

ITEM NO.37

COURT NO.1

SECTION X

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

Writ Petition(s) (Criminal) No(s).76/2016

NAVTEJ SINGH JOHAR & ORS.

Petitioner(s)

VERSUS

UNION OF INDIA MINISTRY OF LAW AND JUSTICE  
SECRETARY.

Respondent(s)

Date : 08-01-2018 This petition was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE  
HON'BLE MR. JUSTICE A.M. KHANWILKAR  
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Petitioner(s) Mr.Arvind Datar, Sr.Adv.  
Mr.Kapil Sibal, Sr.Adv.  
Mr.Mahesh Agarwal, Adv.  
Dr.Menika Gurusurthy, Adv.  
Mr.Saurabh Kirpal, Adv.  
Ms.Arundhati Katju, Adv.  
Ms.Neha Nagpal, Adv.  
Mr.Himanshu Satija, Adv.  
Mr. E. C. Agrawala, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following  
O R D E R

Heard Mr.Arvind Datar, learned senior counsel for the  
petitioner.

In the instant writ petition, the petitioners who claimed  
to be directly affected by the offence enumerated under Section 377  
of the Indian Penal Code, 1860 (for short, 'IPC'), pray for  
declaring the said provision as unconstitutional. It is submitted  
by Mr.Datar that on an earlier occasion, this Court in Suresh Kumar  
Koushal and another vs. Naz Foundation and others, (2014) 1 SCC 1,  
has declared the provision to be intra vires and overruled the

decision rendered by the Division Bench of the Delhi High Court in Naz Foundation vs. Government of NCT of Delhi and others, (2009) 111 DRJ 1. According to Mr.Datar, Naz Foundation was canvassing the cause as a non-governmental organization by invoking the jurisdiction under Public Interest Litigation whereas the petitioners are directly affected persons. The aforesaid submission leaves us unimpressed.

It is further submitted by Mr.Datar that the two-Judge Bench decision in Suresh Kumar Koushal (supra) has been guided by the perception of the majority which is based on social morality and stands on a platform distinct from constitutional morality. Learned senior counsel would submit that the fundamental facet of rule of law is dependent on the fulcrum of constitutional provisions in a democracy. Where the constitutional supremacy prevails, any social principle will not be allowed to come in the way. He would also submit that the interpretation placed by the two-Judge Bench under Article 21 of the Constitution is in an extremely narrow compass and, in fact, the two-Judge Bench has been guided by Article 14 of the Constitution. Learned senior counsel has drawn our attention to the later judgment in National Legal Service Authority vs Union of India and others, (2014) 5 SCC 438, where this Court has emphasised on "gender identity and sexual orientation". He has commended us to paragraphs 21 and 22 of the said judgment which we think appropriate to reproduce:

"21. Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of

persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

22. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

Mr.Datar has also drawn inspiration from the Nine-Judge Bench decision in Justice K.S.Puttaswamy (Retd.) and another vs.

Unoin of India and others, (2017) 10 SCC 1, wherein the majority dealing with Suresh Kumar Kaushal's case has expressed the view thus:

"144. Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

145. The view in Koushal that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without

discrimination.

146 The decision in Koushal presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the Koushal rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which Koushal has dealt with the privacy -dignity based claims of LGBT persons on this aspect."

Be it noted, the said decision did not deal with the constitutional validity of Section 377 IPC as the matter was pending before the larger Bench. The matter which was pending before the larger Bench is a Curative Petition which stands on a different footing. In this regard, Mr.Datar has also referred to paragraph 647 of the judgment of the concurring opinion. It is as follows:

"647. There are two aspects of the opinion of Dr. D.Y. Chandrachud, J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal Vs. Naz Foundation. In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, inter alia, observed that the right to live with dignity and the right of privacy both are

recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section ultra virus of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 123 & 124 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy. The observations made in *Mosley vs. News Group Papers Ltd.*, in a broader concept may be usefully referred to:

"130... It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.

131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of

drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in Von Hannover at (60) and (76), would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years."

The submission advanced by Mr.Datar is that privacy of the individual having been put on such a pedestal and, in the National Legal Service Authority's case(supra) (popularly known as the transgender's case), sexual orientation has been emphasised, Section 377 IPC cannot be construed as a reasonable restriction as that has the potentiality to destroy the individual autonomy and sexual orientation. It is an accepted principle of interpretation of statutes that a provision does not become unconstitutional because there can be abuse of the same. Similarly though a provision of the statute book is not invoked on many occasions, it does not fall into the sphere of Doctrine of Desuetude. Suresh Kumar Kaushal's case has been guided by that.

Certain other aspects need to be noted. Section 377 IPC uses the phraseology "carnal intercourse against the order of nature". The determination of order of nature is not a constant phenomenon. Social morality also changes from age to age. The law copes with life and accordingly change takes place. The morality that public perceives, the Constitution may not conceive of. The individual autonomy and also individual orientation cannot be

atrophied unless the restriction is regarded as reasonable to yield to the morality of the Constitution. What is natural to one may not be natural to the other but the said natural orientation and choice cannot be allowed to cross the boundaries of law and as the confines of law cannot tamper or curtail the inherent right embedded in an individual under Article 21 of the Constitution. A section of people or individuals who exercise their choice should never remain in a state of fear. When we say so, we may not be understood to have stated that there should not be fear of law because fear of law builds civilised society. But that law must have the acceptability of the Constitutional parameters. That is the litmus test.

It is necessary to note, in the course of hearing on a query being made and Mr.Datar very fairly stated that he does not intend to challenge that part of Section 377 which relates to carnal intercourse with animals and that apart, he confines to consenting acts between two adults. As far as the first aspect is concerned, that is absolutely beyond debate. As far as the second aspect is concerned, that needs to be debated. The consent between two adults has to be the primary pre-condition. Otherwise the children would become prey, and protection of the children in all spheres has to be guarded and protected. Taking all the aspects in a cumulative manner, we are of the view, the decision in Suresh Kumar Kaushal's case (supra) requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger Bench.



In the meantime, a copy of the petition be served on the Central Agency so that the Union of Indian can be represented in the instant matter.

Let the matter be placed before Hon'ble the Chief Justice of India, on the administrative side, for consideration of the appropriate larger Bench.

(Chetan Kumar )  
Court Master

(H.S.Parasher)  
Assistant Registrar