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CASE COMMENTARY: NAVTEJ SINGH JOHAR AND ORS V. UNION OF INDIA

~Kritika Rajput

Citation: AIR 2018 SC 4321, (2018) 10 SCC

Court: Supreme Court, Court of Appeals

Date of Decision: 6 September 2018

Petitioner: Navtej Singh Johar, Ritu Dalmia, Ayesha Kapur, Aman Nath, Sunil Mehra

Respondent: Ministry of Health

Judges: Chief Justice Dipak Misra, Justice Rohinton Nariman, Justice D Y Chandrachud, Justice A M Khanvilkar, & Justice Indu Malhotra

FACTS

In this case of Navtej Singh Johar and Ors v. Union of India, the main issue in this case revolved around the validity of sec- 377 of IPC, titled as Unnatural Offences, whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal was considered as criminal offences and these offences carried penalties up to 10 years to life imprisonment with fine.¹

The same issue was originated in 2009 in the case of Naz Foundation v. Government of N.C.T. of Delhi, Delhi high court held that sec 377 is unconstitutional and the consensual sexual acts between two adults of the same sex is not criminal.

¹ Indian Penal Code, 1860, § 377

Again in 2014 two judge bench of the supreme court in the case of Suresh Kumar Koushal v. Naz Foundation, overturned the delhi high court decision and granted sec- 377 the stamp of approval.²

After all these decisions the present petition was filed in 2016 challenging the 2014 decision and a bench of five judge bench heard the matter. The petitioner in the case, Navtej Singh Johar was a dancer who identified as a part of the LGBT community, filed a writ petition for the recognition of right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of right to life guaranteed by article 21.

The petitioner also argued that sec- 377 was violative of article 14, 15 chilling effect on article 19 that is freedom of expression and also it violates the privacy of the LGBT people and choices.

Whereas defendant argued that privacy is derogable and have a risk of HIV/ AIDS in society and not declaring sec-377 constitutional would dismantle the institution of marriage and violates article 25, freedom of conscience and propagation of religion.

ISSUES

1. Whether Sec- 377 violates the fundamental right to expression under Article 19(1)(a) by criminalizing the gender expression of persons belonging to the LGBTQI+ community?
2. Whether Sec-377 violates Article 14 and 15 by allowing discrimination on the basis of “sexual orientation” and “gender identity”?
3. Whether Sec- 377 violates right to autonomy and dignity under Article 21 by penalizing private consensual acts between same-sex persons?

OBSERVATIONS

The Supreme Court, while observing the judgment in Suresh Kumar Koushal, noted that the two-judge Bench in the case had been guided by social morality leaning on majoritarian perception whereas the issue actually needed to be debated upon constitutional morality.³

² Chhayanshi Goyal, Case Comment: *Navtej Singh Johar and Ors. v. Union of India*, Lawctopus, <https://www.lawctopus.com/academike/case-comment-navtej-singh-johar-and-ors-v-union-of-india/>

³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 13 (India)

The judges observed that Sec- 377 of IPC was founded on moral notions which is opposite to constitutional order, liberty is over stereotypes and prevail over the culture. The order of nature that Sec- 377 speaks of is not just about non-procreative sex but is about forms of intimacy which the social order finds “disturbing” which brings forth the various forms of transgression present. Thus, a re- imagination of this order would not only be about the prohibition of non-procreative sex but instead about the limits imposed by society.⁴

The judges observed that this section has been destructive of an identity that is crucial to a dignified existence Sexual acts between consenting adults of the same sex is one facet of the right asserted by homosexual persons to lead fulfilling lives.⁵

The Court analysed the constitutionality of Sec- 377 is against Articles 14, 15, 19 and 21, and relying on the NALSA judgment, which granted equal protection of laws to transgender persons, to reiterate that sexual orientation and gender identity were an integral part of a person’s personality, and the Puttaswamy judgment, which recognised the interrelationship between privacy and autonomy and stated that the right to sexual orientation was an intrinsic part of the right to privacy.

The Court also relied on judgment in *Shakti Vahini vs. Union of India*⁶, and *Shafin Jahan vs. Asokan K.M*⁷ to reaffirm the right to choose a life partner was a feature of individual liberty and dignity under Articles 19 and 21 and referred to principles in *Shayara Bano case*⁸ to hold that Sec- 377 was irrational, arbitrary and violative of Article 14 as it made consensual relationships in private spaces a crime and subjected the LGBT community to discrimination and unequal treatment. Moreover, the Court used the maxim “a man's house is his castle” to hold that Sec-377 was disproportionate and unreasonable for restricting LGBT persons’ right to freedom of expression and choice as the restrictions did not protect public order, decency or morality.⁹

Chief Justice Misra relied on the principles of transformative constitutionalism and stated that “constitutional morality should prevail over social morality to ensure human rights of LGBT

⁴ *Navtej Singh Johar v. Union of India* [2018] 10 SCC 1 (INSC), [A]

⁵ *Navtej Singh Johar v. Union of India* [2018] 10 SCC 1 (INSC), [B]

⁶ *Shakti Vahini v. Union of India & Ors.*, (2018) 7 SCC 192

⁷ *Shafin Jahan v. Asokan K.M.*, AIR 2018 SC 1933

⁸ *Shayara Bano v. Union of India & Ors.*, (2017) 9 SCC 1

⁹ *Navtej Singh Johar and Ors. v. Union of India*, Privacy Library, <https://privacylibrary.ccgmlud.org/case/navtej-singh-johar-and-ors-vs-union-of-india-uo-i-and-ors>

individuals are protected, regardless of whether such rights have the approval of a majoritarian government or not.

J. Nariman in his opinion analyzed the Sec-377 and said that Victorian morality was long gone and gave directives to publicize the judgment to eliminate the stigma faced by the LGBT community.

J. Chandrachud in his opinion recognized that though Sec- 377 was facially neutral, its “effect was to efface identities” of the LGBTQ+ community. He stated not only law not to discriminate against same-sex relationships also take steps to achieve equal protection and to grant the community “equal citizenship in all its manifestations”.

J. Malhotra stated that the right to privacy does not only include the right to be left alone but also extends to “spatial and decisional privacy”. Also concluded her opinion by stating that history owes an apology to members of the LGBTQ+ community.”¹⁰

DECISION

The Court concluded that sexual orientation was natural, innate and immutable. It held that the choice of LGBT persons to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice and an expression of their autonomy and self-determination. Further, the court held that although the LGBT community constituted a sexual minority, they were equally protected under Part III of the Constitution.¹¹

It was declared that in so far as Sec- 377 criminalises consensual sexual acts of adults, it is violative of Articles 14, 15, 19, and 21 of the Constitution. However, clarified that such acts must be completely voluntary in nature.¹² The judgment in Suresh Kumar Koushal was overruled.¹³

ANALYSIS

Decision in *Navtej Singh Johar v. Union of India* marked a breakthrough for equality and personal liberty in India. The Court rightfully declared Sec- 377 void because it offended the fundamental rights to dignity, privacy, equality, and personal liberty of LGBTQ people. It

¹⁰ *Navtej Singh Johar v. Union of India*, Global Freedom of Expression (Nov. 4, 2023),

<https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>

¹¹ *Navtej Singh Johar and Ors. v. Union of India*, Privacy Library, <https://privacylibrary.ccgmlud.org/case/navtej-singh-johar-and-ors-vs-union-of-india-uo-i-and-ors>

¹² *Navtej Singh Johar v. Union of India* [2018] 10 SCC 1 (INSC), [645.1]

¹³ *Navtej Singh Johar v. Union of India* [2018] 10 SCC 1 (INSC), [645.4]

was outdated legislation derived from the colonial period that made individuals conceal themselves and their personal relations because of being frightened.

The main innovation of the decision was the concept of constitutional morality which was prioritized over societal morality.¹⁴It was stated that despite the prejudices prevailing in society regarding homosexuals, all citizens' rights should be protected equally under the Constitution of India, moreover, fundamental rights cannot be conditioned upon the majority's views.

The Court further disregarded the notion that homosexuality goes against the “order of nature” and recognized that sexual preference is natural and constitutes one’s identity. Based on judgment in *K.S. Puttaswamy on privacy*, the Court acknowledged that adults should be allowed to love who they want without any external interference.

This judgment was the first step towards making things better, as decriminalizing homosexuality does not mean providing rights such as the right to marriage or adoption. Even in modern times, there is discrimination towards individuals who identify themselves within the LGBTQ+ community. Nevertheless, this judgment was a move in a more inclusive and constitutional society.

¹⁴ Devika P.V., Case Comment: *Navtej Singh Johar and Ors. v. Union of India*, *J. Legal Rsch. & Juridical Sci.* 812