



The Indian Journal for Research in Law and Management

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Editor-in-Chief – Dr. Mukta Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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NAVTEJ SINGH JOHAR VERSES UNION OF INDIA

- *Adv. Dnyaneshwari Bhise*

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

COURT : Supreme Court

DATE OF DECISION : 6 September 2018

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

RESPONDENT: Union of India, thr. Secretary, Ministry of Law and Justice

JUDGES: Chief Justice Dipak Misra, Justice Rohinton Nariman, Justice D Y Chandrachud, Justice A.M. Khanvilkar and Justice Indu Malhotra.

INTRODUCTION

The plight of LGBTQ+ was unheard, their tears were flowed in silence and their existence was unseen over the years. This colonial era law destroyed end number of lives not only in India but all over the world wherever this particular colonial law was in existence. This happened due to section 377 of Indian Penal Code in India. The said section reads as follows:

377. Unnatural Offences. ---Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years,

and shall also be liable to fine. Explanation.---Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Above mentioned section criminalizes homosexuality and introduced in early 1861 during the British Rule, cited as 'unnatural offences'.

The unjust approach of the said section raised in 2001 through the cases NGO Naz Foundation and AIDS Bedhbhav Virodhi Andolan¹ in Delhi High Court. But both the petitions were dismissed.² In 2009 Delhi High Court, in Naz Foundation v. Govt. of NCT of Delhi, declared section 377 unconstitutional. However, the Supreme Court in Suresh Kumar Koushal v. Naz Foundation³, reversed the Delhi High Court decision and stated that the amending the law is a matter of the legislation⁴. The curative petitions were filed in the Supreme Court by Navtej Singh Johar and others in 2016 before a larger constitutional bench.

The judgement delivered by the Supreme Court on 6 September 2018 which is landmark decision and one of the transformative and inclusive decision. The decision marked a historic step toward recognition of dignity, equality, privacy and individual autonomy of the LGBTQ+ community. The Court held that criminalization of consensual same-sex relations violated fundamental rights guaranteed under Article 14,15,19 and 21 of the constitution of India.

FACTS OF THE CASE

In the present case constitutional validity of Section 377 of the Indian Penal Code was Challenged. The petitioners contend that insofar as it applied to the consensual sexual conduct of adults of the same sex in private, the said act must be constitutional and not to be considered as unconstitutional.

The present case challenged the Suresh Kumar Koushal v. Naz Foundation, 2014.

Through this present petition petitioner was seeking to declare section 377 was unconstitutional and seeking to recognition of right to sexuality, right to autonomy and right

¹ Civil Writ Petition (CWP) No. 1784 of 1994

² Jayna Kothari, Section 377 and Beyond : A new Era for Transgender Equality?

³ (2014) 1 SCC 1

⁴ Chhayanshi Goyal, Case Comment : Navtej Singh Johar and Ors v. UOI, August 19, 2024

to choice of a sexual partner. Not only this but section 377 violates the rights enshrined under Article 14, 15, 19 and 21 of the Indian Constitution.

The matter gained constitutional importance after the Supreme Court recognized the Fundamental Right to Privacy in Justice K.S. Puttaswamy V. UOI⁵.

ISSUES BEFORE THE COURT

- Whether Section 377 IPC violates Article 14, 15, 29, & 21 of the Constitution?
- Whether Section 377 IPC is unconstitutional or not?
- Whether the decision in Suresh Kumar Kaoushal required reconsideration?
- Whether consensual sexual acts between adults in private can be criminalized?
- Whether sexual orientation is protected under constitutional morality and fundamental rights?⁶

ARGUMENTS OF THE PETITIONERS

- Petitioner contend that homosexuality, bisexuality and other sexual orientations are equally natural and reflective of expression of choice. Petitioners view is that it is not a physical or mental illness. It is urged that American Psychological Association is of the opinion that sexual orientation is the natural condition. The only difference between heterosexuality and homosexuality is that the number of later are lesser in numbers. They are simply natural variations of expression and thinking process. And to make this acts offensive is nothing but the violation of Article 14, 15, 19 and 21 of the constitution⁷.
- Petitioner highlighted the fact that the number of LGBT is lesser in India i.e. 7-8% of the total population of India. Hence it is urgent need to recognize and protect the LGBT, for sexual orientation is an integral and innate facet of every individual's identity. To achieve full potential and to live freely without fear, apprehension or trepidation, the protective measures are necessary. The stigmatization of LGBTQ+

⁵ (2017) 10 SCC 1

⁶ AIR 2018 SC 4321

⁷ Ibid

resulted into suffering by family, friends, teachers and relatives on family, professional, social and educational life. Not only family but State also discriminate LGBTQ+ persons in matters such as employment, choice of partner, testamentary rights, insurability, medical treatment in hospitals.

- Compulsory alienation due to stigma and threat is contrary to the fundamental principle of liberty. The said community stay in a constant fear and due to this the overall development is not possible.
- Pinpointing at the NALSA case, petitioner argued that whatever rights bestowed by this case are not sufficient. Therefore, the rights given in NALSA must be applied to this community on equal footing as compared to other citizens and stressing constitutional protection.
- It is the argument of petitioners that if the section 377 kept as it is then the fundamental rights of this community will be violated. The rights such as, right to privacy, right to dignity, equality, liberty and right to freedom of expression.
- The petitioner relied upon K.S. Puttaswamy which states that sexual orientation is also an essential attribute of privacy. Petitioner also contended to struck down the Section 377 IPC in so far as it criminalizes consensual sex between homosexuals. So that this community's existence would not be a mere survival.
- The learned counsel on behalf on petitioners have propounded that sexual autonomy and the right to choose a partner of ones choice is an inherent aspect of the right to life and right to autonomy.

ARGUMENTS OF THE RESPONDENT

- The respondent submitted that whether the law laid down in Suresh Kumar Koushal case is correct or not which was referred to Constitutional Bench. To this Bench the only question referred is the question of the constitutional validity of criminalizing

‘consensual acts of adults in private’ falling under Section 377. And the same leaves to the wisdom of this Court⁸.

- The respondent contended that their rights have been taken under consideration in the light of the various provisions of the constitution and relief has been granted in NALSA⁹.
- The respondent argued that Section 377 is more relevant in present era legally, medically, morally and constitutionally.
- The respondent contended that persons indulging in such activities are more susceptible and vulnerable to contracting HIV/AIDS and the percentage is higher in homosexuals.
- As per the respondent’s point of view if the Section 377 is declared unconstitutional, then the family system will get affected and corrupt the young minds.
- The Indian scenario is different from those of foreign countries for several reasons i.e. political, economic and cultural heritage. Hence not possible to decriminalize Section 377.
- The respondent argued that the present form of the Section 377 does not violate the Article 14, 15, 19 and 21.
- The decriminalization of Section 377 will also affect The Parsi Marriage and Divorce Act, The Special Marriage Act, The Indian Divorce Act and The Hindu Marriage Act¹⁰.

JUDGEMENT

- ✓ The Supreme Court unanimously held that Section 377 is unconstitutional insofar as it criminalizes consensual sexual conduct between adults in private.
- ✓ The LGBT community is entitled to the full range of constitutional rights including liberties protected by the Constitution.
- ✓ The right to choose a partner, to find fulfilment in sexual intimacies and right not to discriminate behavior are intrinsic to the constitutional protection of sexual orientation.
- ✓ The LGBT community is entitled to the benefit of an equal citizenship and the equal protection of law;

⁸Supra 6

⁹AIR 2018 SC 4321

¹⁰Ibid

- ✓ The judgement overruled the decision in Suresh Kumar Koushal v. Naz Foundation¹¹.

CONCLUSION

The present judgement reaffirmed the constitutional values of equality, dignity, liberty and privacy. The decision decriminalizes the Section 377 of IPC which is progressive interpretation of constitutional rights. However, several challenges are unanswered by the Court, such as :

Lack of legal recognition of same-sex marriage¹²;

Absence of comprehensive anti-discrimination laws;

The community's other rights are not discussed i.e. right to property, right to adoption, right to have children etc.

Moreover, question remain is that how Judiciary or State convince citizens not to behave in a bad way towards LGBT community? The acceptance of these people on ground level is shocking. They still consider being homosexual is a taboo which has to be curated. To mold the minds of people is, to consider they are also human beings and need dignified life, somewhat difficult task. Hope so with the passage of time this difficulty will get resolved.

Justice Indu Malhotra noted the necessity to apologize to the LGBTQ community for delay in providing justice and the importance of non-discrimination¹³.

¹¹Supra 9

¹²www.google.com

¹³<https://www.lawctopus.com/academike/case-comment-navtej-singh-johar-and-ors-v-union-of-india/> , visited on 16-05-2026