

Joseph Shine v. Union of India - Case Comment

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BENCH- Justice Deepak Mishra, Justice R.F Nariman, Justice D.Y Chandrachud, Justice A.M Khanwilkar and Justice Indu Malhotra.

CITATION- 2018 SC 1676.

DATE OF JUDGMENT- 27th September 2018.

ABSTRACT

India being a male-dominated society has always been overpowering with the rights and privileges of women. There exist a dichotomy in the current society, which on the one hand expressly promotes gender equality and on the other hand it impliedly suppresses the women. Supreme Court under Chief Justice Dipak Misra realized that it is the need of the hour to take a step towards recognition of women's rights and promote gender equality. Women should be given equal rights and opportunities as men. So, the Apex Court recently passed certain historic judgments to recognize the inequality which women had been facing. One such judgment included Joseph Shine case dealing with decriminalization of adultery. This paper deals with comments on the case Joseph Shine V. Union of India.

Keywords- Dichotomy, Supreme Court, Gender equality, Joseph Shine

INTRODUCTION

Certain laws in India have become so archaic that they have lost their relevance over a period of time. The law on Adultery was one of such laws and the same had been defined under Section 497 of the Indian Penal Code, 1860.¹ It was based on the notion of patriarchy and male chauvinism. Under this law, in order to constitute the offence of adultery, the following must be established:

- (1) Sexual intercourse between a married woman and a man who is not her husband.
- (2) The man who had sexual with the married woman must know or had a reason to believe that she is the wife of another man.
- (3) Such intercourse must take place with her consent i.e., it must not amount to rape.
- (4) Sexual intercourse with the married woman must take place without the consent or connivance of her husband.

Prima facie, it appeared that it is a beneficial legislation passed to serve the interests of women. But on the closer examination, these provisions relied on the assumption that women are chattels of men. The given law clearly revealed that Adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It objectified women and treated husband to be the master of his wife. It thus, relied on the stereotype about women and their subordinate role in marriage.

Therefore, the Supreme Court in the case of *Joseph Shine V. Union of India*² by declared 158 year old law on Adultery unconstitutional thereby recognizing the principles of equality and women's dignity. The Court also stated that the law was based on certain "societal presumptions" which had been in existence in the society from time immemorial.

BACKGROUND

In the given case *Joseph Shine*, a non-resident belonging to Kerala filed a Public Interest Litigation under Article 32 of the Constitution. He challenged the constitutionality of Section 497 of the Indian Penal Code, 1860 read with Section 198 of the Code of Criminal

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¹ "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case, the wife shall not be punishable as an abettor."

² 2018 SC 1676.

Procedure, 1973. He argued that it discriminated against men by only holding them liable for extra-marital relationships while treating women like objects.

The question of constitutional validity of Section 497 of the Indian Penal Code, 1860 arose before the Supreme Court multiple times. *First*, in the case of Yusuf Abdul Aziz V. State of Bombay,³ where the Court held that Section 497 of the Indian Penal Code, 1860 was constitutionally valid as it was a special provision for women only and recognized under Clause 3 of Article 15 of the Constitution. *Second*, in the case of Sowmithri Vishnu V. Union of India,⁴ the Supreme Court placed reliance on Yusuf Abdul Aziz case. The three grounds for challenges brought under this case includes:

1. Section 497 gives the right to the husband to bring an action upon the adulterer but does not give this right to the wife to prosecute the woman with whom her husband has committed adultery;
2. The section does not give the wife right to prosecute her husband who has committed adultery; and
3. It doesn't cover cases in which the husband has sexual relations with an unmarried woman.

The contention made was that Section 497 is a flagrant instance of "gender discrimination, legislative despotism and male chauvinism." However, the Court held Section 497 of IPC doesn't offend Articles 14 and 15 of the Constitution. *Third*, while placing reliance on the two earlier cases, the Supreme Court in the case of V. Revathi V. Union of India and Ors.⁵ observed that this section didn't allow either the husband or the offending wife to prosecute her nor did it permit the wife of the offending husband for being disloyal to her. It was held that since neither of the spouses could bring a charge against each other therefore, this section doesn't discriminate on the ground of sex. So, section 497 of the Act was held to be constitutionally valid.

In the earlier three judgments Supreme Court agreed to the constitutional validity of the Adultery Law. This issue was again raised in the case of Joseph Shine i.e. "Whether Section 497 of the Indian Penal Code, 1860 is unconstitutional?" The 5-judge bench while deciding this issue over-ruled the earlier decisions and passed a concurring judgment by battling for

³ AIR 1954 SC 321.

⁴ (1985) Supp. SCC 137.

⁵ (1988) 2 SCC 72.

gender equality. It struck down Section 497 of the Indian Penal Code, 1860 as the same being in violation of Article 14, 15 and 21 of the Constitution.

The judgment held that Section 497 is archaic and is constitutionally invalid as the same denies the women with her autonomy, dignity and privacy. This case recognized sexual autonomy as an integral part falling within the ambit of Article 21 of the Constitution. Also, the Court observed that in the institution of marriage women are unequal participants as they are incapable of consenting to a sexual act. Thus, women were recognized as sexual property of their spouse. In this way it violated Article 14. With respect to clause 3 of Article 15, the Court clearly stated that Adultery law violated the non-discrimination clause.

According to the Court, Section 497 was declared to be no longer a criminal offence as the same was not committed against the society instead is a personal issue. Considering this as a criminal offence would involve the interference of the State in the private realm of two individuals. Thus, according to Justice Misra, adultery still continues to be a civil wrong and also a ground for divorce thereby giving discretion to the husband and wife to decide the issue.

Apart from scrapping the above law, the Court realized that gender neutrality is needed in the society where even today women are treated as the property of their husbands. While deciding the issue the Court declared this law to be arbitrary in entirety. It doesn't in any manner preserved the sanctity of marriage. Instead this law showed the "proprietary rights" the husband had over his wife.

CRITICAL ANALYSIS

From its very inception the law on adultery was in controversy. As per my opinion, *firstly*, the law was not needed to be brought into existence as it interferes with the sexual autonomy of an individual which in turn affected the dignity of a woman. It was the discretion of an individual to determine his sexual acts and making it punishable criminally interfered with the right of privacy of an individual. Therefore, such a law is irrelevant especially in today's context where sexual privacy is a natural right, fundamental to liberty and a soul mate of dignity.⁶ The application of Section 497 was a clear violation of these enunciated rights as Adultery law was based on the assumption that husband is the owner of wife's sexuality.

⁶ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

Even Justice Nariman in the given judgment emphasised that “Section 497 is an archaic law, which has outlived its purpose”⁷ and thus, need to be struck down.

Secondly, one of the most arbitrary part of Adultery law was the fact that wife’s extra-marital sexual acts would not be a criminal offence if the same had been done with her husband’s consent. Therefore, the consent of women is immaterial. This made women as the property of the husband clearly favouring the patriarchal notions and beliefs resulting in the oppression of women. Also, this law had no application in case of husband having sexual intercourse with unmarried woman. To substantiate this point I would quote Justice Nariman who in the given judgment stated that the nature of the offence under Section 497 IPC is based on a paternalistic notion of a “woman as chattel”⁸ Also, Justice DY Chandrachud emphasised that the Adultery law was based on the notion “that a woman, upon entering marriage, is her husband’s subject, such that her sexual autonomy and dignity are seeded to the autonomy of the husband.”⁹

In today’s era, having a law like Adultery marks the backwardness of the society. Most of the countries of the world don’t have any law on Adultery because in a way this law violates women’s Fundamental Right to equality, autonomy and dignity. Quoting Justice Indu Malhotra who stated that, “the times when wives were invisible to the law and subordinate to their husbands had long passed.”¹⁰ Also, speaking on gender equality, Justice Dipak Misra declared that the Court could no longer allow women to be treated as the property of men. He emphasised that the Court has evolved a progressive jurisprudence on constitutionally protected liberties and, recently, conferred several rights to women.¹¹

However, this judgment completely ignored the rights and interests of men because the law on Adultery was not only committed against women but also against men. But the Court while deciding this case didn’t discuss any discrimination against men by not holding women responsible in adulterous relationship. Thus, Court should have adopted gender-neutral approach. Also, the Court made an arbitrary classification between married and unmarried women and also aggrieved husband and aggrieved wife.

CONCLUSION

⁷ Supra note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

To conclude, this historic judgment of striking away the Adultery law marks the progressiveness of the society. It not only ensures a move from a male dominated society but also provides equality and dignity to women. For a country like India which comprises of diverse population having different beliefs and ideologies adopting such a judgment would be difficult but a judicial pronouncement like this by the Supreme Court marks the beginning of “social change” and the society will slowly adopt the change according to the norms laid down. Therefore, the law of Adultery should not be treated as a criminal offence in the present time as this is a matter of private nature.

Women in today’s world are entitled to the same rights as men. But in a society which had been patriarchal and male-dominated from time immemorial it is difficult to accept a “social change.” A change which will not discriminate between men and women. A change which will give women the right to equality and dignity. A change which will support women empowerment. In order to achieve this change some bold steps are required not only from the public at large but also some authorities taking charge. Judiciary in the recent past has proved itself to be the guarantor and protector of Fundamental Rights of the People. The judicial pronouncement has been passed in order to protect gender inequality. The social stigma existing in our country where women are considered to be oppressed by men is to be abolished. The judicial wing has taken beyond implementation of laws.

The purpose of the verdict is to realize the status of women in the society. However, the orthodoxy which exists here is a challenge for the Judiciary to make people accept a change which is for the betterment of the society. But these steps marks the beginning of a new era. An era of equal rights and privileges to women. An era of women empowerment. As there is a famous saying by Kofi Annan, “There is no tool for development more effective than empowerment of women,”

SUGGESTIONS

India being at a very nascent stage in terms of women’s rights need to be very cautious in dealing with such issues. *Firstly*, the Judiciary should be clearer in terms of laying down certain guidelines and rules while passing such historic judgment. It is expected from the Judiciary to know the consequences of its judgment and pass safety orders accordingly. *Secondly*, other authorities like Legislature or say the Government instead of using these verdicts as political stands should consider such issues with a wider perspective. *Thirdly*, the people living in the society instead of protesting or agitating against the same should

understand the purpose with which these verdicts have been passed. For a change to be brought in, the entire society is required to contribute in its own manner. Also, sometimes accepting the change is most important contribution. *Fourthly*, while recognising the rights of one gender the interests of the other gender should not be ignored. India instead of promoting gender equality in favour of one gender say, women should adopt a gender-neutral approach in order to support equality.