

“Joseph Shine Vs Union of India – A Case Study”

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ABSTRACT

“The legal subordination of one sex to another is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect equality, admitting no power and privilege on the one side, nor disability on the other¹.”

The Apex Court noted this passage of John Stuart Mill, British philosopher and political economist, while commencing upon the task of examining Sections 497 IPC and 198 CrPC with respect to their Constitutional validity.

KEYWORDS

Adultery, Article 14, Article 15, Article 21, Women dignity, Section 497 IPC, Section 198 CrPC, Transformative Constitutionalism

INTRODUCTION/BACKGROUND OF THE CASE

The present writ petition was filed under Article 32 of the Constitution of India challenging the validity of Section 497 of the Indian Penal Code. A three Judge Bench, before which the matter was listed, took note in the following cases already decided by the Apex Court-

- I. Yusuf Abdul Aziz v. Sate of Bombay²
- II. Sowmithri Vishnu v. Union Of India³
- III. Revathi v. Union of India and others⁴
- IV. W Kalyani v. State through Inspector of Police and Another⁵

The matter was referred to the Constitution Bench while observing that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved and that this provision creates a dent on the individual independent identity of a woman.

¹ John Stuart Mill on Subjection of Women

² AIR 1954 SC 321

³ (1985) Supp SCC 137

⁴ (1988) 2SCC 72

⁵ (2012) 1 SCC 358

THE STATUTORY PROVISIONS

Adultery is defined in Section 497 IPC.

497. Adultery.—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 case the wife shall not be punishable as an abettor.

The procedure for prosecution of an offender is contained in Section 198 CrPC.

198. Prosecution for offences against marriage.— (1) **No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:**

Provided that—

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under ¹[Section 494 or Section 495] of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister ²[, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption].

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so

appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under ³[eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.

THE EARLIER PRECEDENTS

1. YUSUF ABDUL AZIZ V. STATE OF BOMBAY⁶

In Yusuf Abdul Aziz, the Hon'ble court was dealing with a fact situation where the question arose that whether section 497 contravened Articles 14 and 15 of the Constitution of India.

In the said case the appellant was being prosecuted for adultery under Section 497 of IPC. As soon as the complaint was filed, the husband applied to the High Court of Bombay to determine the constitutional validity of section 497 IPC.

The Court observed that S. 497 IPC was a special provision which was made for women only and was saved by Article 15(3)⁷ of the Constitution.

⁶ AIR 1954 SC 321

⁷ Article 15. **Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.**—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

According to the Court sex was a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code.

2. SOWMITHRI VISHNU V. UNION OF INDIA⁸

A petition was filed and preferred under article 32 of the Constitution which challenged the validity of Section 497 of IPC.

It was contended before the Court that the concerned section does not confer any right upon the wife to prosecute the woman with whom her husband had committed adultery. The wife also had no right to prosecute the husband who has committed adultery with another woman. It was submitted that Section 497 did not take in its ambit those cases where the husband has sexual relations with an unmarried woman and that husbands had a free licence under the law to have extramarital affair or a relationship with unmarried woman. The submission was advanced that section 497 is a flagrant instance of “gender discrimination, legislative despotism and male chauvinism”. However, the Hon’ble Court repelled the aforesaid submissions and held “The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Were such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough.”

The court stated that breaking a matrimonial home is no less a crime than breaking a house. The Court felt that these arguments could only be taken into consideration by the Parliament for amending the relevant provisions..

The court also placed reliance on Yusuf Abdul Aziz (supra) and held that the same does not offend Articles 14 and 15 of the Constitution and opined that the stability of marriages is not an ideal to be scorned. Being of this view, the Court dismissed the petition.

3. V. REVATHI V. UNION OF INDIA AND OTHERS⁹

In this case the court analysed the design of the provision and ruled that “the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

⁸ (1985) Supp SCC 137

⁹ (1988) 2SCC 72

wife to prosecute the offending husband for being disloyal to her. Thus both the husband and the wife are disabled from striking each other with the weapon of criminal law”.

Here the Court placed heavy reliance on the three judge bench in Sowmithri Vishnu (supra) and proceeded to state that the community punished the outsider who broke into the matrimonial home subject to the rider that the erring man alone could be punished and not the erring woman. It was observed that there was reverse discrimination in favour of the woman rather than against her. According to the Court there was no discrimination against the woman insofar as she was not permitted to prosecute her husband.

By expressing the above said view, the court stated that the concerned provision or section was not vulnerable to any kind of hostile discrimination.

4. W. KALYANI V. STATE THROUGH INSPECTOR OF POLICE AND ANOTHER¹⁰

In this case, the court noted that section 497 IPC was under criticism from certain quarters for displaying a strong gender bias because it made the position of a married woman almost a property of her husband.

The provision also came under criticism on the ground that only a man could be proceeded against and punished for adultery and the wife could not be punished even as an abettor.

The issue of constitutional validity of Section 497 of IPC and Section 198 CrPC did arise in the concerned case.

VIOLATIVE OF ARTICLE 14 OF CONSTITUTION OF INDIA

In order to cull out the principles embodied in Article 14, the Hon’ble Court relied upon the following judgments:

- Shayara Bano v. Union of India and others¹¹
- State of Mysore v. S.R. Jayaram¹²
- Indira Nehru Gandhi v. Raj Narain¹³
- E.P. Royappa v. State of Tamil Nadu¹⁴
- Maneka Gandhi v. Union of India¹⁵
- A.L. Kalra v. Project and Equipment Corporation of India Ltd.¹⁶
- Ajay Hasia v. Khalid Mujib Sehravardi¹⁷
- K.R. Lakshmanan v. State of T.N.¹⁸

¹⁰ (2012) 1 SCC 358

¹¹ (2017) 9 SCC 1

¹² (1968) 1 SCR 349

¹³ (1975) Supp SCC 1

¹⁴ (1974) 4 SCC 3

¹⁵ (1978) 1 SCC 248

¹⁶ (1984) 3 SCC 316

¹⁷ (1981) 1 SCC 722

- Mithu v. State of Punjab¹⁹
- Sunil Batra v. Delhi Administration²⁰

The following principles of Article 14 were noted:

- A. The Rule of Law, which is a positive aspect of Article 14, prescribes that if a State action was found to be arbitrary and unreasonable, it would negate the equal protection of law and would be struck down.
- B. The Rule of Law would mean that the decisions would be made by application of known principles and rules and should be predictable. If a decision is taken without any such principle or without any such rule, it is unpredictable and such decision is antithesis of a decision taken in accordance with law.²¹
- C. The Statutory Laws will be struck down if it is shown that they are arbitrary.
- D. The test of manifest arbitrariness would apply to invalidate legislation under Article 14. Manifest arbitrariness would mean that something is done by legislature capriciously, irrationally and without any determining principle. Additionally, when something is excessive and disproportionate, it would be manifestly arbitrary.

ANALYSIS OF THE FACT SITUATION BY THE COURT VIS A VIS ARTICLE 14

On the basis of aforesaid principles of Article 14, the Hon'ble Court observed as under:

- A. Adultery law treated the woman as a chattel and as a property of men and this provision was a reflection of the social dominance that was prevalent from ancient times.
- B. Section 497 IPC does not bring within its purview an extra marital relationship with an unmarried woman or a widow.
- C. The court also took a look into Section 198 CrPC which deals with the aggrieved person. Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC and it also does not consider the wife of the adulterer as an aggrieved person.
- D. The court also noted that this section does not treat a woman as an abettor but protects a woman and does not enable the wife to file any criminal prosecution against the husband. Though, she can take civil action against the husband but the husband is also entitled to take civil action. However, that does not save the provision from being manifestly arbitrary.

Accordingly the court held that it had no hesitation saying that this section suffered from the vice of article 14 of the Constitution being manifestly arbitrary.

¹⁸ (1996) 2 SCC 226

¹⁹ (1983) 2 SCC 277

²⁰ (1978) 4 SCC 494

²¹ Dicey – Law of Constitution

VIOLATIVE OF ARTICLE 21 OF CONSTITUTION OF INDIA

Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The court also addressed the issue of constitutionality of Section 497 IPC and Section 198 CrPC against the backdrop of Article 21 of the Constitution with reference to the matters of women dignity and gender equality.

WOMEN DIGNITY AND GENDER EQUALITY –

Following cases were noted with respect to dignity and gender equality of women:

- **Arun Kumar Agarwal and another v. National Insurance Company Limited and others²²**

- I. The case involved an issue relating to the criteria of determination of compensation payable to the dependents of a woman who had died in a road accident and also she did not have a regular income.
- II. The learned judges stated that the contribution made by wife to the house is invaluable and cannot be counted in terms of money.
- III. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others.

- **STATE OF MADHYA PRADESH V. MADAN LAL²³**

In this case, the court held that Dignity of a woman was a part of her non-perishable and immortal self. There could not be a compromise or settlement as it would be against her honour which matters the most.

- **PAWAN KUMAR V. STATE OF HIMACHAL PRADESH²⁴**

- I. This case was related to eve teasing and while dealing with the concept of equality and dignity of a woman, the court observed that eve-teasing is causing harassment to women in educational institutions and public places.
- II. A woman had her own space as a man has. She enjoyed as much equality under Article 14 of the Constitution as a man did. The right to live with dignity was guaranteed under Article 21 of the Constitution could not be violated by indulging in obnoxious act of eve-teasing. It affected the fundamental concept of gender sensitivity and justice and the rights of a woman under Article 14 of the Constitution.

²² (2010) 9 SCC 218

²³ (2015)7SCC 621

²⁴ (2017)7 SCC 780

III. The Court also stated that male chauvinism had no room in a civilized world. The Constitution of India confers the affirmative rights on women and the said rights are perceptible from Article 15 of the Constitution.

- **Lord Keith in R v. R**²⁵ declared that marriage in modern times was regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.
- **Lord Denning**²⁶ states that a wife is no longer her husband's chattel. She is beginning to be regarded by the laws as a partner in all affairs which are their common concern.
- While addressing the issue of gender equality and dignity of women, the Court stated that there could be no patriarchal monarchy over the daughter and a husband's monarchy over his wife. Therefore, there cannot be a "community exposition of masculine dominance".
- **K.S. PUTTUSWAMY v. Union of India**²⁷ also talks about dignity and privacy of an individual. The Hon'ble Court observed, "The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21)."

ANALYSIS BY THE COURT WITH REFERENCE TO ARTICLE 21

According to the Court, Section 497 created invidious distinctions in dignity of women and thus dent in their individual dignity. It also noted that the element of connivance or consent of the husband tantamounted to subordination of women. The Court held, "We have no hesitation in holding that the same offends Article 21 of the Constitution."

WHETHER ADULTERY SHOULD BE A CRIMINAL OFFENCE AT ALL

After analyzing the Constitutional validity of section 497 from the angle of Articles 14 and 21, the Court analyzed the situation whether Section 497 should at all be an offence. While undertaking this exercise, the following observations were made:

- There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. But the important question is whether it should be treated as a criminal offence?
- The court also concluded that law existed to serve the needs of the society. If the law was to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable.

²⁵ (1991)4 All ER 481

²⁶ Denning – The Due Process of Law

²⁷ (2017)10 SCC 1

- The law must march in tune with the changed ideas and ideologies in a changing society. Law must take cognizance of the changing society and it must be compatible with the developing concepts and ideologies in the changing times. The need of the present has to be served with the interpretative process of law.
- The court stated that treating adultery as an offence would tantamount to the State entering into a real private realm. Under the existing provision, the husband was treated as an aggrieved person and the wife was ignored as a victim. According to the Court, the provision was reflective of a “tripartite labyrinth”. A situation might arise where equality of status and the right to file a case might be conferred on the wife but in either of the situations; the whole scenario was extremely private.
- If adultery was treated as crime, then there would be extreme interference with the privacy of a matrimonial relationship or matrimonial sphere.
- The court also noted that adultery was no longer a crime in People’s Republic of China, Japan, Australia and Brazil. The diversity of culture in those countries can be judicially taken note of. In England the adultery was never an offence except for a small period of time.
- Non-criminalisation of adultery could be proved from certain other facets. When the parties to a marriage lost their moral commitment of the relationship, it created a dent in the marriage and it depended upon the parties how they dealt with the situation. Some may exonerate and live together and some may seek divorce. It is absolutely a matter of privacy at its pinnacle.
- If the act was treated as an offence and punishment was provided, it would tantamount to punishing people who were unhappy in marital relationships.

ANALYSIS BY THE COURT

It was observed, “Thinking of adultery from the point of view of criminality would be a retrograde step. This Court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.”

FINAL CONCLUSIONS

- According to the Court, Adultery as crime in India would face the frown of Articles 14 and 21 of the Constitution and thinking of it as a crime would be a retrograde step. Thus the court decided to take the path of transformative constitutionalism and treating Adultery as a crime was unwarranted in law.
- The Court held that Section 497 IPC was unconstitutional and that adultery would not be treated as an offence and it also declared Section 198 of CrPC unconstitutional.
- Consequently the decisions in Sowmithri Vishnu and V. Revathi and any other judgement regarding adultery were overruled.

ANALYSIS BY THE WRITER

It is seen that most of the progressive nations across the world have done away with the criminal element of adultery. The matter being of extremely private nature may be a civil wrong inviting a matrimonial claim or a claim in torts. It is important to notice that the situation involving adultery may arise due to unhappy matrimonial life. It would be better to leave the parties to their private sphere, which of course is a fundamental right, giving them liberty to proceed on the basis of a civil wrong, if they so like.

However one most important factor would arise, that is, adultery is not an accepted norm in the society till now. The moral perceptions of the society will not accept adultery in its social fabric. However Constitutional morality requires all the citizens to follow the values propounded by the Constitution. The Rule of Law happens to be the basic feature of Constitution. Thus the society has to slowly adapt to the change in the norms as laid down by the Apex Court.