

ITEM NO.1501
(for judgment)

COURT NO.1

SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s).1011/2022

SUPRIYO @ SUPRIYA CHAKRABORTY & ANR.

Petitioner(s)

VERSUS

UNION OF INDIA

Respondent(s)

(WITH IA No. 77591/2023 - APPLICATION FOR PERMISSION, IA No. 78072/2023 - APPLICATION FOR PERMISSION, IA No. 93478/2023 - APPROPRIATE ORDERS/DIRECTIONS, IA No. 89225/2023 - EXEMPTION FROM FILING O.T., IA No. 67243/2023 - INTERVENTION APPLICATION, IA No. 78130/2023 - INTERVENTION APPLICATION, IA No. 82649/2023 - INTERVENTION APPLICATION, IA No. 89777/2023 - INTERVENTION APPLICATION, IA No. 93943/2023 - INTERVENTION APPLICATION, IA No. 67241/2023 - INTERVENTION APPLICATION, IA No. 77589/2023 - INTERVENTION APPLICATION, IA No. 78104/2023 - INTERVENTION APPLICATION, IA No. 82585/2023 - INTERVENTION APPLICATION, IA No. 57252/2023 - INTERVENTION APPLICATION, IA No. 76395/2023 - INTERVENTION APPLICATION, IA No. 82418/2023 - INTERVENTION APPLICATION, IA No. 89264/2023 - INTERVENTION APPLICATION, IA No. 53929/2023 - INTERVENTION APPLICATION, IA No. 76346/2023 - INTERVENTION APPLICATION, IA No. 78063/2023 - INTERVENTION APPLICATION, IA No. 82401/2023 - INTERVENTION APPLICATION, IA No. 91777/2023 - INTERVENTION APPLICATION, IA No. 52855/2023 - INTERVENTION APPLICATION, IA No. 82381/2023 - INTERVENTION APPLICATION, IA No. 87116/2023 - INTERVENTION APPLICATION, IA No. 89213/2023 - INTERVENTION APPLICATION, IA No. 91562/2023 - INTERVENTION APPLICATION, IA No. 74124/2023 - INTERVENTION APPLICATION, IA No. 77910/2023 - INTERVENTION APPLICATION, IA No. 82327/2023 - INTERVENTION APPLICATION, IA No. 87110/2023 - INTERVENTION APPLICATION, IA No. 88422/2023 - INTERVENTION APPLICATION, IA No. 77890/2023 - INTERVENTION APPLICATION, IA No. 83727/2023 - INTERVENTION APPLICATION, IA No. 87179/2023 - INTERVENTION APPLICATION, IA No. 90784/2023 - INTERVENTION APPLICATION, IA No. 71983/2023 - INTERVENTION APPLICATION, IA No. 77826/2023 - INTERVENTION APPLICATION, IA No. 87164/2023 - INTERVENTION APPLICATION, IA No. 89988/2023 - INTERVENTION APPLICATION, IA No. 89286/2023 - INTERVENTION/IMPLEADMENT, IA No. 87149/2023 - INTERVENTION/IMPLEADMENT, IA No. 93475/2023 - INTERVENTION/IMPLEADMENT, IA No. 87142/2023 - INTERVENTION/IMPLEADMENT, IA No. 75060/2023 - INTERVENTION/IMPLEADMENT, IA No. 78057/2023 - INTERVENTION/IMPLEADMENT, IA No. 52775/2023 - INTERVENTION/IMPLEADMENT, IA No. 90903/2023 - INTERVENTION/IMPLEADMENT, IA No. 72352/2023 - INTERVENTION/IMPLEADMENT, IA No. 87151/2023 - PERMISSION TO APPEAR

AND ARGUE IN PERSON, IA No. 78594/2023 - PERMISSION TO APPEAR AND ARGUE IN PERSON, IA No. 78593/2023 - PERMISSION TO APPEAR AND ARGUE IN PERSON, IA No. 83410/2023 - PERMISSION TO APPEAR AND ARGUE IN PERSON, IA No. 87159/2023 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

WITH

W.P.(C) No. 93/2023 (X)
(FOR ADMISSION)

T.C.(C) No. 5/2023 (XI-A)

T.C.(C) No. 8/2023 (XIV-A)
(FOR ADMISSION)

T.C.(C) No. 9/2023 (XIV-A)
(FOR ADMISSION)

T.C.(C) No. 11/2023 (XIV-A)
(FOR ADMISSION)

T.C.(C) No. 12/2023 (XIV-A)
(FOR ADMISSION)

W.P.(C) No. 1020/2022 (PIL-W)
(FOR ADMISSION and IA No.176659/2022-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

W.P.(C) No. 1105/2022 (X)
(FOR ADMISSION)

W.P.(C) No. 1141/2022 (X)
(FOR ADMISSION)

W.P.(C) No. 1142/2022 (X)
(FOR ADMISSION and IA No.201628/2022-EXEMPTION FROM FILING AFFIDAVIT)

W.P.(C) No. 1150/2022 (X)
(WITH IA No. 53745/2023 - APPLICATION FOR PERMISSION)

W.P.(C) No. 159/2023 (PIL-W)
(FOR ADMISSION)

W.P.(C) No. 129/2023 (X)
(FOR ADMISSION and IA No.24442/2023-EXEMPTION FROM FILING O.T.)

W.P.(C) No. 260/2023 (X)
(FOR ADMISSION)

T.C.(C) No. 6/2023 (XIV-A)

W.P.(C) No. 319/2023 (X)

T.C.(C) No. 7/2023 (XIV-A)
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T.C.(C) No. 10/2023 (XIV-A)
(FOR ADMISSION)

T.C.(C) No. 13/2023 (XIV-A)

W.P.(C) No. 478/2023 (X)
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Date : 17-10-2023 These matters were called on for pronouncement
of judgment today.

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- 1 Hon'ble Dr Dhananjaya Y Chandrachud, Chief Justice of India, Hon'ble Mr Justice Sanjay Kishan Kaul, Hon'ble Mr Justice S Ravindra Bhat and Hon'ble Mr Justice Pamidighantam Sri Narasimha pronounced separate judgments.
- 2 In terms of the reportable judgment, Hon'ble the Chief Justice of India issued following directions and conclusions:

"339 Counsel for the petitioners and some counsel for the respondents advanced extensive submissions on the various forms of violence and discrimination that society and the state machinery inflict upon the queer community, and especially queer couples. This has been discussed in detail in the prefatory part of the judgment. Counsel sought directions to obviate such violence and discrimination.

- a. The Union Government, State Governments, and Governments of Union Territories are directed to:
 - i. Ensure that the queer community is not discriminated against because of their gender identity or sexual orientation;
 - ii. Ensure that there is no discrimination in access to goods and services to the queer community, which are available to the public;
 - iii. Take steps to sensitise the public about queer identity, including that it is natural and not a mental disorder;
 - iv. Establish hotline numbers that the queer community can contact when they face harassment and violence in any form;
 - v. Establish and publicise the availability of 'safe houses' or Garima Grehs in all districts to provide shelter to members of the queer community who are facing violence or discrimination;
 - vi. Ensure that "treatments" offered by doctors or other persons, which aim to change gender identity or sexual orientation are ceased with immediate effect;
 - vii. Ensure that inter-sex children are not forced to undergo operations with regard only to their sex, especially at an age at which they are unable to fully comprehend and consent to such operations;
 - viii. Recognize the self-identified gender of all persons including transgender persons, hijras, and others with sociocultural identities in India, as male, female, or third gender. No person shall be forced to undergo hormonal therapy or sterilisation or any other medical procedure either as a condition or prerequisite to grant legal recognition to their gender identity or otherwise;

- b. The appropriate Government under the Mental Healthcare Act must formulate modules covering the mental health of queer persons in their programmes under Section 29(1). Programmes to reduce suicides and attempted suicides (envisaged by Section 29(2)) must include provisions which tackle queer identity;
- c. The following directions are issued to the police machinery:
- i. There shall be no harassment of queer couples by summoning them to the police station or visiting their places of residence solely to interrogate them about their gender identity or sexual orientation;
 - ii. They shall not force queer persons to return to their natal families if they do not wish to return to them;
 - iii. When a police complaint is filed by queer persons alleging that their family is restraining their freedom of movement, they shall on verifying the genuineness of the complaint ensure that their freedom is not curtailed;
 - iv. When a police complaint is filed apprehending violence from the family for the reason that the complainant is queer or is in a queer relationship, they shall on verifying the genuineness of the complaint ensure due protection; and
 - v. Before registering an FIR against a queer couple or one of the parties in a queer relationship (where the FIR is sought to be registered in relation to their relationship), they shall conduct a preliminary investigation in terms of **Lalita Kumari v. Government of U.P.**¹, to ensure that the complaint discloses a cognizable offence. The police must first determine if the person is an adult. If the person is an adult and is in a consensual relationship with another person of the same or different gender or has left their natal home of their own volition, the police shall close the complaint after recording a statement to that effect.

G. Conclusions and orders of enforcement

340 In view of the discussion above, the following are our conclusions:

- a. This Court is vested with the authority to hear this case. Under Article 32, this Court has the power to issue directions, orders, or writs for the enforcement of the rights in Part III;
- b. Queerness is a natural phenomenon known to India since ancient times. It is not urban or elite;
- c. There is no universal conception of the institution of marriage, nor is it static. Under Articles 245 and 246 of the Constitution read with Entry 5 of List III to the Seventh Schedule, it lies within the domain of Parliament and the state legislatures to enact laws recognizing and regulating

¹ (2014) 2 SCC 1

queer marriage;

d. Marriage has attained significance as a legal institution largely because of regulation by the state. By recognizing a relationship in the form of marriage, the state grants material benefits exclusive to marriage;

e. The State has an interest in regulating the 'intimate zone' to democratize personal relationships;

f. The issue of whether the Constitution recognizes the right to marry did not arise before this Court in **Justice KS Puttaswamy (9J)** (supra), **Shafin Jahan** (supra), and **Shakti Vahini** (supra);

g. The Constitution does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law. However, several facets of the marital relationship are reflections of constitutional values including the right to human dignity and the right to life and personal liberty;

h. This Court cannot either strike down the constitutional validity of SMA or read words into the SMA because of its institutional limitations. This Court cannot read words into the provisions of the SMA and provisions of other allied laws such as the ISA and the HSA because that would amount to judicial legislation. The Court in the exercise of the power of judicial review must steer clear of matters, particularly those impinging on policy, which fall in the legislative domain;

i. The freedom of all persons including queer couples to enter into a union is protected by Part III of the Constitution. The failure of the state to recognise the bouquet of entitlements which flow from a union would result in a disparate impact on queer couples who cannot marry under the current legal regime. The state has an obligation to recognize such unions and grant them benefit under law;

j. In Article 15(1), the word 'sex' must be read to include 'sexual orientation' not only because of the causal relationship between homophobia and sexism but also because the word 'sex' is used as a marker of identity which cannot be read independent of the social and historical context;

k. The right to enter into a union cannot be restricted based on sexual orientation. Such a restriction will be violative of Article 15. Thus, this freedom is available to all persons regardless of gender identity or sexual orientation;

l. The decisions in **Navtej** (supra) and **Justice KS Puttaswamy (9J)** (supra) recognize the right of queer couples to exercise the choice to enter into a union. This relationship is protected from external threat. Discrimination on the basis of sexual orientation will violate Article 15;

m. Transgender persons in heterosexual relationships have the right to marry under existing law including personal laws which regulate marriage;

n. Intersex persons who identify as either male or female have the right to marry under existing law including personal laws which regulate marriage;

o. The state must enable the LGBTQ community to exercise its rights under the Constitution. Queer persons

have the right to freedom from coercion from their natal families, agencies of the state including the police, and other persons;

p. Unmarried couples (including queer couples) can jointly adopt a child. Regulation 5(3) of the Adoption Regulations is ultra vires the JJ Act, Articles 14, and 15. Regulation 5(3) is read down to exclude the word “marital”. The reference to a ‘couple’ in Regulation 5 includes both married and unmarried couples as well as queer couples. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried couples who seek to jointly adopt a child. However, while framing regulations, the state may impose conditions which will subserve the best interest and welfare of the child in terms of the exposition in the judgment;

q. The CARA Circular disproportionately impacts the queer community and is violative of Article 15;

r. The Union Government, State Governments, and Governments of Union Territories shall not discriminate against the freedom of queer persons to enter into union with benefits under law; and

s. We record the assurance of the Solicitor General that the Union Government will constitute a Committee chaired by the Cabinet Secretary for the purpose of defining and elucidating the scope of the entitlements of queer couples who are in unions. The Committee shall include experts with domain knowledge and experience in dealing with the social, psychological, and emotional needs of persons belonging to the queer community as well as members of the queer community. The Committee shall before finalizing its decisions conduct wide stakeholder consultation amongst persons belonging to the queer community, including persons belonging to marginalized groups and with the governments of the States and Union Territories.

The Committee shall in terms of the exposition in this judgment consider the following:

- i. Enabling partners in a queer relationship (i) to be treated as a part of the same family for the purposes of a ration card; and (ii) to have the facility of a joint bank account with the option to name the partner as a nominee, in case of death;
- ii. In terms of the decision in **Common Cause v. Union of India**², as modified by **Common Cause v. Union of India**³, medical practitioners have a duty to consult family or next of kin or next friend, in the event patients who are terminally ill have not executed an Advance Directive. Parties in a union may be considered ‘family’ for this purpose;
- iii. Jail visitation rights and the right to access the body of the deceased partner and arrange the last rites; and
- iv. Legal consequences such as succession rights, maintenance, financial benefits such as under the

² (2018) 5 SCC 1

³ 2023 SCC OnLine SC 99

Income Tax Act 1961, rights flowing from employment such as gratuity and family pension and insurance.

The report of the Committee chaired by the Cabinet Secretary shall be implemented at the administrative level by the Union Government and the governments of the States and Union Territories.”

- 3 Hon’ble Mr Justice Sanjay Kishan Kaul, while concurring with the judgment of Hon’ble the Chief Justice of India, concluded as follows:

“33. Is this the end where we have arrived? The answer must be an emphatic ‘no’. Legal recognition of non-heterosexual unions represents a step forward towards marriage equality. At the same time, marriage is not an end in itself. Our Constitution contemplates a holistic understanding of equality, which applies to all spheres of life. The practice of equality necessitates acceptance and protection of individual choices. The capacity of non-heterosexual couples for love, commitment and responsibility is no less worthy of regard than heterosexual couples. Let us preserve this autonomy, so long as it does not infringe on the rights of others. After all, “it’s my life.”⁴”

- 4 Hon’ble Mr Justice S Ravindra Bhat pronounced the judgment on behalf of himself and Hon’ble Ms Justice Hima Kohli. In terms of the reportable judgment, the conclusions and directions are as follows:

“149. This court hereby summarizes its conclusions and directions as follows:

- i. There is no unqualified right to marriage except that recognised by statute including space left by custom.
- ii. An entitlement to legal recognition of the right to union – akin to marriage or civil union, or conferring legal status upon the parties to the relationship can be only through enacted law. A sequitur of this is that the court cannot enjoin or direct the creation of such regulatory framework resulting in legal status.
- iii. The finding in (i) and (ii) should not be read as to preclude queer persons from celebrating their commitment to each other, or relationship, in whichever way they wish, within the social realm.
- iv. Previous judgments of this court have established that queer and LGBTQ+ couples too have the right to union or

⁴ ‘Its my life’, a song by Bon Jovi.

“It’s my life

It’s now or never

But I ain’t gonna live forever

I just want to live while I’m alive”.

relationship (under Article 21) – “be it mental, emotional or sexual” flowing from the right to privacy, right to choice, and autonomy. This, however, does not extend to a right to claim entitlement to any legal status for the said union or relationship.

- v. The challenge to the SMA on the ground of under classification is not made out. Further, the petitioner’s prayer to read various provisions in a ‘gender neutral’ manner so as to enable same-sex marriage, is unsustainable.
- vi. Equality and non-discrimination are basic foundational rights. The indirect discriminatory impacts in relation to earned or compensatory benefits, or social welfare entitlements for which marital status is a relevant eligibility factor, for queer couples who in their exercise of choice form relationships, have to be suitably redressed and removed by the State. These measures need to be taken with expedition because inaction will result in injustice and unfairness with regard to the enjoyment of such benefits, available to all citizens who are entitled and covered by such laws, regulations or schemes (for instance, those relating to employment benefits: provident fund, gratuity, family pension, employee state insurance; medical insurance; material entitlements unconnected with matrimonial matters, but resulting in adverse impact upon queer couples). As held earlier, this court cannot within the judicial framework engage in this complex task; the State has to study the impact of these policies, and entitlements.
- vii. Consistent with the statement made before this Court during the course of proceedings on 03.05.2023, the Union shall set up a high-powered committee chaired by the Union Cabinet Secretary, to undertake a comprehensive examination of all relevant factors, especially including those outlined above. In the conduct of such exercise, the concerned representatives of all stakeholders, and views of all States and Union Territories shall be taken into account.
- viii. The discussion on discriminatory impacts is in the context of the effects of the existing regimes on queer couples. While a heterosexual couple’s right to live together is not contested, the logic of the discriminatory impact [mentioned in conclusion (vi) above] faced by queer couples cohabiting together, would definitionally, however, not apply to them.
- ix. Transgender persons in heterosexual relationships have the freedom and entitlement to marry under the existing statutory provisions.
- x. Regulation 5(3) of the CARA Regulations cannot be held void on the grounds urged. At the same time, this court is of the considered opinion that CARA and the Central Government should appropriately consider the realities of *de facto* families, where single individuals are permitted to adopt and thereafter start living in a non-matrimonial relationship. In an unforeseen eventuality, the adopted child in question, could face exclusion from the benefits

otherwise available to adopted children of married couples. This aspect needs further consideration, for which the court is not the appropriate forum.

- xi. Furthermore, the State shall ensure - consistent with the previous judgment of this Court in *K.S. Puttaswamy (supra)*, *Navtej Johar (supra)*, *Shakti Vahini (supra)* and *Shafin Jahan (supra)*- that the choice exercised by queer and LGBTQ couples to cohabit is not interfered with and they do not face any threat of violence or coercion. All necessary steps and measures in this regard shall be taken. The respondents shall take suitable steps to ensure that queer couples and transgender persons are not subjected to any involuntary medical or surgical treatment.
- xii. The above directions in relation to transgender persons are to be read as part of and not in any manner whittling down the directions in *NALSA (supra)* so far as they apply to transgender persons.
- xiii. This court is alive to the feelings of being left out, experienced by the queer community; however, addressing their concerns would require a comprehensive study of its implications involving a multidisciplinary approach and polycentric resolution, for which the court is not an appropriate forum to provide suitable remedies.”

5 Hon’ble Mr Justice Pamidighantam Sri Narasimha, while concurring with the judgment of Hon’ble Mr Justice S Ravindra Bhat, concluded as follows:

- a. The question of marriage equality of same sex/LGBTQ+ couples did not arise for consideration in any of the previous decisions of this Court, including the decision in *Navtej Singh Johar & Ors. v. Union of India*⁵ and *NALSA v. Union of India*⁶. Consequently, there cannot be a binding precedent on this count. The reasons for arriving at this conclusion are articulated in the opinion of Justice Bhat.
- b. The rights of LGBTQ+ persons, that have been hitherto recognized by this Court, are the right to gender identity, sexual orientation, the right to choose a partner, cohabit and enjoy physical & mental intimacy. In the exercise of these rights, they have full freedom from physical threat and from coercive action, and the State is bound to afford them full protection of the law in case these rights are in peril.

⁵ (2018) 10 SCC 1

⁶ (2014) 5 SCC 438

- c. There is no unqualified right to marriage guaranteed by the Constitution, that qualifies it as a fundamental freedom. With respect to this, I agree with the opinion of Justice Bhat, but will supplement it with some additional reasons.
- d. The right to marriage is a statutory right, and to the extent it is demonstrable, a right flowing from a legally enforceable customary practice. In the exercise of such a right, statutory or customary, the State is bound to extend the protection of law to individuals, so that they can exercise their choices without fear and coercion. This, in my opinion, is the real import of the decisions in *Shafin Jahan v. Asokan K.M.*⁷ and *Shakti Vahini v. Union of India*⁸.
- e. The constitutional challenge to the Special Marriage Act, 1954 and the Foreign Marriage Act, 1969 must fail, for the reasons indicated in the opinion of Justice Bhat.
- f. Similarly, Justice Bhat also rightly finds the semantic impossibilities of gender-neutral constructions of the Special Marriage Act, 1954 and the Foreign Marriage Act, 1969. On both (e) and (f), the opinion of Justice Bhat is exhaustive as to the reasons, and they need not be supplemented.
- g. I find that a right to a civil union or an abiding cohabitational relationship conferring a legally enforceable status cannot be situated within Part III of the Constitution of India. On this count too, I agree with the conclusions of Justice Bhat, and supplement them with my own reasons.
- h. I agree with the reasoning and the conclusion of Justice Bhat with respect to the constitutionality of Regulation 5(3) of the CARA Regulations, 2020.

6 In terms of the reportable judgments, the Writ Petitions and Transferred Cases

⁷ (2018) 16 SCC 368

⁸ (2018) 7 SCC 192

are disposed of.

- 7 Pending applications, including applications for intervention/impleadment, stand disposed of.

(SANJAY KUMAR-I)
DEPUTY REGISTRAR

(SAROJ KUMARI GAUR)
ASSISTANT REGISTRAR

(Four reportable judgments are placed on the file)