

ITEM NO.53

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  
R E C O R D O F P R O C E E D I N G S

Writ Petition (Criminal) No.194/2017

JOSEPH SHINE

Petitioner(s)

VERSUS

UNION OF INDIA

Respondent(s)

(With appln.(s) for intervention/impleadment)

Date : 05-01-2018 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. Kaleeswaram Raj, Adv.  
Mr. Suvidutt M.s., AOR

For Respondent(s) Mr. R. Balasubramanian, Adv.  
Mr. B.V. Balram Das, Adv.  
Mr. Sachin Sharma, Adv.

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

Heard Mr. Kaleeswaram Raj, learned counsel for the petitioner and Mr. R. Balasubramanian, learned counsel along with Mr. B.V. Balram Das, learned counsel for the Union of India.

This Court on 8<sup>th</sup> December, 2017, at the stage of admission, had passed the following order:-

"In this petition, preferred under Article 32 of the Constitution of India, the petitioner has challenged the constitutional validity of Section 497 of the Indian Penal Code and and Section 198(2) of the Criminal Procedure Code. The said provisions read as under:

"497. Adultery.— Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

198. Prosecution for offences against marriage

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."

Learned counsel submits that the said provisions have been treated to be constitutionally valid in three Judgments, namely, Yusuf Abdul Aziz vs. State of Bombay, 1954 SCR 930 = AIR 1954 SC 321; Sowmithri Vishnu vs. Union of India and Another, (1985) Suppl. SCC 137 and V. Revathi vs. Union of India and Others, (1988) 2 SCC 72. He has also drawn our attention to the decision in W. Kalyani vs. State through Inspector of Police and Another, (2012) 1 SCC 358 wherein a two-Judge Bench of this Court, after referring to the provision, observed thus:

"10. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the Section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the Section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a

woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence."

On a perusal of the judgment in *Yusuf Abdul Aziz's* case, it seems that the provision was upheld on the basis of Article 15(3) of the Constitution.

In *Sowmithri Vishnu's* case (supra), the Court while relying on the principles laid down in *Yusuf Abdul Aziz's* case opined that the provision is *intra vires*. For the said purpose, the Court has expressed the view thus:

"Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried woman. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or, perhaps, invites a civil action by the wife for separation. The legislature is entitled to deal with the evil where it is felt and seen most : A man seducing the wife of another. Mrs. Chidambaram says that women, both married and unmarried, have changed their life style over the years and there are cases where they have wrecked the peace and happiness of other matrimonial homes. We hope this is not too right but, an under-inclusive definition is not necessarily discriminatory. The alleged transformation in feminine attitudes, for good or bad may justly engage the attention of the law-makers when the reform of penal law is undertaken. They may enlarge the definition of adultery to keep pace with the moving times. But, until then, the law must remain as it is. The law, it is, does not offend either Article 14 or Article 15 of the Constitution. Incidentally, the demand of the petitioner that sexual relationship of a husband with an unmarried woman should also be comprehended with in the definition of 'adultery' is a crusade by a woman against a woman. If the paramour of a married woman can be guilty of adultery, why can an unmarried girl who has sexual relations with a married man not be guilty of adultery? That is the grievance

of the petitioner.”

In *V. Revathi's* case (supra), learned Judges took the family as the platform and gave emphasis on the matrimonial unit and thereafter observed:

“5. Section 497 of the Indian Penal Code and Section 198(1) read with Section 198(2) of the Criminal Procedure Code go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit. The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. It does not arm the two spouses to hit each other with the weapon of criminal law. That is why neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination based on sex. While the outsider who violates the sanctity of the matrimonial home is punished a rider has been added that if the outsider is a woman she is not punished. There is thus reverse discrimination in 'favour' of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman in so far as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated an offender in the eye of law. The wife is not permitted as Section 198(1) read with section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practised in circumscribing the scope of

Section 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer. "

*Prima facie*, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, *prima facie*, appears to be quite archaic. When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice."

On a perusal of the aforesaid decisions, it is found that the constitutional validity of Section 497 of the Indian Penal Code has been upheld. One of them, namely, *Yusuf Abdul Aziz* case (supra) has been delivered by a four-Judge Bench. As is noticeable, the four-Judge Bench has opined that the said offence does not offend Articles 14 and 15 of the Constitution. In *Sowmithri Vishnu's* case (supra), it has been held thus:

"Though it is true that the erring spouses have no remedy against each other within the confines of Section 497 of the Penal Code, that is to say, they cannot prosecute each other for adultery, each one has a remedy against the other under the civil law for divorce on the ground of adultery. "Adultery" under the civil law has a wider connotation than under the Penal Code. If we were to accept the argument of the petitioner, Section 497 will be obliterated from the statute book and adulterous relations will have a more free play than now. For then, it will be impossible to convict anyone of adultery at all. It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationship is punishable by law. Stability of marriages is not an ideal to be scorned."

In *Sowmithri Vishnu's* case (supra), the Court has laid emphasis on the family platform and further opined that no discrimination has been practised.

As indicated in our earlier order, we had noted that the provision seems quite archaic and especially, when there is a societal progress. Thus analyzed, we think it appropriate that the earlier judgments required to be reconsidered regard being had to the social progression, perceptual shift, gender equality and gender sensitivity. That apart, there has to be a different kind of focus on the affirmative right conferred on women under Article 15 of the Constitution.

In view of the aforesaid, we think it appropriate to refer the matter to a Constitution Bench. Let the papers be placed before the learned Chief Justice of India on the administrative side for constitution of the appropriate larger Bench.

(Chetan Kumar)  
Court Master

(H.S. Parasher)  
Assistant Registrar