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Navtej Singh Johar v. Union of India

Harshita Shankar & Tushar Shankar

CASE COMMENT

NAVTEJ SINGH JOHAR VS UNION OF INDIA

BENCH: DIPAK MISRA, CJI

FACTS OF THE CASE:

This case is very famous for its central view on the constitutional validity of Section 377 of the Indian Penal Code, 1860 which was applied to the consensual sexual conduct of an individual (adults) of the same sex in private.

Section 377 was titled 'Unnatural Offences' and stated that "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."

The Petition was raised by Navtej Singh Johar, a dancer who identified as part of the LGBT community, filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed by Art. 21 of the Constitution of India. The Petitioner also argued that Section 377 was a violation of Art. 14 of the Constitution because it was vague in the sense that it did not define "carnal intercourse against the order of nature".

ISSUES OF THE CASE:

A. Issues raised by the petitioner:

There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex. Among other things, the Petitioner further argued that

- (i) Section 377 was a violation of Art. 15 of the Constitution (Protection from Discrimination) since it discriminated based on the sex of a person's sexual partner,
- (ii) Section 377 had a "chilling effect" on Article 19 (Freedom of Expression) since it denied the right to express one's sexual identity through speech and choice of romantic/sexual partner, and
- (iii) Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of "a certain choice or manner of living."

B. Issues raised by the respondent:

Respondent, in this case, was Union of India certain non-governmental organizations, religious bodies, and other representative bodies also filed applications to intervene in the case. The Union of India submitted that it left the question of the constitutional validity of Section 377 (as it applied to consent adults of the same sex) to the “wisdom of the Court”.

Some of the interveners argued very much against the petitioner, submits that the right to privacy was not unbridled, that such acts were derogatory to the “constitutional concept of dignity”, that such acts would increase the prevalence of HIV/AIDS in the society, and that declaring section 377 unconstitutional would be a bad impression or detrimental to the institution of marriage and that it may violate Article 25 of the Constitution of India.

ANALYSIS OF THE ISSUES:

(i) Previous Judgement related to the case:

The issue in the case originated in 2009 when the Delhi High Court, in the case of *Naz Foundation v. Govt. of N.C.T. of Delhi*, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex.

But, in 2014, a two-judge bench of the Supreme Court, in the case of *Suresh Kumar Koushal v. Naz Foundation*, overturned the Delhi HC decision and granted Section 377 “the stamp of approval”. When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge bench of the Supreme Court opined that a larger bench must answer the issues raised. As a result, a five-judge bench heard the matter.

(ii) LGBTQ community in India:

LGBTQ community has a long-lasting history in our country, this is not new to society nor it is a disease. It is either by choice or by Nature, both depend on the individual. In India, this has been a subject of discussion since ancient times to modern times. Hindu texts have taken positions regarding homosexual characters and themes. *Rigveda*, one of the four canonical sacred texts of Hinduism says *Vikriti Evam Prakriti* (meaning what seems unnatural is also natural), which some scholars believe recognizes homosexual dimensions of human life, like all forms of universal diversities.

(iii) Medical issues related to the LGBTQ community:

As a member of the LGBTQ community, they are not responsible for spreading HIV/AIDS this community themselves face a lot of medical issues. LGBT topics in medicine are those that relate to lesbian, gay, bisexual, and transgender people's health issues and access to health services. According to the US Gay and Lesbian Medical Association (GLMA), besides HIV/AIDS, issues related to LGBT health include breast and cervical cancer, hepatitis, mental health, substance abuse, tobacco use, depression, access to care for transgender persons, issues surrounding marriage and family recognition, conversion therapy, refusal clause legislation, and laws that are intended to "immunize health care professionals from liability for discriminating against persons of whom they disapprove ."

JUDGMENT:

After almost 150 years to the criminalization of LGBTQ community in Indian society by the British government, Finally, the Supreme Court of India gave judgment in regards to the suffering minority of LGBTQ community stating that;

- The five-judge bench of the Indian Supreme Court (Court) unanimously held that Section 377 of the Indian Penal Code, 1860 (Section 377), insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. With this, the Court overruled its decision in *Suresh Koushal v. Naz Foundation*¹ that had upheld the constitutionality of Section 377.
- The Court relied upon its decision in *K.S. Puttaswamy v. Union of India* and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be a violation of their fundamental rights. It held that Section 377 amounts to an unreasonable restriction on the right to freedom to expression since consensual carnal intercourse in private “does not in any way harm public decency or morality” and if it continues to be on the statute books, it would cause a chilling effect that would “violate the privacy right under Art. 19(1)(a)”
- The Court affirmed that “intimacy between consenting adults of the same sex is beyond the legitimate interests of the state” [p. 142] and sodomy laws violate the right to equality under Art. 14 and Art. 15 of the Constitution by targeting a segment of the population for their sexual orientation. Further, the Court also relied upon its decisions in *Shafin Jahan v. Asokan K.M.* and *Shakti Vahini v. Union of India* to reaffirm that an adult’s right to “choose a life partner of his/her choice” is a facet of individual liberty.

- Chief Justice Misra relied on the principles of transformative constitutionalism and progressive realization of rights to hold that the constitution must guide the society's transformation from an archaic to a pragmatic society where fundamental rights are fiercely guarded. He further stated, "constitutional morality would prevail over social morality" to ensure that the human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majoritarian government.

RESEARCHER'S INFERENCE:

Section 377 is not all about sexual intercourse but it is about freedom, freedom to have the life of choice, freedom to know your sexual orientation and not to hide it, not to call a criminal just because someone's sexual orientation is different. It is the Constitution of India which give everyone *RIGHT TO LIFE*, the very law of the land gives us this right. It is all our citizen and no one has any right to take this freedom away. For equality, for dignity, for privacy. Inside a bedroom of two adults is their business, it is their privacy, no one can invade into that, not even the Government as it will be a clear violation of *RIGHT TO PRIVACY*. We are 50 years behind because it is rather late than western democracy. But, it is better late than never. Finally, the Supreme Court has done which unfortunately our Parliament couldn't do. Rejection of Shashi Tharoor's bill in the Parliament was not the right step taken up by the Government.

India is a country where there has always been space, space given to every individual to live like they want, for alternative expression of sexual orientations, LGBTQ community finds its history in our sculptures, temple, manuscripts, the depiction of GOD and so on. It was the British Victorian Code's moral (mid-19th century) criminalized the community which was so free in our country.

The ancient Indian text Kamasutra written by Vātsyāyana dedicates a complete chapter on erotic homosexual behavior. Historical literary evidence indicates that homosexuality has been prevalent across the Indian subcontinent throughout history and that homosexuals were not necessarily considered inferior in any way until about the 18th century.

Hinduism has taken various positions, ranging from homosexual characters and themes in its texts to being neutral or antagonistic towards it. The Arthashastra, an ancient Indian treatise on statecraft, mentions a wide variety of sexual practices which, whether performed with a man or a woman, were sought to be punished with the lowest grade of fine.

If we focus only on the BLACK and WHITE of the world, we can never see the RAINBOW.