

“Case Comment: Navtej Singh Johar & Ors. Vs. Union of India & Ors.”

*Sakshi Tomar
Faculty,
Legal Edge Tutorials,
Bhopal*

CITATION	AIR 2018 SC 4321
COURT	Supreme Court of India
JUDGES/CORAM	Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice Rohinton Fali Nariman, Justice D.Y. Chandrachud and Justice Indu Malhotra
DATE OF JUDGEMENT	06.09.2018

INTRODUCTION

Section 377 of the Indian Penal Code imposes criminal liability on anyone who “voluntarily has carnal intercourse against the order of nature”. When the said Section was questioned before the Supreme Court of India with ‘consent’ as the crux of the arguments, the Court decided to de-criminalise certain acts as described in the following analysis and the same has been hailed as a landmark precedent. The Supreme Court, by way of this judgement, reiterated its pace with changing times and mind-set of the people.

FACTS

The **facts** of the case are as follows: A writ petition was filed before a three-judge bench of the Supreme Court on 08.01.2018. In the prayer, the petitioners prayed for declaration of “right to sexuality”, “right to sexual autonomy” and “right to choice of a sexual partner” to be a part of right to life guaranteed by Article 21 of the Constitution of India. It was also prayed by the petitioners to declare Section 377 of the Indian Penal Code as unconstitutional.

The three-judge bench of the Apex Court decided that the matter was required to be addressed by a larger bench. Thus, when the petition was transferred, the learned five judges of our Supreme Court struck down Section 377 in as long as it criminalized consensual sex.

ISSUES

The **main issue** in the case was: Whether or not the non-recognition and subsequent denial of expression of choice by way of Section 377 was contrary to the judgement given in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*?

CONTENTIONS OF THE PETITIONERS AND INTERVENORS

1. Homosexuality, bisexuality and other sexual orientations are equally natural to all persons and are founded on consent of two legally qualified persons; the orientations are neither a physical illness nor a mental disease;
2. Making the sexual orientations of a person criminal, was offensive to the well-established principles of individual dignity and autonomy; sexual orientation is an essential attribute of one's privacy¹;
3. Lesbian, gay, bisexual and transgender (LGBT) community comprise 7-8% of India's population and they need to be recognized irrespective of their minority and they need legal protection;
4. Section 377 violates Article 14 as it is vague regarding the term "carnal intercourse against order of nature" and no intelligible differentia or reasonable classification exists as long as sex is consensual²;
5. Section 377 is contrary to Article 15 and has a chilling effect on Article 19(1)(a) as LGBT persons cannot express their sexual identity and orientation freely³;
6. Sexual autonomy and right to choose a partner of one's choice is inherent under Article 21 of the Constitution⁴; a person's right to reputation is also taken away under Section 377, which is a facet of Article 21⁵
7. Section 377 hampers the ability of the LGBTs to realize their constitutional right to shelter; LGBTs seek assistance of private sources such as Gay Housing Assistance Resources (GHAR) in order to access safe shelter and this is an indication that the members of this community are in a dire need of immediate care and protection of the government and judiciary;

¹ K.S. Puttaswamy & Anr. v. Union of India & Ors. (2017) 10 SCC 1

² Anuj Garg & Ors. v. Hotel Association of India & Ors. (2008) 3 SCC 1

³ S. Khushboo v. Kanniammal & Anr. (2010) 5 SCC 600

⁴ Shakti Vahini v. Union of India and Ors. (2018) 7 SCC 192;

National Legal Services Authority of India v. Union of India & Ors. (2014) 5 SCC 438

⁵ Kishore Samrite v. State of U.P. & Ors. (2013) 2 SCC 398

CONTENTIONS OF THE RESPONDENTS AND OTHER INTERVENORS

1. No person has any liberty to abuse one's organs and that the offensive acts as mentioned in Section 377 are committed by abusing one's organs;
2. Acts mentioned in Section 377 are undignified and derogatory to the constitutional concept of 'dignity' and thus, de-criminalising the Section would be wrong and constitutionally immoral;
3. Section 377 rightly makes the acts stated therein punishable as the Section was incorporated after taking note of the legal systems and principles which prevailed in ancient India and now in 2018, the said Section is more relevant legally, medically, morally and constitutionally;
4. If Section 377 was declared unconstitutional then the family system would be in shambles and institution of marriage would be affected;
5. Despite the de-criminalisation of various consensual acts of adults in other parts of world, they cannot be de-criminalised in India due to its different political, economic and cultural fabric;
6. In the event that consenting acts between two same sex adults are excluded from the ambit of Section 377, then a married woman would be rendered remediless against her bi-sexual husband and his consenting male partner and additionally would have a cascading effect on personal laws and legislations like the Special Marriages Act;
7. Doctrine of manifest arbitrariness is of no application as the law is not clearly or otherwise arbitrary, for Section 377 applies irrespective of one's gender or sexual orientation;
8. Consent could also be obtained by misconception, unsoundness of mind, intoxication or coercion;
9. Section 377 does not violate Article 14 as it merely defines a particular offence and its punishment and it is well within the power of the State to determine who should be regarded as a class for the purpose of a legislation and this is reasonable classification.

SUMMARY OF COURT DECISIONS AND JUDGEMENT

When the writ petition was first presented by dancer Navtej Singh Johar, before the three-judge bench, the bench referred to the *Suresh Koushal* case in which the Supreme Court overturned the *Naz Foundation* judgement. The three-judge bench felt that there were a lot

of aspects to be considered regarding Section 377- determination of “order of nature”, social morality, rights of sections of people, constitutional foundations, consenting adults, etc. Thus, the judges deemed the case fit to be considered by a larger bench.

Considering the petitions and examining the same through various aspects, the learned five-judge bench of the Apex Court gave its judgement in favour of the petitioner and unanimously held that Section 377 was unconstitutional as far as it criminalized consensual sex between two adults of same or different sex. As the judgement was given by a five-judge bench, it is a binding precedent on all courts in India.

ANALYSIS

First looking at the chronological legal events that led to the present case: The issue legally arose in 2009 when the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi & Ors.*⁶ observed that Article 15 of the Constitution prohibits discrimination on various grounds- including sex. Thus, the Court declared Section 377 unconstitutional in view of Articles 14, 15 and 21 of the Constitution of India. But this judgement was overturned in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*⁷ by another Delhi High Court bench wherein it was held that prohibition of acts under Section 377 only regulated sexual conduct regardless of gender identity and sexual orientation of a person. Section 377 would apply irrespective of age and consent, for the Section did not criminalize a particular people or identity or sexual orientation and only identified certain acts which, when committed, would constitute an offence.

Next, looking at the Constitutional jurisprudence aspect: it is definitively true that our Constitution guarantees the citizens of India certain inalienable rights. However, repeatedly, by way of precedents, it has been established by the Indian courts that the rights guaranteed as Fundamental Rights under Articles like 14 and 21 of the Constitution of India are dynamic and timeless rights of 'liberty' and 'equality' and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature of our social fabric and conditions. Flowing from the same principle is the concept of 'Transformative Constitutionalism'. Transformative constitutionalism is the ability of the Constitution to adapt and transform with the changing times. The principle also

⁶ (2009) 111 DRJ 1

⁷ (2014) 1 SCC 1

places an onus on the judiciary of a country to uphold the supremacy and values of the Constitution. Thus, *in tandem* with the above two propositions, rights of LGBT community were required to be recognized under Articles 14, 19 and 21 of the Constitution of India.

Further, the concept of constitutional morality is also of very high importance. Constitutional morality aims at ushering a diverse and inclusive society while adherence to the principles of constitutionalism is observed. Since 1860, our society has undergone huge amounts of progressive change: sexual minorities have been accepted now and given space, especially since the *NALSA* judgement. Nevertheless, Section 377 in its original form created a chilling effect on the acceptance and judicial judgement. If this happens or if such a treatment to the LGBT community is allowed to persist, then the Indian courts, which are under the obligation to protect the fundamental rights of citizens, would be failing in the discharge of their duty. A failure to do so would reduce the citizens' belief in the judiciary of their country. The Court, as the final guardian of the Constitution, has to also keep in view the necessities of the needy, weaker and minor sections. The role of the Court assumes further importance when the class or community whose rights are in question are those who have been the object of humiliation, discrimination, separation and violence by not only the State and the society but also at the hands of their very own family members and friends. The development of law cannot further struggle for the realisation and attainment of the rights of such members of the society. Thus, in view of constitutional morality as well, Section 377 should not cover consensual sex between two adults, though of the same sex.

On the argument of the LGBT community being statistically minor, as advanced by the respondents, fundamental rights apply to citizens irrespective of their numbers in the population. These rights are guaranteed to each and every citizen and cannot be denied to a community because of its minority in the society. However small the fragment of LGBT community is, they must have equal legal protection; if not more. The Court, on this point correctly said, "The idea of number, in this context, is meaningless; like zero on the left side of any number".

Furthermore, the Petitioners contended that Section 377 violated Article 14 guaranteeing the right to equality because there existed 'no intelligible differentia'. The same contention is true as what is 'natural' varies from time to time; especially in today's times when sex is not only equivalent to generation of offspring. With regards to violation of Article 15, the contention

stands true as well because ‘sex’ is the term at which sexual orientation and genders are defined. Article 15 has perpetually been assumed stereotypical of sex as ‘male and female and heterosexuals’. Thus, Article 15 must cover in its ambit the LGBT community as well. In respect of Article 19, Justice Misra and Justice Khanwilkar specifically pointed out that such expression of sexual orientation does not violate decency or morality, because these concepts are not majoritarian in character. The Section also violated Article 21 for right to life includes right to privacy of consensual acts and right to choose a sexual partner, irrespective of the either party’s sex. Sexual autonomy is also to be in the ambit of Article 21. The aspect of right to privacy as upheld in the *K.S. Puttaswamy* case is also an important point of consideration. The Supreme Court in the Puttaswamy judgement held that denying the LGBT community its right to privacy on the ground that they form a minority would be violative of their fundamental rights. Thus, keeping in view the Constitutional rights of a citizen, they must be extended to the LGBT community as well. Additionally, keeping in mind the precedent set by the *NALSA* judgement that gender identity was intrinsic to one’s personality and denying the same would be violative of one’s dignity, the Section must have been de-criminalised much sooner.

The Supreme Court correctly based its judgement on the aspects covered in the above analysis and de-criminalised consensual sexual acts of two adults and termed the acts as “natural”. To summarise the above analysis in a sentence: the Supreme Court held that sexual orientation forms a part of the right of expression under Article 19 and is an important part of the right to privacy.

CONCLUSION

Thus the decision of the Apex Court de-criminalising consensual sexual acts between two adults, irrespective of their gender or sexual orientation, was correct. In so far as, the Court retained bestiality, sex with minors and non-consensual sexual activity within the ambit of Section 377, the decision was apt to prevent any loopholes or abuse of law. Thus, the Court overruled *Suresh Kumar Koushal* decision as well. Having suffered at the hands of society as well as family and being termed as ‘untouchables’, it was high time that our Supreme Court adopted a progressive and open mind and accepted the LGBT community as a part of the Indian society.