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Legal Framework Regulating Internet Obscenity: An Indian Perspective

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LEGAL FRAMEWORK REGULATING INTERNET OBSCENITY: AN INDIAN PERSPECTIVE

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In India, the legal provisions that regulate obscenity are sections 292, 293 and 294 of the Indian Penal Code ("IPC"), sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act and section 67 of the Information Technology Act. The IPC penalizes acts of sale, etc., of obscene books or objects to persons including young persons and also performance of obscene acts, songs in or near public places to the annoyance of others. The Indecent Representation of Women Act prohibits advertisements containing indecent representation of women and the publication or sending by post of books, pamphlets or in any form containing indecent representation of women. The Information Technology Act ("ITA") prohibits the publishing of information which is obscene in nature in electronic form. These provisions shall be dealt with in detail later.

The difficulty arises in defining obscenity as the aforementioned statutes do not do that anywhere. However, the word has been interpreted by courts in India.

DEFINING OBSCENITY

The test for obscenity was first laid down the Regina v. Hicklin as a “tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall”. Lord CJ Cockburn in his opinion in the Hicklin case explained that the danger of prurient literature was that it “would suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of a most impure and libidinous character”. In India, the Supreme Court in the case of Ranjit D. Udeshi v. State of Maharashtra observed that the test laid down by Cockburn, C.J. should not be discarded. It observed:

“that the test of obscenity to adopt in India is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity in treating sex in a manner appealing to the carnal side of human nature or having that tendency. The obscene matter in a book 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 book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book on it must not be overlooked”.

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1 1st year, B.A., LL.B. (Hons.), School of Law, Christ University (Summer, 2009).
2 Sections 292, 293 and 294, Indian Penal Code, 1860.
3 Section 3, Indecent Representation of Women (Prohibition) Act, 1986.
4 Section 4, Indecent Representation of Women (Prohibition) Act, 1986.
6 (1868) 3 QB 360.
7 AIR 1965 SC 881.
It further interpreted the word “obscene” as that which is “offensive to modesty or decency, lewd, filthy and repulsive”. Also that section 292 of the IPC was a reasonable restriction on the right of freedom of speech and expression under Article 19 (2) of the Constitution.

In another case Samresh Bose v. Amal Mitra⁸, the court held that:

“the concept of obscenity would differ from country to country depending on the standards of morals of contemporary society”. And that “obscenity has a tendency to deprave and corrupt those whose minds are open to such immoral influences”.

Another test for obscenity is the Miller Test which was laid down by the United States Supreme Court in the case of Miller v. California.⁹ It is a three-prong test for obscenity:

1. Whether the “average person”, applying community standards would find the work, taken as a whole, appeals to the prurient interest;
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically denied by state law;
3. Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

(emphasis supplied)

The third-prong of Miller test needs a more objective assessment of the “reasonable person” test. This test was endorsed by the Supreme Court in the case of Director General of Doordarshan v. Anand Patwardhan¹⁰ and also in the case of Ajay Goswami v. Union of India,¹¹ where it was observed that the test for judging a work should be that of an ordinary person of common sense and prudence and not an “out of the ordinary or hypersensitive person”.

In the last few years, lawmakers have been in a dilemma with regard to the applicability of these tests for obscenity in an electronic environment. Dr. A.R. Lakshmanan, J. in the Ajay Goswami case, while referring to contemporary day and age of the internet observed that:

“Community mores and standards played a part in the Indian Supreme Court taking a different view from the general view taken by the English Courts. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with a click of the mouse”.

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⁸ AIR 1970 SC 1390.
The United States Department of Justice has said that nowadays “commercial websites selling obscene materials are increasing both in number and in the degradative quality of their images. Typically, these websites offer an online mechanism for ordering physical products (such as magazines, videotapes, or DVDs), provide online content viewable for a fee, or both. Although many commercial websites are accessed intentionally, others employ deceptive tactics to lure visitors, including the use of misleading domain names (the website's address typed into the browser's window)”.

Due to the widespread reach of the internet, such websites are accessible from any corner of the world, even India.

The Delhi High Court in the case of Maqbool Fida Hussain v. Raj Kumar Pandey has held that “section 67 is the first statutory provision dealing with obscenity on the internet and it must be noted that the both under the Indian Penal Code, 1860 and the Information Technology Act, 2000 the test to determine obscenity is similar.”

**Obscenity in Electronic Form**

In India, the Information Technology Act regulates obscene material in electronic form. Section 67 of the Act reads thus:

> “whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is 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, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees”.

The ingredients of an offence under this section are:

- a) Publication or transmission in the electronic form.
- b) Lascivious material appealing to prurient interests.
- c) Tendency to deprave and corrupt persons.
- d) Likely-audience
- e) To read, see or hear the matter contained or embodied electronic form.

The word “publish” has not been defined under the Act. However, the Supreme Court held in the case of Bennett Coleman & Co. v. Union of India that publish means “dissemination and circulation”. In an electronic form, publication or transmission of

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information includes dissemination, storage and circulation. Information is defined under section 2 (1) (v) as “information” includes data, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche. So, the obscene material could be in any of these forms to attract the offence of section 67. This section advocates that the ‘obscene material in electronic form’ 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 ‘obscene material in the electronic form’ is likely to fall.

It is necessary to note that any offence related to obscenity in electronic form cannot be tried under section 292 of the IPC, as section 81 of the ITA states that the Act will have an overriding effect:

“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

Therefore, as a thumb rule, offences related to ‘obscenity in electronic form’ should be tried under the provisions of section 67 only and any attempt to import provisions of section 292 of IPC would tantamount to disregard of legislative intent behind the Act and cause miscarriage of justice. But, in the recent judgment of Avnish Bajaj v. State (NCT of Delhi) both the provisions were considered together in arriving at the judgment. Also, the punishment under section 67 of the ITA is more stringent that section 292 of the IPC. Section 67 is also criticized it is very easy for a person to escape criminal charges just by proving his lack of knowledge of publication or transmission of obscene information in the electronic form. Moreover, though publication or transmission of obscene information may be illegal but mere possession, browsing or surfing through obscene content is not an illegal activity.

The issues related to publication of obscene information in electronic form has to be looked at from the perspective of ‘extra-territorial’ jurisdiction and Internet technologies, keeping in view that ‘obscenity’ is no longer a local or static phenomenon. It is now global and dynamic in nature and thus needs strict interpretation of statute.

RELEVANT CASE LAW


Brief Overview of the Facts of the Case:

The Petitioner is the managing director of Baazee India Private Limited (BIPL) now known as Ebay India Private Limited (EIPL). The Company operates a website called

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17 *Supra* note 15 at pg. 156.
18 *Id* at 157.
Baazee.com, a website which is an e-commerce platform which facilitates exchanges between buyers and sellers. The said website carried a listing for an objectionable video showing two minors performing sexually explicit acts. This clip was advertised for sale for a period of thirty hours on the said website by a seller during which eight persons with distinct e-mail ids had purchased the clip. It was removed after the Community Watch of the Website made a report about the said objectionable video. The Video was sold for a price of Rs.125 by the seller one Ravi Raj who was a fourth year student of the Indian Institute of Technology, Kharagpur. The website already had existing content filter systems but the student managed to evade the system with a manipulation of keywords and listing it under the books category. He adopted a disguised registered address as Alice Electronics from Kharagpur. The buyer could choose numerous payment options one of which was “Paisa Pay” a payment system unique to the Baazee.com website using which Bazee.com would get a commission of Rs.3 per transaction. The buyer in this particular transaction had to pay a total of Rs.128, Rs.3 of which went to BIPL and Rs.125 of which was remitted to the seller by way of HDFC bank. On the 9th of November 2004, the Crime Branch of the Delhi Police sent notices under Section 91 of the Code of Criminal Procedure to Sharat Dugumatri (Senior Manager, Trust and Safety, BIPL) who is accused no.3 and obtained information on the working of the Baazee.com portal. On the 10th of December in response to a query addressed to Baazee.com Sharat provided the details of the seller and the buyers who bought the item and also informed the police that the system had been locked so as to prevent them from modifying their contact details. On the 12th of December, Sharat disclosed details of the payments made to the sellers and confirmed that a payment of Rs. 17,787.87 was disbursed to the seller by way of HDFC payment services. Upon the arrest of Ravi Raj the metropolitan magistrate took cognizance of the offenses under Section 67 of the Indian IT Act and Sections 292 and 294 of the Indian Penal Code. The accused were summoned to face trial. Ravi Raj has been absconding so his trial has been separated. The petition sought to quash criminal proceedings against the petitioner.

Holding:

Are the offenses under Sections 292 and 294 IPC and Section 67 IT Act attracted?

“If any —book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object is —lascivious or appeals to the prurient interest or —if taken as a whole is such as to tend to deprave or corrupt person, who are likely to read, see or hear the matter contained or embodied in it, then such object —shall be deemed to be obscene. The law in this regard has been explained by the Supreme Court in Ranjit D. Udeshi v. State of Maharashtra AIR 1965 SC 881, C.T. Prim v. State AIR 1961 Cal 177 and Samaresh Bose v. Amal Mitra AIR 1986 SC 967.”

In the present case, there are two pieces of material that call for scrutiny. One is the video clip and the other the listing on the website baazee.com. It was not argued by learned counsel for the petitioner that the video clip in question did not even prima facie attract the definition of an obscene object within the meaning of Section 292 (1) IPC.
Also, it is a matter of record that a separate case has been instituted before the Juvenile Justice Board against the child involved in the act. As will be noticed hereafter, the listing itself suggested that even according to the seller the clip answered the description “of child pornographic material”.

Prima facie it appears that the listing itself answered the definition of obscenity since it contained words or writing that appealed to the prurient interest or if taken as a whole was such as to tend to deprave or corrupt person, who are likely to read, see or hear the matter contained or embodied in it. The listing contained explicit words that left a person in no doubt that what was sought to be sold was lascivious. The words “This video is of a girl of DPS RK PURAM which has been filmed by his boyfriend in very sexual explicit conditions” are a prominent feature of the listing which invited a potential buyer to purchase the obscene object which was the video clip by projecting it as child pornography since the reference is to school children. Despite the arguments to the contrary of the learned senior counsel for the petitioner, this Court did agree with their submissions that the listing itself was not even prima facie an obscene material or text.

As far as the listing is concerned, its contents were in the knowledge of BIPL the moment the listing was placed on the website by Ravi Raj. The offence under Section 292 (2) (a) IPC gets attracted when the prosecution is able to prove that a person has “publicly exhibited or in any manner put into circulation” or “has in his possession” the obscene object. Even if Ravi Raj, and not BIPL, may have inserted the listing, the website of BIPL certainly possessed it. The website was easily accessible on the net and therefore the website also publicly exhibited the listing. It cannot be said therefore that in respect of the listing, Section 292 (2) (a) IPC is not even prima facie attracted as far as BIPL is concerned.

The advertisement might itself have been inserted by the seller but the website facilitated the sale by carrying the listing which informed the potential buyer that such a video clip that is pornographic can be procured for a price. For instance, there could be a notice board in the premises of a club or association, on which is pasted a listing by one of the members offering for sale a pornographic film. It would not be open to the club/association to say that it in providing space on its notice board it is not by itself—making known that an obscene object—can be procured from or through any person. Section 292(d) would be attracted in such a situation to fasten criminal liability on the club itself. If it is proved that a particular member was aware of the placing of such listing on the notice board such member would also be liable. Baazee.com here was using a public space in the form of a website that could be accessed by any Internet.

The question for the purposes of Section 67 is whether the website caused the publishing of such obscene material. For this purpose, the chain of transactions is relevant. Once the interested buyer gets on to baazee.com and views the listing, he then opts to buy the said product and then makes payment. Only then the remaining part of the chain is complete and the product, which in this case is the video clip in electronic form, is then transmitted through an email attachment and then can get further transmitted from one
person to another. The video clip sent as an email attachment can straightway be downloaded onto the buyer’s hard disc and numerous copies thereof can be made for further transmission. The publishing in this form is therefore instantaneous and can be repeated manifold. In fact in the present case, the transmission of the clip to eight buyers located in different parts of the country took place in a very short span of time.

Therefore, it cannot be said that baazee.com in this case did not even prima facie cause the publication of the obscene material. The ultimate transmission of the video clip might be through the seller to the buyer but in a fully automated system that limb of the transaction cannot take place unless all the previous steps of registration with the website and making payment take place. It is a continuous chain. When five to six links of the chain are under the direct control of the website and it is only on completion of each step that the final two steps which result in the actual publication of the obscene material ensue, it cannot be said that the website did not even prima facie cause publication of the obscene material.

To summarize this part of the discussion, this Court finds that a prima facie case for the offence under Section 292 IPC and Section 67 IT Act is made out as far as the owner of the website baazee.com, i.e. the company BIPL (renamed as EIPL) is concerned. The offence under Section 294 IPC is not even prima facie attracted.

The Court also held that the petitioner could not be held separately liable for the offence but that only the Company was liable.


The petitioner in this case was detained under section 3 (1) of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act.

The main grounds of detention were that he was indulging in offences under section 67 of the Information Technology Act, 2000, sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986 and under section 27 of the Arms Act, 1969. The petitioner challenged his detention under Article 32 of the Constitution.

The petition was dismissed, as the Supreme Court did not find much merit in the plea that the delay of two days in furnishing translated copies of documents had caused any prejudice to the detenu. It held that the contents of the letter received from members of the public pro bono public, were not extraneous or irrelevant.

This case highlights the importance of the courts exercising the interests of the contemporary society and particularly the influence of the ‘obscene material in electronic form’ on it while interpreting section 67. For this purpose, even the State Governments
may have to apprehend perpetrators of ‘cyber obscenity’ by invoking local state legislations accordingly.19


The petitions have been clubbed into one petition. The petitions seek to challenge summoning orders issued against the petitioner over certain paintings which celebrate nudity. The Ld. ACMM, Delhi issued summons to the petitioner for various offences Under Section 292/294/298 of the Indian Penal Code (IPC' for short) against which the present revision petitions have been filed.

**Holding:**

In the conspectus of the legal principles enunciated and discussed aforesaid both of India and across the globe, the legal tests governing the law on obscenity are clear. On applying the said tests governing obscenity, in my considered view, the said painting cannot be said to fall within the purview of Section 292 thereby making it obscene. The impugned painting on the face of it is neither lascivious nor appeals to the prurient interests. At the same time, the person who is likely to view the said painting would not tend to be depraved or corrupted. In other words, the said painting would not arouse sexual interest in a perverted inordinate person or would not morally corrupt and debase a person viewing the said painting. Though some might feel offended or disgusted at the very inception of seeing the alleged Mother India in nude but that by itself and nothing more in my opinion is not sufficient to qualify the test of obscenity. The said painting depicting India in a human form in no manner has that tendency to make an average person feel embarrassed by naked portrayal of a concept which has no particular face to it since the painting has not lost its artistic value/touch.

"An attempt to understand the said painting from the artist's/petitioner's perspective would show how the painter by way of an abstract expression has tried to elucidate the concept of a nation in the form of a distressed woman. No doubt, the concept of a nation has had a long association with the idea of motherhood but just because the artist has expressed it in nude does not make the painting obscene per se thereby satisfying the test that nudity or sex alone cannot be said to be obscene. If the painting is looked as a whole, it would reveal that that the revulsion referred to by learned Counsel for the respondents of patriotic nationals would not arise for the reason that except the fact that it is in nude, there is nothing which can be considered as pinching to the eye. As a matter of fact, the aesthetic touch to the painting dwarfs the so called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked."

Once Hans Hofmann said and I quote, "A work of art is a world in itself reflecting senses and emotions of the artist's world." To put it differently in the words of Edward Hopper,
"Great art is the outward expression of an inner life in the artist." If the above holds true, then it would not be wrong to suggest that the petitioner is pained by the growing untold misery of our nation and made an attempt to bring the same out on a canvass. The artist's creativity in this painting is evident from the manner in which the artist by way of a tear and ruffled, unkempt, open hair of the woman tried to portray the sad and the dispirited face of our nation who seems to have suffered a great deal of anguish and agony. A woman's sorrow has been described by the way the woman is lying with her eyes closed, with one arm raised on her face and a tear dropping from the eye. The object of painting the woman in nude is also part of the same expression and is obviously not to stimulate the viewer's prurience but instead to shake up the very conscious of the viewer and to invoke in him empathy for India and abhorrence for the culprits. The person who may view the painting is likely to react in tears, silence or analogous to the same but no way near the feelings of lust. There can be many interpretations to the painting. One of the interpretations to it can be to show the disconsolate India which is entangled in various problems like corruption, criminalisation, crisis of leadership, unemployment, poverty, over population, low standard of living, fading values and ethics etc. The other can be that Bharat Mata is perhaps just used as a metaphor for being so bereft because of the earthquake which occurred around the time when this painting was made. Other than this, the bold use of colour and the depiction of the great range of Himalayas by way of the hair flowing of the women restore the artistic touch in the painting.

One of the tests in relation to judging nude/semi nude pictures of women as obscene is also a particular posture or pose or the surrounding circumstances which may render it to be obscene but in the present painting, apart from what is already stated above, the contours of the woman's body represent nothing more than the boundaries/map of India. There can be a numbers of postures or poses that one can think of which can really stimulate a man's deepest hidden passions and desires. To my mind, art should not be seen in isolation without going into its onomatopoetic meaning and it is here I quote Mr. Justice Stewart of the US Supreme Court in Jacobellis v. Ohio 378 U.S. 184 (1964) who defined 'obscenity' as, "I will know it when I see it". The nude woman in the impugned painting is not shown in any peculiar kind of a pose or posture nor are her surroundings so painted which may arouse sexual feelings or that of lust in the minds of the deviants in order to call it obscene. The placement of the Ashoka Chakra or the States in the painting is also not on any particular body part of the woman which may be deemed to show disrespect to the Ashoka Chakra/States and the same was conceded by the learned Counsel for the respondent during the course of the arguments advanced. Even if a different view had to be taken that if the painter wanted to depict India in human form, it may have been more appropriate to cloth the woman in some manner may be by draping a sari or by a flowing cloth etc., but that alone cannot be made a ground to prosecute the painter. It is possible that some persons may hold a more orthodox or conservative view on the depiction of Bharat Mata as nude in the painting but that itself would not suffice to give rise to a criminal prosecution of a person like the petitioner who may have more liberal thoughts in respect of mode and manner of
depiction of Bharat Mata. The very theme of our Constitution encompassing liberty, equality and fraternity would abhor the non-tolerance of another view. The judge also must not apply his more liberal or conservative view in determining this aspect but should place himself in the shoes of the painter and endeavour to decipher the theme and thought process of the painter who created the painting. It would always be prudent for the judge to err on the side of a liberal interpretation giving the scheme of our Constitution.

This case also held that the test of obscenity under section 67 the Information technology Act and the IPC is similar.


Overview of the facts:

All the three petitioners of these three writ petitions are student of fourth year (VIIIth Semester) of six years M.C.A. degree course in International Institute of Professional Studies (for short IIPS) of Devi Ahilya Vishwa Vidyalaya. Indore. It is an Institute where both boys and girls are receiving education. On 9-4-2001 some girls students studying in VIIIth Semester orally complained to Dr. A. K. Raman, Director of the Institute regarding circulation of two Web site (most popular name in computer language) containing obscene pictures in the names of these girls together with obscene comments in English in the name of each girl on each picture. The girls requested for holding of an inquiry by the Director to avoid any publicity and embarrassing situation to all of them. Sensing the seriousness of the issue, at the same unfortunately got paper publicity in town, the Director, immediately asked Mr. Imroz Khan -- a software engineer working in the Institute to probe into the matter and find out its origin. The inquiry was then made by Mr. Khan which inter alia revealed that the entire episode began with sending of one e-mail message which was sent from one Internet Account bearing T. No. 260598 belonging to one petitioner Vaibhav Jain's residence. It was also found that one such e-mail message was also sent by another petitioner -- Ravi Nawal to all students of VIIIth Semester. In these e-mail, students were invited to visit these two web sites. In this e-mail, the details of web sites were mentioned. The authors of these two web sites were directed to forthwith remove the web sites. Looking to the seriousness of the Issue, the matter was also reported to police, by the Institute, the offending computers of these petitioners from their respective houses and which were used for preparation of these offending web site were seized by the police together with obscene pictures shown in those web sites. A report was then submitted by Mr. Khan to the director of Institute, who in turn set up an inquiry committee immediately consisting of four senior professors to examine the issue to find out persons responsible for the entire episode and submit the report. The inquiry committee then summoned these three writ petitioners and one Mr. A Singh and recorded their statements in detail in question/answer forms on the issue relating to offending two web sites and its origin. The committee then considered the entire issue on the basis of the material, statements of the petitioners and submitted
their report to Vice-Chancellor. The Vice Chancellor after taking into account all facts and the report submitted to him, passed the impugned order dated 19-4-2001 holding these three petitioners to be prima facie responsible and architect of offending web sites.

So far as petitioner -- Vaibhav Jain was concerned, he was rusticated from the Institute with immediate effect. Whereas, other two writ petitioners i.e. -- Ravi Nawal and Rahul Shah were debarred from appearing in examination of the current session with immediate effect. It is against this order, all the three students (petitioners) have felt aggrieved and have filed these three individual writs.

**Holding:**

The writ petitions were dismissed and the impugned order of rustication was upheld by the Court based on the gravity of the issue. The questions regarding natural justice were dismissed as, in the judge’s opinion, the inquiry instituted by the Vice Chancellor itself was a manifestation of such a natural justice process.

The Judge also, as obiter dicta, remarked:

“I cannot, however, resist myself from making some observations which I feel may serve good in a time to come. This Court views with concern the menace pervading in the student community emanating from Educational Institutions. This incident has crossed the limits of decency, morality and humanity. The questions, arise, where the country’s future, heading to? And who have to be blamed for this occurrence. Parents or teachers? Imposition of punishment in itself is no solution to the problem. It does not serve good to either though it is necessary to maintain the discipline in the Institution. A time has come to eradicate this evil arising out of use of this latest and new cyber technology and teach the students of their ill effects rather than to tell them their real use -- though it is equally necessary. The immature and unpolluted minds of young and bright students in their studies, as I see from the reports filed by the petitioner in support of their case if not controlled at a proper time, such many more incidence in other shape are bound to occur. It is thus the moral responsibility of Guru imparting the education to ensure that every student gets only the real knowledge of education so that his shishya becomes a model student of future to uplift not only the name of his Guru but also the name of Institution where he received the education and also his family. Equally, it is the duty of parents to ensure that their children are nurtured in most congenial and good atmosphere under their parental care without being influenced by Western Media impact, on their immature brain. It is hoped that the Institution so to the parents will rise to an occasion and will make sincere endeavour to create such healthy atmosphere, in the pious temple of education, as also in family in the larger Interest of society as a whole.”