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Abstract:

LGBTQ community has suffered a lot since time immemorial and even when we are in the 21st century, there is constant fight ongoing over their basic rights. The situation got much attention when leading NGO working for LGBTQs filed a petition to strike down section 377 IPC as it has discriminatory affects on LGBTQ persons. Moreover the mindset of highest authority also came into highlight when the high court's decision was struck down and raised much hue and cry. In this paper, author tries to analyse this regressive judgement and its consequences.

Keywords: LGBTQ, NAZ case, Constitutional Rights

I. INTRODUCTION

The case deals with the constitutionality of Section 377 of the Indian Penal Code which was enacted during the British administration in India in 1860. It created an offence of voluntarily having carnal intercourse "against the order of nature" with any man, woman or animal, punishable by up to ten years imprisonment or a fine.¹ Even if the provision shows to be neutral on its face, it was the contention that it has a discriminatory effect on LGBTQ persons, particularly homosexual men.

II. FACTUAL BACKGROUND:

In 2001 the NAZ Foundation – a non-governmental organisation working in the field of HIV/AIDS intervention and prevention – filed a writ petition before the Delhi High Court seeking a declaration that Section 377, to the extent that it penalised sexual acts in private between consenting adults, violated the India Constitution, specifically, Articles 14 (equality before the law), 15 (non-discrimination), 19(1)(a)-(d) (freedom of speech, assembly, association and movement) and 21 (right to life and personal liberty).² The Naz Foundation disputed that section 377 had a bigoted effect because it was predominantly used against homosexual conduct, thereby criminalising activity practiced more often by homosexual men and women which consequently jeopardised HIV/AIDS prevention methods by driving homosexual men and other sexual minorities underground.

In 2004, the High Court dismissed the writ petition and a subsequent review petition on the grounds that only purely academic issues had been submitted which could not be examined by the court and after which the NAZ Foundation challenged both orders and the writ petition was remitted for a fresh decision in 2006.

¹ Sec. 377, Indian Penal Code, 1860

² *NAZ Foundation v Government of N.C.T Delhi*, 2010 CriLJ 94

In its 2009 decision, the High Court found in favour of the NAZ Foundation and accepted its arguments that consensual same-sex sexual relations between adults should be decriminalised, holding that such criminalisation was in contravention of the Constitutional rights to life and personal liberty, equality before the law and non-discrimination.³

In its reasoning, the High Court stated that;

“[S]ection 377 grossly violates homosexual individuals’ right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual acts between adults in private. Section 377 criminalises the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution.”⁴

Later, this decision was appealed to the Supreme Court and the Appellants’ denied that Section 377 was unconstitutional and submitted that the High Court committed a brutal blunder by declaring Section 377 to violate Articles 14, 15 and 21 of the Constitution as it ignored the lack of any foundational facts in the Respondent’s writ as only the documentary evidence provided was not a basis for finding that homosexuals were singled out for discriminatory treatment by the law, hence do not call for pronouncement of constitutionality of that section. It was also submitted that the statistics included in the Respondent’s petition were manufactured, fraudulent and unsatisfactory for finding that Section 377 adversely affected the control and prevention of HIV AIDS and that decriminalisation would trim down the number of such cases. Also, section 377 is entirely gender neutral and as no specific class is under attack by the law, therefore rendering the finding of the High Court that it offended Article 14 to be without rational basis. It was argued that Section 377 does not violate the right to privacy and dignity under Article 21 and this right to privacy does not embrace the right to commit any offence as defined under Section 377 or any other section.

The Respondents submitted that Section 377 targets the LGBTQ community by criminalising a very much personal characteristic of sexual orientation and by including within its scope the consensual acts between persons within the isolation and privacy of their homes, is the contravention to the right to equality as well as indirect contravention of right to life with dignity for sexual rights and sexuality are human rights guaranteed under Article 21. As Sexual intimacy is a mainstay feature of human experience and is imperative to mental health, psychological well being and social adjustment. It was argued that by criminalising sexual acts engaged in by homosexual men, they are denied this human experience while the same is allowed to heterosexuals and thus, the Court should take account of changing values and the temporal reasonableness of Section 377 for the Constitution of India is a living document and it should remain flexible to meet newly emerging problems and challenges. It was also submitted by the respondents

³ Ibid.

⁴ Ibid.

that the difference between obscene acts in private and public is recognised in Section 294 and Section 377 is impermissibly vague, delegates policy making powers to the police, and results in the harassment and abuse of the rights of LGBTQ persons. Appellants provided evidence of widespread abuse and harassment (citing judicial evidence and NGO reports). And maintained that Section 377 does not lay down any principle or policy for exercising discretion as to which of all the cases falling under the broadly phrased law may be investigated and is silent on whether the offence can be committed within the home. Also, criminalisation increases stigma and discrimination and acts as a barrier to HIV prevention programmes as it thwarts health services by preventing the collection of HIV data, impeding dissemination of information, preventing the supply of condoms; limiting access to health services, driving the community underground, preventing disclosure of symptoms, creating an absence of safe spaces leading to risky sex.

III. DECISION:

The panel of two Supreme Court judges deciding the case allowed the appeal and overturned the High Court's previous decision, finding its declaration to be "legally unsustainable". The Supreme Court ultimately found that Section 377 IPC does not violate the Constitution and dismissed the writ petition filed by the Respondents.

IV. ANALYSIS AND COMMENT:

As private consensual relations are protected under Article 21 of the Indian Constitution, Section 377 is illogical as there is no convincing state interest to rationalize the limitation of a fundamental freedom. It can be very well observed that Section 377 violates Article 14 on two grounds: first, because it was unreasonable, irrational and arbitrary to criminalise non-procreative sexual relations, and secondly, because the legislative objective of punishing "unnatural" acts had no rational nexus with the classification between procreative and non-procreative sexual acts, hence, section 377 denies a homosexual person the right to full personhood which is embedded in notion of life under Article 21 of the Constitution. In *Maneka Gandhi v Union of India*, the Court reiterated that the term 'personal liberty' is of "the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man."⁵ As it was alleged that if the declaration were approved, India's social composition and the foundation of marriage would be detrimentally affected; it must be brought to the notice that our Indian Constitution is a not so rigid document and it is totally in the spirit of it to take care of every community's, person's dignity, well being.

Also as long as the law is on the statute book, there is a constitutional presumption in its favour; therefore, Courts by their very character should not embark on the chore of legislating which should be left to Parliament but it has the full authority to strike down a law which contravenes the fundamental rights of people.

⁵ AIR 1978 SC 597

It is pertinent to mention that some organisations and individuals stated that they had an interest in protecting, defending the moral, cultural and religious values of ancient Indian society; however the supporters for the Respondents composed of individuals and organisations argued that Section 377 caused undue harm to the LGBTQ community as a whole and homosexual men in particular. But it was maintained by Supreme Court that, Section 377 does not criminalise a particular people or identity or orientation, it merely identifies certain acts which if committed would constitute an offence.

In reviewing the reading down of the Section 377 by the High Court, the Supreme Court stated that the High Court had overlooked the fact that “a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders” and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that “this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.” But this implies that the apex court is neither interested to protect the so called miniscule section of LGBT community nor give them equal regard as that of human clan. It is disheartening to mention that the supreme protector of fundamental rights discourages and disregards the very human rights of this not-so- miniscule fragment of society.

It is also important to mention that, the Supreme Court spent a very little time evaluating the application of Article 21 to Section 377 and in its place, relied much on criticising the High Court for its judgment.

V. LATEST STATE OF AFFAIRS

The observations by the bench, which is dealing with a clutch of petitions challenging the constitutional validity of section 377 of the Indian Penal Code, came when advocate Shyam George, appearing for some Apostolic Alliance of Churches and Utkal Christian Association, submitted that it was the legislature's job to decide whether to amend or allow section 377 in the statute book.⁶ The courts cannot wait for a "majoritarian government" to decide on enacting, amending or striking down a law if it violates fundamental rights, a five-judge bench headed by Chief Justice Dipak Misra observed while hearing a batch of petitions seeking decriminalisation of consensual gay sex;

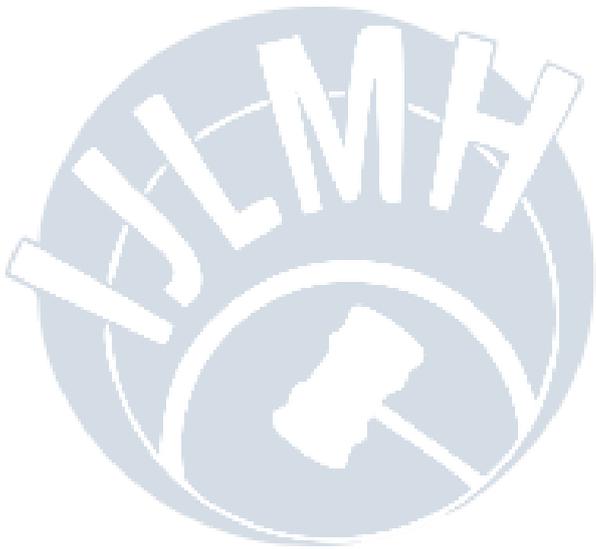
[W]e would not wait for the majoritarian government to enact, amend or not to enact any law to deal with violations of fundamental rights, the courts are not in obligation to wait and would act if any violation of fundamental right was brought before it, the bench, which also comprised Justices R F Nariman, A M Khanwilkar, D Y Chandrachud and Indu Malhotra.

VI. CONCLUSION

It is a private affair to have consensual sexual activities between two adults of the same sex which should

⁶ *Court's duty to strike down law if it violates fundamental right: SC*, The Economic Times, (Jul. 17,2018, 10:15 AM) <https://economictimes.indiatimes.com/news/politics-and-nation/courts-duty-to-strike-down-law-if-it-violates-fundamental-right-sc/articleshow/65022530.cms>

not be regulated by a law as it violates their Fundamental Rights. Also, it is a personal choice to have a sexual partner which is no business of the State to regulate on at all. Section 377 criminalises the persons belonging to the LGBT community moreover it causes a fear in their minds where they have a different sexual orientation which makes them guilty throughout life. It also becomes difficult to tackle the menace of HIV/AIDS as such LGBT community people remain underground for the fear of criminalisation. So, much hopes are rested on this bench which will decide the fate of the case before this October.



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