

**CASE COMMENTARY: JOSEPH SHINE v. UNION OF INDIA**

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**Sharath Chandira Nathan P\*****FORUM:** The Supreme Court of India**CASE CITATION:** Writ Petition (Criminal) No.194 of 2017<sup>1</sup>**DATE OF JUDGMENT:** 27.09.2018**CORAM:** Dipak Misra, CJI., A.M.Khanwilkar, J., R.F.Nariman, J., Dr.Dhananjaya Y Chandrachud, J., and Indu Malhotra, J.**INTRODUCTION**

For centuries the women of our country have been denied various rights that were readily available to the men of our country in the name of safety and security. The women of our country were given minimal, if not no rights, in the household and were only subjected to do tasks that were classified as tasks of a woman and assigned to them, such as cooking, cleaning, caring for offspring, etc.

During the reign of the British Crown, the status of rights for women in our country did not take any significant change as the laws enacted by the British Empire were actually laws of England which were modified and adopted as per the Indian needs. Only in exceptional circumstances, the British were compelled to control a few wrongs done against women.

After obtaining independence from the rule of the British Empire, the Constitution of India, 1950 (hereinafter referred to as the 'Constitution') was adopted by the people of India. A plethora of rights has been given to the people of India through Part III of the Constitution. Articles 14, 19 and 21 of the Constitution have been expounded by the Apex Court of India to be the golden triangle of rights. Any violation of this golden triangle by any law, either existing before the adoption of the Constitution or created by the Union or State Legislature, is said to affect the day-to-day lives of the people of India and is met with severe consequences.

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<sup>1</sup>AIR 2018 SC 4898 : (2019) 3 SCC 39

Although the Constitution has guaranteed various rights, the Constitutional Courts of India have been instrumental in providing meaning and effect to the words of the Constitution of India by expounding on them and striking down the provisions of law, when such provision contravenes the Fundamental Rights guaranteed by the Constitution.

The case at hand deals with a pre-constitutional provision of law purporting to save the marital home by providing punishment for the offence of Adultery, as defined in Section 497 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and a post-constitutional provision of law as provided in Section 198(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'CrPC').

### **FACTS OF THE CASE:**

The petitioner namely, Joseph Shine, had filed a writ petition under Article 32 of the Constitution challenging the validity of Section 497 of IPC and Section 198(2) of the CrPC. Initially, a three-Judge bench took up the case and upon hearing the learned counsel for the petitioner, referred the matter to the present Coram of Judges.

### **PRIOR LITIGATIONS AGAINST THE VALIDITY OF ADULTERY:**

Four major case laws were considered by the Supreme Court of India in *Joseph Shine v. Union of India*<sup>2</sup> before deciding upon the validity of the offence of Adultery and Section 198(2) of the CrPC.

**Yusuf Abdul Aziz v. State of Bombay**<sup>3</sup>: The Court was dealing with the question of whether Section 497 of IPC violated Articles 14 & 15 of the Constitution. In this, the Appellant was accused of the offence of adultery. The Constitution Bench concluded that Section 497 is a special provision made under Article 15(3) of the Constitution, which carves out an exception to the law stated in Article 15(1) of the Constitution<sup>4</sup>. Hence, the Court held Section 497 of IPC to be valid and not in contravention of Articles 14 and 15 of the Constitution.

**Sowmithri Vishnu v. Union of India and Another**<sup>5</sup>: The Court, in the instant case, dealt with the following three contentions of the petitioner:

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<sup>2</sup>AIR 2018 SC 4898 : (2019) 3 SCC 39

<sup>3</sup>AIR 1954 SC 321 : 1954 SCR 930

<sup>4</sup>*Ibid*

<sup>5</sup> AIR 1985 SC 1618 : (1985) Supp SCC 137

- Section 497 of IPC confers a right upon the husband of the woman (adulteress), but it fails to provide any right upon the wife of the husband (adulterer)<sup>6</sup>;
- Section 497 of IPC fails to provide the right upon the wife of the husband (adulterer) to prosecute the woman (adulteress) with whom her husband has committed adultery<sup>7</sup>; and
- Section 497 of IPC does not provide punishment for a husband having a sexual relationship with an unmarried woman or a widow<sup>8</sup>.

After hearing the arguments of the petitioner regarding her contentions, the Apex Court of India, held that the submissions of the petitioner go to alter the policy of law and that the offence in Section 497 of IPC contemplates that the wife is a victim and not the author of the crime. Then, the Hon'ble Court, following the decision in Yusuf Abdul Aziz<sup>9</sup>, held that Section 497 of IPC does not offend Articles 14 and 15 of the Constitution and further opined that the stability of marriages is not an ideal to be scorned<sup>10</sup>.

**V.Revathi v. Union of India<sup>11</sup>:** The case involved a challenge to Section 497 of the IPC and Section 198(2) of the CrPC. The petitioner contended that the provision of law in Section 497 of IPC read with Section 198(2) of CrPC restricts the wife from initiating prosecution against her husband (adulterer) for being in adultery<sup>12</sup>. The Court held that the law does not allow either the wife to prosecute the offending husband or the husband to prosecute the adulterous wife for being disloyal to either of them. The Court, following the decision in Sowmithri Vishnu<sup>13</sup>, went on to hold that Section 497 of IPC and Section 198(2) of CrPC is a “legislative packet” and both are not in violation of the Constitution.

**W.Kalyani v. State through Inspector of Police and Another<sup>14</sup>:** Although the Court did not deal with the constitutionality of Section 197 of IPC, the Court dealt with the question as to whether Section 497 of IPC reeks of gender bias for positioning the woman as the property of her man. The Court acknowledged the criticism that Section 497 of IPC was subjected to then for the gender bias but nevertheless held that since the appellant is a woman, as per

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<sup>6</sup>*Ibid*

<sup>7</sup>*Ibid*

<sup>8</sup>*Ibid*

<sup>9</sup> AIR 1954 SC 321 : 1954 SCR 930

<sup>10</sup>(1985) Supp SCC 137 at 144

<sup>11</sup>(1988) 2 SCC 72

<sup>12</sup>*Ibid*

<sup>13</sup>(1985) Supp SCC 137

<sup>14</sup> (2012) 1 SCC 358

Section 497 of IPC, she is immune to the charge of adultery and cannot be punished for that offence<sup>15</sup>.

### **RATIONALES OF THE COURT**

In light of the arguments advanced by the petitioner and the respondent, the Supreme Court of India on the following grounds struck down Section 497 of IPC and Section 198(2) of CrPC as violative of Articles 14, 15 and 21 of the Constitution and thereby declaring them as unconstitutional:

**Manifest Arbitrariness:** The learned counsel for the petitioner referred the case in *Shayara Bano v. Union of India and Others*<sup>16</sup> and other judgments<sup>17</sup> to highlight that a statute or a provision of law in a statute will be struck down if found to be 'arbitrary' and that, a test of manifest arbitrariness as laid down in the judgments may be as the touchstone to find the validity of subordinate legislation under Article 14. The test of manifest arbitrariness is that the legislature does something capriciously, irrationally and/or without adequate determining principle<sup>18</sup>. When something is done which is excessive and disproportionate, such legislation would also be deemed as manifestly arbitrary<sup>19</sup>. The Court was inclined to the views of the learned counsel of the petitioner.

It is evident, from a bare reading of Section 497 of IPC that women are subordinate to men. The provision also professes the age-old principle that women are mere chattel, and like in the case of trespass of chattel, the provision enables the husband of the wife as an aggrieved person to initiate legal proceedings against the act of adultery. In modern times of the 21<sup>st</sup> century, wherein women are achieving in studies, politics, engineering, science, and a plethora of other fields of sciences, it is not wise to keep holding on to an aspect, which has been withering ever since its origin, as a ground for criminal action. The Hon'ble Court was also inclined to accept that Section 497 of IPC is manifestly arbitrary<sup>20</sup>.

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<sup>15</sup> *Ibid* at Para 10.

<sup>16</sup> (2017) 9 SCC 1

<sup>17</sup> *State of Mysore v. S.R.Jayaram* (1968) 1 SCR 349; *Indira Nehru Gandhi v. Raj Narain* (1975) Supp SCC 1; *Maneka Gandhi v. Union of India* (1974) 4 SCC 3; *A.L.Kalra v. Project and Equipment Corporation of India Ltd.* (1984) 3 SCC 316; *Ajay Hasia v. Khalid Mujib Sehravardi* (1981) 1 SCC 722; *K.R.Lakshmanan v. State of T.N.* (1996) 2 SCC 226; *Mithu v. State of Punjab* (1983) 2 SCC 277; *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494

<sup>18</sup> AIR 2018 SC 4898 : (2019) 3 SCC 39

<sup>19</sup> *Ibid*

<sup>20</sup> AIR 2018 SC 4898 : (2019) 3 SCC

**S.497 IPC as the Saviour of Marital Life:** One of the major defenses to the petitioner's plea is that Section 497 of IPC plays a vital role in holding the institution of marriage together after a person has committed the offence of adultery<sup>21</sup>.

In the case of *Sowmithri Vishnu*<sup>22</sup>, it was held that: "12.... It is better, from the point of view of the interests of society, that at least a limited class of adulterous relationships is punishable by law. The stability of marriages is not an ideal to be scorned."<sup>23</sup>

The expression "Stability of marriages is not an ideal to be scorned." is a commendable value of life, which needs to be followed by every couple in their marriages and before ending the same. But, marriage is an immensely private affair in itself and to govern an aspect of such a private affair, involving a third party, by criminal law is an overreach of the law. It is stated that adultery, quite often, is not found to be the result of and not the cause of an unhappy marital relationship<sup>24</sup>. The Hon'ble Supreme Court of India was inclined to this view about the offence of adultery. Also, the deterrence theory of punishment has been held not to actually cause any such deterrence from committing the offence of adultery. It has been opined that it is hard to anticipate a general and special deterrence effect for the offence of adultery from the perspective of criminal policy<sup>25</sup>.

**Change of Times and Adultery as Crime:** The Hon'ble Supreme Court of India also dealt with the question of whether adultery may be treated as a crime in modern times. It has been stated in "Principles of Criminal Liability"<sup>26</sup> that:-

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"1. Definition of crime.—There is no satisfactory definition of crime that will embrace the many acts and omissions which are criminal, and which will at the same time exclude all those acts and omissions which are not. Ordinarily, a crime is a wrong that affects the security or well-being of the public generally so that the public has an interest in its suppression. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. It is, however, possible to instance many crimes which exhibit neither of the foregoing characteristics. An act may be made

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<sup>21</sup> *Ibid*

<sup>22</sup> *Sowmithri Vishnu v. Union of India and Another* (1985) Supp SCC 137

<sup>23</sup> *Ibid* at 144

<sup>24</sup> *James Sibongo v. Lister Lutomni Chaka and Anr.* (Case No. SA77-14) (19.08.2016) [Supreme Court of Namibia].

<sup>25</sup> Note 64, Part V-A (3)(1) ('Change in Public's Legal Awareness' under the head of 'Appropriateness of Means and Least Restrictiveness).

<sup>26</sup> *Halsbury's Laws of England*, 4<sup>th</sup> Edn., Vol.11, p.11

criminal by Parliament simply because it is a criminal process, rather than civil, which offers the more effective means of controlling the conduct in question.”

Also, it was discussed in *Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly*<sup>27</sup> that the purpose of law is to serve the needs of society and thereby govern it. The law must reflect the changing times, ideas and ideologies of that society and keep up with the core ideas of the society, as society is constantly evolving and the law cannot afford to remain immutable<sup>28</sup>.

It was also pointed out that the law must take cognizance of the changing society and March in consonance with the developing concepts<sup>29</sup>. Taking into account the above-said concept of crime and the need for change with changing society, the Supreme Court of India held that adultery does not fit into the concept of crime, as doing so would be an intrusion into the extremely private zone of the matrimonial parties. It held that the existence of the offence of adultery expects the parties to the marriage to remain loyal and maintain fidelity in their marital life, and when this is violated attaches criminal liability to a third party. This command of the law is a discriminatory command, a social-moral value, which gets into the core of privacy.

**Dignity and Privacy:** The dignity of a woman is something that should be treated as a non-renounceable part of her existence and no one dares to undermine the dignity of a woman<sup>30</sup>. In another instance, it was opined that a woman is entitled to the same space as a man and she enjoys the equality guaranteed under Article 14 of the Constitution and the right to live with dignity guaranteed under Article 21 of the Constitution<sup>31</sup>. Especially, in the case of *K.S. Puttaswamy and Another v. Union of India and Others*<sup>32</sup>, it has been held that privacy is an essential aspect of the dignity of an individual. Further, it has been held that when an individual is able to create a zone of privacy around himself/herself, the complete value of life and liberty is realized<sup>33</sup>. Thus, the Hon’ble Supreme Court of India went on to hold that Section 497 of IPC curtails the privacy of women and creates gender stereotypes, which in

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<sup>27</sup> (1986) 3 SCC 156

<sup>28</sup> *Ibid*

<sup>29</sup> *Common Cause (A Registered Society) v. Union of India and Another* (2018) 5 SCC 1

<sup>30</sup> *State of Madhya Pradesh v. Madanlal* (2015) 7 SCC 681.

<sup>31</sup> *Pawan Kumar v. State of Himachal Pradesh* (2017) 7 SCC 780

<sup>32</sup> (2017) 10 SCC 1

<sup>33</sup> *Ibid*

turn affect the individual dignity of women, especially since, when the consent or even connivance of the husband has obtained the offence of adultery would not be attracted.

**Adultery as Offence around the World:** Gradually, the world around us has begun to acknowledge the autonomy, choice and desire of women in their sexuality. Provisions of law is similar to that of Section 497 of IPC have been struck down as unconstitutional by the Constitutional Courts of South Korea<sup>34</sup> and Guatemala<sup>35</sup>. The Constitutional Court of South Korea struck down Article 241 of the Criminal Law, which criminalized adultery, by holding that the right to self-determination, guaranteed by its Constitution, is inclusive of the right to sexual self-determination<sup>36</sup>.

In *Law Advocacy for Women in Uganda v. Attorney General of Uganda*<sup>37</sup>, the provision of adultery was challenged on the grounds of it 1) prescribing punishment for a man only when the man has sexual relations with another married woman, and prescribing punishment for a woman when she has sexual relations with any man either married or unmarried, thereby allowing a man to have sexual relations with unmarried women, and 2) prescribing severe punishment to women than men. The Court held that the offence of adultery is wholly unconstitutional and violative of the Constitution of Uganda.

#### **Adultery as an Unconventional Variant of Marital Life:**

Martin Siegel in his book titled “For Better or for Worse: Adultery, Crime and The Constitution”<sup>38</sup> has opined that:

- firstly, adultery is to be viewed as a constitutionally protected marital choice<sup>39</sup>;
- secondly, certain relationships constituting adultery are protected under freedom of association<sup>40</sup>; and
- finally, the act of adultery is protected by sexual privacy<sup>41</sup>.

<sup>34</sup> 2009 Hun-Ba 17, (26.02.2015) [Constitutional Court of South Korea]

<sup>35</sup> Expediente 936-95, (07.03.1996), República de Guatemala Corte de Constitucionalidad [Constitutional Court of Guatemala]

<sup>36</sup> 2009 Hun-Ba 17, (26.02.2015) [Constitutional Court of South Korea]

<sup>37</sup> Constitutional Petitions Nos. 13 /05 /& 05 / 06 in *Law Advocacy for Women in Uganda v. Attorney General of Uganda*, (2007) UGCC 1 (5 April, 2007)

<sup>38</sup> Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, *Journal of Family Law*, Vol.30, (1991)45

<sup>39</sup> *Ibid* at p.46

<sup>40</sup> *Ibid* at p.46

<sup>41</sup> *Ibid* at p.46

Relying upon the view of Justice Blackmun in *Hardwick*<sup>42</sup>, the Court opined that the freedom of choice includes the freedom of making unpopular choices. Martin Siegel states that sexual activity may be preliminary or incidental to a developing association, or it may be its final culmination and solidification, and to classify adultery as a mere sexual activity is dangerous<sup>43</sup>. It is implied that to restrict the sexual freedom of a person would be to restrict his freedom of association with the person of his choice.

Also, in *Thornburgh v. American College of Obstetricians and Gynaecologists*<sup>44</sup>, it has been opined that the privacy of a person is that the body of a person belongs to himself and it does not belong to others person nor to society. It may be inferred that Martin Siegel places emphasis on the concept that every person is a unique individual and no one person may be expected to align himself to the way society, in general, wants him to exercise his choices regarding his sexual activities. The autonomy of the individual regarding his sexual choices triumphs over the standards of sexual choices provided by society in general. Such requirement for confirmation is in violation of a person's privacy i.e., sexual choices.

## DECISION

A total of 4 judgments were pronounced by the Hon'ble Judges of the Constitution Bench, all of which are concurring judgments. In effect, it was held that—

- Section 497 of IPC is struck down as unconstitutional in violation of Articles 14, 15 and 21 of the Constitution.
- Section 198(2) of CrPC is unconstitutional as being violative of Articles 14, 15 and 21 of the Constitution.
- The decisions in *Yusuf Abdul Aziz v. State of Bombay*<sup>45</sup>, *Sowmithri Vishnu v. Union of India and Another*<sup>46</sup>, *V.Revathi v. Union of India*<sup>47</sup> and *W.Kalyani v. State through Inspector of Police and Another*<sup>48</sup> are overruled.

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<sup>42</sup> *Hardwick*, 478 U.S. 205

<sup>43</sup> Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, *Journal of Family Law*, Vol.30, (1991) 45 at Page 78

<sup>44</sup> 476 U.S. 747 (1986)

<sup>45</sup> AIR 1954 SC 321 : 1954 SCR 930

<sup>46</sup> AIR 1985 SC 1618 : (1985) Supp SCC 137

<sup>47</sup> (1988) 2 SCC 72

<sup>48</sup> (2012) 1 SCC 358



## CONCLUSION

The Judgment in *Joseph Shine v. Union of India*<sup>49</sup> earmarked the day when the sexual autonomy and freedom of women of India were disengaged and became to be no longer dependent on their husbands. A part of the discrimination against women in the name of protecting them by labeling them 'weaker sex' has been put to stop. Day by day the world of women is becoming more expansive, breaking the barriers of the kitchen of their households. The need for a better life by enabling the exercise of the right of privacy and dignity of women has been well enunciated in the judgment.



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<sup>49</sup>AIR 2018 SC 4898 : (2019) 3 SCC 39