

END OF ADULTERY

Nishti*

INTRODUCTION

Supreme Court's ruling in Joseph Shine vs. Union of India¹ falls under the jurisprudence law of reformatory theory. It recreates the objective of the Indian constitution of human dignity, the creation of an equitable and unbiased society and justice. The ideas on which the concept of adultery is based are patriarchy and male chauvinism i.e. men are superior to women and the society will run with male dominance. The judgement deeply abominates and denounces practices in a society where women are treated as subordinate to men and considered as their property.

In the case of Joseph Shine vs Union of India, the constitutional validity of section 497 of the IPC which criminalized the act of adultery and section 198 CrPC which provided the prosecution for offences against marriages is questioned. Adultery according to IPC is defined as "whoever has sexual intercourse with a person who is said or whom he knows or has the reason to believe to her 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."² The section treats women as a victim and not culprits.

The constitutional bench of the Supreme Court, with one accord, declared section 497 as unconstitutional, as it violates Article 14 which mandates the right to equality and Article 21 which enshrines the right to dignity in the Indian constitution. The bench ruled that the act of adultery cannot be said to be an offence but can be a reason for civil action as a basis of divorce by another spouse in the marital tie. Moreover even the framers of the code Lord Macaulay raised concern over section 497 in the code as an offence though he suggested it to remain as a civil wrong.

*BA LLB, MAHARAJA AGRASEN INSTITUTE OF MANAGEMENT STUDIES, NEW DELHI.

¹ AIR 2018 SC 4898

² S.497, Indian Penal Code

CASE BRIEF and BACKGROUND

A PIL was filed under Article 32 in December 2017, by an Indian citizen who resided in Italy, challenging the constitutional validity of adultery and section 198 of CrPC. Section 497 of IPC was struck down by the supreme court of India on the grounds that it violated some of the fundamental rights of the people that are articles 14, 15 and 20 of the Indian Constitution. The constitutional bench of the SC with one accord held that the law was tyrannous, obsolete, condescending, oppressive and undermines a woman's autonomy, her dignity and privacy. Section 198 CrPC was also struck down as unconstitutional. This decision overruled the previous decisions of the court on cases related to adultery in Yusuf Abdul Aziz vs. State of Bombay³, Sowmithri Vishnu vs. Union of India⁴, Vishnu Revathi vs. Union of India⁵ and W. Kalyani vs. State through Inspector and another⁶ where the constitutional validity of Section 497 was upheld.

The Indian criminal law jurisprudence borrowed the provision of adultery from the common law conception of forbidding adultery. Even in England where it was a crime itself decriminalized adultery. Divorce and Matrimonial Causes Act of 1857 abolished the crime of adultery giving the rights of the husband to ask for damages if adultery is performed by the wife.⁷ Giving damages to the husband in case if wife committed adultery was a way of showcasing how the law considered women the property of men. Due to its patriarchal consequences, the provision of awarding damages to the husband was abolished by the law reforms (miscellaneous provision) Act, 1970⁸.

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CONTENTIONS

Petitioner

- Petitioner's counsel contended that the provision of adultery is based on grounds of gender only which has a reasonable connection to the result that has to be achieved. Also, the wife's consent is given no importance and is considered immaterial. Hence, it violates Article 14, a fundamental right of people.
- It was also argued that the law is made on the presumption that women are subordinate to men and are considered to be the property of men as stated in article

³ AIR 1954 SCR 930

⁴ AIR 1985 SC 1618

⁵ (1988)2 SCC 72

⁶ (2012) 1 SCC 358

⁷ S. LIX of Divorce and Matrimonial Causes Act, 1857.

⁸ S.4 of Law Reforms (Miscellaneous Provision) Act, 1970.

497 IPC ‘...without the consent and connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of adultery...’⁹.

- The provision is biased, unjust, discriminatory and unequal towards sex as it is provided that only males are to be prosecuted for adultery which violates Article 15 of the Indian constitution.
- The petitioner argued that the law is impermissible as it compromises with women’s dignity by not respecting her sexual liberation, and self-determination and not giving any concern or importance to her will and consent and thus violating another fundamental right which is Article 21 protection to life and personal liberty.

Therefore section 497 IPC and section 198 CrPC must be struck down.

Respondents

- The respondent’s council contended that adultery is a crime that breaks families as a third person comes between the husband and wife and there should be some sort of deterrence present in order to protect marriages.
- It was claimed that the act of adultery affects the couple, and mankind as a whole as an outsider commits total awareness to tear down the sacredness of marriage.
- Article 15(3) of the Indian constitution saves the provision from being proven discriminatory as it states that the state has special powers to make provisions for women and children.

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It was pleaded by the respondent’s side to the court to rescind the part that is unconstitutional but must keep the law.

ISSUES RAISED

1. Whether the law of adultery is tyrannous and prejudicial and violates Article 14?
2. Whether the conventional image of women being subordinate to men and being the property of their husbands and discrimination under Article 15 is being encouraged by this provision?
3. Whether women’s dignity being compromised by not giving her consent a due recognition and denial of her sexual liberation?
4. Whether criminalization of adultery is the encroachment of the right to privacy of an individual?

⁹ S.497 of Indian Penal Code

PREVIOUS JUDGEMENTS

In the case of Joseph Shine vs. Union of India, the judgment was given unanimously by the constitutional bench of the Supreme Court comprising Chief Justice Deepak Misra, Justice Khanwilkar, Justice Nariman, Justice Chandrachud and Justice Indu Malhotra.

Before giving the final judgement on the constitutionality of section 497IPC, Justice Misra and Justice Khanwilkar looked over the previous judgments given on the same issue.

- In Yusuf Abdul Aziz vs. state of Bombay,¹⁰ the constitutional validity of section 497 was challenged on the basis that it violates articles 14 and 15 of the constitution of India as the section mentions that a wife cannot be a wrongdoer even in the case of abetting the act of adultery and will be treated as a victim only, but it was saved by Article 15(3) which stated that state has the power to make special provisions for women and children and that article 14 is supposed to be read with other section as it's a general one also sex is just a classification.
- Likewise in Sowmithri Vishnu vs. Union of India¹¹, Vishnu Revathi vs. Union of India¹² court upheld the constitutionality of section 497 in relation to article 14 on the basis that no provision can be held invalid just for the reason that it restricted the class of offenders only to men and not women.

COURT OBSERVATIONS

ISSUE 1

JUDGMENTS CITED

E.P. Royappa vs. State of Tamil Nadu¹³ & Shayara Bano v. Union of India¹⁴

A law to be proved constitutional and not arbitrary in nature it shall pass through the test of exhibiting arbitrariness and any law found to be arbitrary in nature shall be repealed. The provision of adultery was found to be arbitrary in nature in the sense that it treats only the husband as the affronted person and only he is empowered to prosecute for the offence, the wife is not entitled to any such right. Thus the provision gives no due attention to equality and showcases inequality. Adultery is considered to be stealing the property of the husband

¹⁰ AIR 1954 SCR 930

¹¹ AIR 1985 SC 1618

¹² (1988)2 SCC 72

¹³ (1974) 4 SCC 3

¹⁴ (2017) 9 SCC 1

as the provision showcases the idea that women are the property of men because it says that if the husband's consent and connivance are present then it would not amount to adultery. Also, the provision does not treat the wife as an offender in any case and only the third party that came in the marital tie of two people gets punished. In present times where women are no less than men and have their own identity, stand equal to men, and are progressing, there's no meaning or pertinence of having such a law that is autocratic, biased, and discriminatory in nature. The provision of adultery clearly violated the fundamental right of people i.e. right to equality.

ISSUE 2

Government of Andhra Pradesh v. P B Vijayakumar¹⁵ & Independent Thought vs. Union of India¹⁶

The provision of adultery is based on conventional thinking that wives are their husband's property to the extent that they even have control over their sexuality. It symbolizes that women are submissive and powerless of exercising their sexual autonomy and liberation. The provision of adultery clearly discriminates between women and men on the grounds of sex. Section 497 clearly states that women cannot be punished even as an abettor. Article 15(3) was inserted to make a special provision for women and children and that it will protect women from male dominance and will empower them. But section 497 cannot be saved under article 15 (3) as this provision is based on patriarchy and does not aim to protect women but instead encourages their subordination towards men. Thus the said provision violates Article 15.

ISSUE 3

JUDGMENTS CITED

S. Puttaswamy and Anr. vs Union of India and others¹⁷ & Common Cause v. Union of India and Ors.¹⁸

Article 21 of the Indian constitution provides protection for the dignity of a person and sexual privacy is also covered under it. A man and a woman have an equal right to privacy and there is no discrimination on the basis of gender. Both have full-fledged rights to protect their dignity and privacy on the condition that they do not interfere with others. Section 497

¹⁵(1995) 4 SCC 520

¹⁶ (2017) 10 SCC 800

¹⁷ (2017) 10 SCC 1

¹⁸ (2018) 5 SCC 1

permits adultery if the husband gave his consent and the connivance and will of the wife are not being asked here. She is treated as her husband's property and even her sexual autonomy is not given to her and all her individuality is taken away from her. The penal code was drafted in 1860 at that time society regarded women as a puppet of men as backward and subordinate to men, but now in present times women stand equal to men and their dignity and individuality are of the utmost concern, now society thinks differently. A woman is no more a chattel of men. Even treating a woman as a victim shows her weakness and there is no need for any provision that encourages such stereotypes. The enforcement of this law is a way to force faithfulness in people by hampering their freedom to make a decision about their lives if a clear violation of fundamental rights.

ISSUE 4

Crime i.e. a lawbreaking act that influences the whole community or the public in some way or the other and is punishable by law whereas adultery is an offence that is equivalent to entering or interfering in an individual's personal life. Even though it may happen between two acceding adults and is a crime against the state but does not harm society or people, its main objective is to protect the sanctity of marriage and the institution of marriage the fact cannot be ignored that adultery at the first place is committed only because of pre-existing disruptions in the marriage. The provision of adultery treats the husband as a discontented person and the wife as a sufferer and punishes the third party. In the opinion of the court if the law is reformed so as to ensure equality between husband and wife in adultery then also adultery is fully a confidential matter of the couple, also its punishment that is of 5 years is also not required. Therefore it is better to leave adultery as a grounds for divorce instead of being a crime.

Section 497 i.e. adultery is revoked and now it is a ground for any wrongful conduct or even divorce but is no more a crime.

CRITICAL ANALYSIS

As people are moving towards westernization being unfaithful in the marital tie or as it is said infidelity is becoming more common. The decision of striking down adultery as a crime has been criticised a lot as it is noted that there has been a rise in the commission of adultery as now there is no fear in people and are not restricted from doing so. Many people claimed that recommendations of the 42nd and 152nd law commission should have been agreed to so that an equal status could be given in the offence of adultery but these were rejected. The

Supreme Court also criticized that it must have left the decision to the parliament to alter the law according to current society and changing times.

CONCLUSION

“Freedom for all doesn't mean freedom to all”

In today's world where principles of equity and liberalisation have conquered the world, there is grave importance of reform like this to end all the discriminatory, biased, unjust laws that promote inequality or in any manner subordinate women and push them backward. With the passage of time society has improved, and its thinking its mindset have changed also stereotypes are getting broken and have got ahead with time, so there is a need to reform or strike down all the provisions that promote or encourage discrimination or conventional thinking in any way that is affecting the society in a negative sense. Adultery was one of them and it was important to get free from it. Adultery was not just discriminatory but also brought shame to women's dignity and showcased that women are the chattel of men. Adultery as a crime was inserted at the tie when patriarchy was filled in society and women had no individual freedom but now the times are changed, they are no more the shadows of men and now adultery has no criminal significance but had become a ground for civil wrong only and the judgment of this case decriminalized it. This step would have been taken long back but our judicial system is alive and strives to change with the changing societal aspects.

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