business executives who exploit the workers, for parents who do not have any scruples in making money, remain obsessed with making money and do not take care of their children and for those people who under the guise of gentlemen seek to satisfy their lust and do not spare even young girls. Sukhen had a restless mind and he would often feel that there was something missing in his life and would often suffer from a



peculiar feeling when left alone, though in society he was dreaded and regarded as a goonda. It appears that as a result of his association with Shikha, and the closer and more intimate the association became, a kind of change was coming over. The feeling of restlessness was gradually passing away and he was finding peace and seeing some kind of meaning in life. Shikha's association brought some peace and solace to his restless life. Shikha kindled in him the human feelings which had remained dormant in him and had in fact been perverted. Because of his association with Shikha and Shikha's love for him, Sukhen was about to change his ways of life to lead a meaningful and useful life. As this change was gradually coming over the Sukhen he fell a victim of the violence of rival political parties and he succumbed to the injuries inflicted on him by rival political groups. This in substance is the story.

We shall now refer at some length to some of the portions of the book challenged as obscene and 80 found by the courts below.

The story begins with the scene showing that Sukhen was trying to catch a beautiful butterfly moving about in the room where Shikha was lying on the bed. His attempt to catch the butterfly initially failed and Sukhen used a long pole to push down the butterfly which was resting in the wall at a height beyond his reach. Shikha protested, apprehending that the butterfly would be hurt. In his attempt to catch the butterfly,

51

Sukhen did hurt the butterfly which fell down with one of the wings severed. Shikha takes the butterfly in one of her palms with her face and body turned against Sukhen towards the wall. Seeing Shikha in that position with the butterfly on her palm and Shikha trying to fix the severed wing in its place in the body of the butterfly, Sukhen is reminded of what happened to Zina, a daughter of one of the officers of the factory at the picnic party of the factory owner and its big executives. Sukhen remembers how at that party Zina, a girl of about 14 years of age was being fondled by the elderly persons holding high posts in the factory and whom Zina would call 'Kaku' (Uncle). Sukhen also recalls that how he thereafter had taken Zina away from those persons to a sugarcane field and had an affair with her there. This part of the affair with Zina in the sugarcane field had been considered to be obscene. Sukhen feels that the butterfly resting in the palms of Shikha resembled Zina in the sugarcane field while she was there with him. After remembering this incident Sukhen turns to Shikha and goes near her. There he notices Shikha's dress and he finds Shikha had only a loose blouse with nothing underneath and a good part of her body was visible and there is some description by Sukhen of what was visible and of his feelings on seeing Shikha in that position. Sukhen's kissing Shikha and going to bed with Manjari, his friend's sister, are other parts of the book considered obscene. The affairs of Sukhen's 'Mejda' (second elder brother) with the maid-servant's daughter and Sukhen's description of the same have also been held to be obscene.

We have read with great care. It is to be remembered that Sarodiya Desh is a very popular journal and is read by a large number of Bengalis of both sexes and almost of all ages all over India. This book is read by teenagers, young boys, adolescents, grown-up youngmen and elderly people. We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the

book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because

52

of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity. It has to be remembered that the author has chosen to use such kind of words and language in expressing the feelings, thoughts and actions of Sukhen as men like Sukhen could indulge in to make the whole thing realistic. It appears that the vulgar and slang language used have greatly influenced the decision of the Chief Presidency Magistrate and also of the learned Judge of the High Court. The observations made by them and recorded earlier go to indicate that in their thinking there has been kind of confusion between vulgarity and obscenity. A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. We may observe that characters like Sukhen, Shikha, the father and the brothers of Sukhen, the business executives and others portrayed in the book are not just figments of the author's imagination. Such characters are often to be seen in real life in the society. The author who is a powerful writer has used his skill in focussing the attention of the readers on such characters in society and to describe the situation more eloquently he has used unconventional and slang words 80 that in the light of the author's understanding, the appropriate emphasis is there on the problems. If we place ourselves in the position of the author and judge the novel from his point of view, we find that the author intends to expose various evils and ills pervading the society and to pose with particular emphasis the problems which ail and afflict the society in various spheres. He has used his own technique, skill and choice of words which may in his opinion, serve properly the purpose of the novel. If we place our selves in the position of readers, who are likely to read this book, and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged, we feel that the readers as a class will read the book with a sense of shock, and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across such characters and such situations in life and have faced them or may have to face them in life. On a very anxious consideration

53

and after carefully applying our judicial mind in making an objective assessment of the novel we do not think that it can be said with any assurance that the novel is obscene

merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents any suggestion which is depraving or lascivious. We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and will have to read books which are purely religious. We are, therefore, of the opinion that the Courts below went wrong in considering this novel to be obscene. We may observe that as on our own appreciation of the novel, we are inclined to take a view different from the view taken by the Courts below, we have taken the benefit of also considering the evidence given in this case by two eminent personalities in the literary field for proper appreciation and assessment by us. It has already been held by this Court in two earlier decisions which we have already noted that the question whether a particular book is obscene or not, does not altogether depend on oral evidence because it is duty of the Court to ascertain whether the book offends the provisions of S. 292 I.P.C. but it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the book is in a language with which the court is not conversant. It is indeed a matter of satisfaction for us that the views expressed in course of their evidence by the two eminent persons in the literary field are in accord with the views taken by us.

We must, therefore, allow this appeal. We set aside the judgment of the Courts below and the conviction recorded and  
54

sentenced imposed on the appellants. We acquit the appellants of the charges framed against them and we hold that the novel is not obscene and does not offend S. 292 I.P.C. We direct that the fine, if paid by the appellants, shall be refunded to them. We make no order as to costs.

S.R.

Appeal allowed.

55