



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

Case Analysis : Navtej Singh Johar And Ors Vs Union Of India Air 2018 Sc 4321

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ABSTRACT

LGBTQ stands for Lesbian, Gay, Bisexual, Transgender and Queer, they are also referred to as homosexuals. For the past many years the members of this community have faced a lot of harassment and have been deprived of their basic human rights, it was thus in Navtej Singh Johar case that for the first time steps were taken for the upliftment of this community. This research paper makes a detailed analysis of the Supreme Court judgment in Navtej Singh Johar and Ors vs Union of India and Ors¹ and compares it with the Supreme Court Judgement in Suresh Kumar Koushal vs NAZ Foundation and Ors² as regards to constitutional validity of Section 377 of Indian Penal Code 1860. This paper also makes a comparative analysis of the rights of LGBTQ community prevalent in different countries.

Keywords - LGBTQ, Section 377, Article 14, Article 15, Article 19, Article 21, NALSA

INTRODUCTION

After 73 years of independence, the right to equality is available solely to those who stand by the preconceived notions and not to those who deviate from it. People belonging to the LGBTQ community are often looked down upon by the so-called normal people. This decision of the Supreme Court is of great importance as it is the first step towards awareness and acceptance by the society.

The purpose of the Indian Constitution is to secure the rights and duties conferred upon its citizens. Equality, Liberty and Justice are some of the important pillars of the Constitution of India. Thus every citizen has the right to be treated equally, right to liberty of thought, expression and belief and right to justice. These rights should not be influenced by any kind of prejudices formed on the basis of a person's sexual orientation or preferences. Thus the members of the LGBTQ community being citizens of India are entitled to protection from any unconstitutional provisions and to have appropriate laws which safeguard their interest.

¹ AIR 2018 SC 4321

² (2014) 1 SCC 1

Different laws are laid down to protect public interest. The Pareto Efficiency test lays down that “if law or rule improves someone’s situation without injuring anyone else it is in public interest”. This test to a certain extent is idealistic, but in the current situation this test can be relied upon, as abolishing section 377 or taking steps to enact law to protect the interest of LGBTQ community is not likely to cause any physical or mental harm to any other citizen and thus implementing such laws can be said to be in public interest.

FACTS OF THE CASE

A Writ petition is a remedy made available to the citizens under Article 32, it can be filed when the fundamental rights provided under part III of Indian Constitution are violated. This case is Writ petition which was filed by Navtej Singh Johar and four others. The main purpose of this petition was to decriminalize certain provisions contained in Section 377³. The roots of this case were laid down under several previous judgments, particularly those of the Supreme Court and Delhi High Court.

In National Legal Services Authority (NALSA) vs Union of India and others⁴, the rights of people belonging to the third gender or transgender community first came into picture. The petitioner intended to throw light on the traumatic experiences faced by the transgender community and emphasised on the fact that they have the right to decide their sexual orientation and their identity. The Supreme Court held that there is no reason why fundamental rights otherwise available to all citizens of India should not be available to people belonging to the transgender community.

It only takes a spark to set the forest on fire, the NALSA case in 2014 acted as that spark which gave fire to the revolution for the LGBTQ right. In 2001, it was in Naz Foundation vs Government of NCT of Delhi and others⁵, where an appeal to decriminalize section 377 of Indian Penal code 1860 was filed for the first time. Section 377 penalizes carnal intercourse against the order of nature. The petitioner pleaded that penalization under section 377 should not extend to the sexual intercourse between consenting adults, be it homosexuals or heterosexuals, as the existing section violates article 14, 15, 19 and 21 of Constitution of India. The Delhi High Court held that section 377 in so far as it penalizes consensual sexual acts of adults in private is indeed in violation of their rights provided under article 14, 15, 19 and 21 and thus decriminalized it.

This decision was challenged in Suresh Kumar Koushal & Anr vs Naz Foundation & Ors, the Supreme Court held that section 377 does not suffer from unconstitutionality and thereby reversed the decision of Delhi High Court. The justification provided was that the members of LGBTQ community form only a miniscule fraction of the population, and that the High Court “in its anxiety to protect the so-called rights of LGBT persons” relied on judgments of other jurisdictions. Thus concluded that declaration of section 377 as unconstitutional is not sustainable.

It was in 2016 when Navtej Singh Johar and other filed a writ petition challenging constitutionality of section 377 on the ground that they were psychologically distressed due to the continuance of unconstitutional provisions of section 377 of Indian Penal Code 1860 and thus was in violation of their Fundamental rights. The petition was placed before a five judge constitution seat of the Supreme Court.

³ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

⁴ (2014) 5 SCC 438

⁵ (2009) 111 DRJ 1

JUDGMENT

On 6th September 2018, the Supreme Court held that the provision of section 377 of Indian Penal Code 1860, which is criminalizing consensual sexual acts between adults (i.e.. a person above 18 years of age), be it homosexuals or heterosexuals in private, is violative of articles 14, 15, 19 and 21 of Constitution of India.

This section of Indian penal code was not completely abolished, certain provisions criminalizing nonconsensual sexual act against adults or minors and acts of bestiality will continue to remain in force. The amendment will not have retrospective effect but can be applied to any pending matters at trial, appellate or revisional stage. The decision laid down by the two judge bench of Supreme court in Suresh Kumar Koushal & Anr vs Naz Foundation & Ors recriminalizing section 377 was also held to be overruled.

CONSTITUTIONAL PROVISIONS

The Constitution of India is subject to interpretation by the judiciary and usually the interpretation provided by the Supreme Court is followed. In the present case the views upheld by the two judge bench of the Supreme Court in Suresh Kumar Koushal & Anr vs Naz Foundation & Ors and by five judge bench of the Supreme Court in Navtej Singh Johar and Ors vs Union of India are altogether contradictory. The same sections and articles are interpreted in completely different manner by these two benches. Let us consider the different sections and articles interpreted by both the benches which led to the opposite judgments.

Section 377 of Indian penal code

The root cause of action in both the cases is section 377 which deals with “Unnatural offences” provided under Indian Penal code 1860. Section 377 has been worded as follows:

“Whoever voluntarily has carnal inter-course 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 fine⁶.”

In Suresh Kumar Koushal & Anr vs Naz Foundation & ors, the two judge bench of Supreme Court held that section 377 is not unconstitutional. It was of the opinion that on reading the section it can be seen the torture or harassment faced by members of the LGBTQ community is in no way condoned by this section, and the mere misuse of section 377 by any person or authority does not render it unconstitutional. Nowhere in this section is it mentioned that it is applicable to a particular group or gender, it is gender neutral. Thus it is applicable to all in the same sense and therefore cannot be said to be violative of the articles 14, 15, 19 and 21 of the Constitution of India.

Section 377 punishes unnatural offences, any carnal intercourse against the order of nature and which is likely to cause any harm and thus it ought to be punished. Supreme Court also opined that section 377 forms part of a pre-constitutional legislation, article 372 empowers the Constitution to continue in force any pre-constitutional laws unless altered, repealed or amended by competent authority, thus if it were violative of any of the provision contained in part III of Indian Constitution the parliament by now would have repealed it.

The Supreme Court by applying the doctrine of severability held that there is no part of the section which can be severed without affecting the whole section. Thus it concluded that the decision of Delhi High Court was wrong as it would affect the section as a whole and that it was to a larger extent influenced by foreign judgments.

When the question of constitutionality of section 377 was brought before a five judge bench of the Supreme Court in Navtej Singh Johar case, it was held that the part of section 377 which penalizes consensual sexual intercourse between adults is unconstitutional and thus is bound to be amended. The words used in section 377 are “carnal intercourse against the order of nature”, the expression “order of nature” means social

⁶ Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India)

morality, but on what grounds can it be determined as to what is in accordance with the order of nature and what is not.

Social morality is a dynamic concept and is bound to change from time to time, and law is also expected to change with it. The Constitution also to a certain extent encompasses social morality provided it does not breach the boundaries of law, as what may be moral for one person may not be moral for another. Thus, it is for the judiciary to interpret the constitution according to the changing time and need and thereby maintain balance in the society. It is through this dynamism that the fundamental rights can be made available to people who have been deprived of their rights.

Speaking about sexual preference or sexual orientation of a person has always been considered as a taboo in society. People with different sexual preferences or orientation have always been looked down on by others. In a country like India where democracy prevails, people should not be required to live in fear for exercise of their choice.

Johann Wolfgang von Goethe, had said, "I am what I am, so take me as I am". Everyone has the right to live, to express and to love whoever they want, as everyone has the right to be treated equally. Equality is very easy to achieve among equals but when it comes to unequals it is the responsibility of the authority to make laws to protect the interest of weaker sections of the society so far it is not causing any harm to other citizens. The judiciary is the one who has to determine whether the laws are in consonance with the provisions of the constitution or not.

The Supreme Court after considering all the legal and social aspects came to the decision that section 377 of the Indian Penal Code 1860 is unconstitutional as it was depriving the members of the LGBTQ community of their choice and basic human rights which form the basis of Indian Constitution.

The decision arrived at by both the benches was based on the interpretation of various articles of the Indian Constitution. In other words, it can be said to be the litmus test used by the courts to decide the constitutionality of section 377. Following sections were interpreted by Supreme Court:

1) Article 14: Equality before Law

Article 14 of Indian Constitution provides that every person has equal status before law and has equal opportunity to be protected by law. The article is negatively worded stating that equality before law and equal protection of law cannot be denied by the state. The protection under this article is available to everyone, citizens and non citizens both.

Equality before law is borrowed from the United Kingdom Constitution, it owes its origin to the concept of "Rule of Law". The principle of rule of law was laid down by Greek political thinker Aristotle and further developed by Prof. Dicey. Rule of Law establishes the supremacy of Law i.e. *lex superanus*⁷. It means that law is the supreme authority and no one is above law.

Equal protection of law is another right provided under article 14. It focuses on equality among equals i.e... equal treatment of people in similar circumstances. Equal treatment of all irrespective of the circumstances surrounding them would itself amount to discrimination and it would ultimately be violative of article 14. Thus even though Article 14 promotes equality but at the same time it allows certain reasonable classification to be made for the well being of weaker sections of the society.

Upholding the above interpretation the Supreme Court in Suresh kumar Kaushal case held that section 377 is constitutional, and the decision of Delhi High Court in Naz foundation case declaring it to be unconstitutional is not valid. The Supreme Court agreed with the argument put forward by the petitioner's counsel that the section in no way provides for classification among individuals as it is gender neutral. The Supreme Court further observed that the only classification that the section provides is of people who indulge

⁷ Dr. Kumud Ranjan Singh, Indian Polity and Constitutional Issues, 83, Arihant Publication (India) Ltd 2011.

in carnal intercourse in ordinary course and those who indulge in carnal intercourse against the order of nature and that the people in the latter category are in no position to challenge the constitutionality of section 377 of Indian Penal Code 1860. The function of section 377 is to define the offence and prescribe the punishment for the same and thus it does not in any way promote discrimination.

The five judge bench of the Supreme Court in Navtej Singh Johar case upheld a completely different view. While determining the validity of any section in the light of article 14 it should be seen whether it fulfills the following two conditions, in order to be regarded as constitutional. The two tests are as follows:

1. Classification to be founded on intelligible differentia.
2. Differentiation must have a rational nexus with objects sought to be achieved.

Section 377 satisfies the first test as the intention for the classification and penalization of carnal intercourse against the order of nature is to protect women and children from being subjected to it. So far as the second condition is concerned it was observed that, firstly what is criminalized under this section forms part of other independent provisions for example rape is punished under section 375 of Indian penal code, the POSCO act penalizes sexual offences against children, and secondly to a certain extent it penalizes consensual acts of sexual intercourse between members of the LGBTQ community thus it cannot be said to have any rational relation with the object sought to be achieved. Since the section does not fulfill both the condition and is discriminatory towards the members of LGBTQ community it is violative of article 14.

2) Article 15: Prohibition of discrimination

Discrimination on the basis of religion, race, caste, sex, place of birth or any of them is prohibited by virtue of article 15 of Indian Constitution. Along with prohibiting discrimination, article 15 provides certain exceptions under which special provisions can be made to promote the upliftment of the weaker sections of the society. Article 15 can be said to be an extension of the objectives laid down in Article 14 which promotes equality among all and reasonable classification.

The term “sex” used in article 15 has been interpreted in National Legal Service Authority (NALSA) vs Union of India and ors, it was held that the term “sex” shall also include “sexual identity”. Following this judgment, Supreme Court in Navtej Singh Johar case held that penalizing consensual sexual intercourse between members of LGBTQ community under section 377 of the Indian penal code 1860 is violative of article 15 as it was discriminating on the basis of their sexual orientation and preference.

3) Article 19(1)(a): Freedom of Speech and Expression

One of the most important rights provided by the framers of the constitution is the freedom to speak and express one’s opinion freely and openly. The Fundamental right of Freedom of Speech and Expression is provided under Article 19(1)(a) of Constitution of India. Freedom of speech and expression means the right to speak and to express one’s opinion by words of mouth, writing, printing, picture or any other manner⁸. But the right of freedom of speech and expression is not absolute, as it is subject to certain reasonable restrictions imposed in the interest of public order, decency or morality which is laid down under article 19(2).

Now the question arises is, when can a restriction be considered as reasonable? In Chintaman Rao vs. State of Madhya Pradesh⁹, it was held that for restrictions to satisfy the test of reasonableness it should not be arbitrary or excessive in nature and ultimately it should be in the interest of the public.

In S. Khushboo vs Kanniammal & Anr¹⁰, it was held that the restrictions imposed on fundamental rights should not go beyond the rational and logical limits. While analyzing the reasonable restriction placed on

⁸ Dr. Kumud Ranjan Singh, Indian Polity and Constitutional Issues, 87, Arihant Publication (India) Ltd 2011.

⁹ AIR 1951 SC 118

¹⁰ (2010) 5 SCC 600

freedom of speech and expression in the interest of public morality and decency, the unpopular views in the socio-cultural space should also be taken into consideration.

After considering the above facts the Supreme Court in Navtej Singh Johar case held that section 377 of Indian penal Code 1860 imposes unreasonable restriction on a person's freedom of speech and expression provided under article 19. Section 377 penalizes sexual acts between consenting adults, this section has been particularly misused against homosexuals and thereby discouraging them to display affection in public so far as it does not amount to indecency, this is nothing but unreasonable restriction on a person's right to express his or her feelings.

In Suresh kumar koushal case the respondent i.e...the Naz Foundation had challenged the validity of section 377 as it is violative of article 19. Despite this not much regard was given by the two judge bench of the Supreme Court.

4) Article 21: Right to life and liberty

Article 21 provides for the right to life and right to personal liberty and this right extends to all irrespective of their citizenship status. The article appears to be plain and simple but both the right to life and personal liberty have many facets. These facets have been uncovered over the period of time as a result of many interpretations of this article provided by the Supreme Court.

Right to life does not mean the mere right to exist but also the right to reputation, right to lead a dignified life, right to live in an unpolluted environment etc... Similarly the right to personal liberty also includes rights like right to privacy, right against illegal detention etc... thus it can be said that right to life and liberty means the fullest opportunity to develop one's personality and potentially to the highest level possible in the existing stage of our civilization¹¹. Thus it can be concluded that every individual has a right to be accepted and respected in the society and to be able to lead a dignified and prosperous life.

Section 377 penalizing consensual sexual intercourse between two adults was misused against homosexuals. The effect of such misuse was that members of LGBTQ community were forced to live in fear and to hide their identity thereby imposing unreasonable restrictions on their right to live with dignity and respect. It also infringes their right of privacy, as a person's sexual orientation and preference are matters of their personal life and thus are entitled to a certain degree of privacy.

The question of constitutional validity of section 377 was raised in Suresh Kumar Koushal case and Navtej Singh Johar case. In the Navtej Singh Johar case the Supreme Court after considering the above mentioned arguments held that the section 377 of Indian Penal code is indeed violative of rights provided under article 21 particularly right to live with dignity and right to privacy. Whereas when the same question was dealt in the earlier case by two judge bench of the Supreme Court, the bench instead of considering the validity of section 377 in the light of article 21, it criticized the decision of Delhi High Court of decriminalizing Section 377 in Naz foundation case.

STATUS OF LGBTQ RIGHTS IN DIFFERENT COUNTRIES

The Supreme Court by passing the judgment in Navtej Singh Johar case in the year 2018 started the journey towards the acceptance and upliftment of the members of LGBTQ community. There are certain countries that have already reached the destination and have appropriate laws to protect their interest and there are also those countries that are yet to recognize the need to provide such protection.

¹¹ Dr. Kumud Ranjan Singh, Indian Polity and Constitutional Issues, 91, Arihant Publication (India) Ltd 2011.

1) Canada

Canada is one of the few countries which has legally recognized the rights of members of LGBTQ community in several respects, be it in marriage, divorce, survival benefit etc... Canadian legal system has come a long way since the decision in 1967 where Everett Klippert was sent to jail for indefinite period of time as he was charged to be a “dangerous sex offender” when he had confessed to the police that he is gay and had sex with other men. It was then that several discussions had started regarding decriminalizing homosexuality and ultimately in 1969 the criminal code was amended and accordingly in 1971 Everett Klippert was released from jail. After that several cases had arisen before the courts in Canada regarding the rights of the members of the LGBTQ community and as per their decision existing laws have been amended and new laws have been introduced for the enforcement of the same.

2) United Arab Emirates (UAE)

UAE is one of the countries where discrimination on the basis of sexual preference or orientation is still prevalent. Article 80 of Dubai penal code penalizes homosexuality, and the punishment prescribed by the article is imprisonment for a term of 14 years. Earlier the punishment for homosexuality was death. Apart from Dubai penal code there are several other legislation like Criminal code of Dubai 1970, Federal penal code 1987, Sharia Law which punishes homosexuality with imprisonment and even with death.

3) United States of America (USA)

The legislations in the USA are not as Liberalized as Canada but at the same time they are not as orthodox as in UAE. LGBTQ rights in the USA are protected to a certain extent under existing laws. Among the several victories in favor of LGBTQ community, one such victory is the freedom to marry. But despite this, discrimination on the basis of sexual preference and orientation is still prevalent in certain areas. Several attempts have been made by introducing several bills to promote equality but time and again it is faced with opposition on the grounds of religion, morality etc... The attitude of people towards members of LGBTQ community has changed a lot but there is still a long way to go.

CONCLUSION:

In the history of evolution of the LGBTQ rights, Navjet Singh Johar case would serve as the first page which pushed the revolution in the right direction. Even though the cause of action of the case was to decide upon the constitutionality of section 377 of the Indian penal code 1860, along with that it provided legal recognition to the members of the LGBTQ community. The Supreme Court in its decision time and again highlighted that even though Lesbians, Gays, Bisexuals, Transgender and Queers (LGBTQ) are different from what we consider as normal but at the end they are human beings and thus entitled to all the fundamental rights prescribed in the constitution.

United we stand and divided we fall, whenever there is discrimination against any group of the society it hampers not only the social growth but to certain extent affects our economic growth as well. This can be evidenced from the history of every nation. Whatever is the kind of discrimination but the ultimate result is the same.

In this research paper we saw the difference of opinion of the Supreme Court judges on the same subject matter. After the analysis of the Suresh Koushal Kumar vs NAZ Foundation the point of view of the two judge bench of the Supreme Court was that since the section does not explicitly state that it is applicable only to a particular class of people it cannot be said to be discriminatory and thus unconstitutional. The fact that it is being misinterpreted and is used as a weapon to harass a particular class of society, alone is not enough to render it unconstitutional.

When a section is capable of multiple interpretations, efforts must be made to construct in such a manner that it does not cause any confusion. A statute must be interpreted having regard to the constitutional provisions and also human rights¹². In Navtej Singh Johar and others Vs Union of India, the five judge bench of the Supreme Court taking into account the misuse of the section which was depriving the members of the LGBTQ community of their fundamental right, held that the part of the section violating the fundamental rights of LGBTQ community should be abolished and section should be accordingly amended.

Doctrine of severability states that, where only a part of the law is inconsistent with or contravene the fundamental rights it is only that part which shall be void under Article 13 and not the whole of the law¹³. Applying this principle the Supreme Court provided for the abolishment of only that part of section 377 which penalized consensual sexual intercourse between consenting adults.

We live in a civilized society, the proper functioning of which is ensured by the laws in force in the society. Thus well drafted laws are necessary for the protection, welfare and development of the members of the society. This case has raised the need of written set of laws for protecting various rights of the Lesbians, Gays, Bisexuals, Transgender and Queers (LGBTQ) as they are also the members of the society. In future whenever any new law is proposed to be passed, which would be applicable to the general public at large this case along with other cases would always be referred to make sure that it is not violative of the rights of the members of LGBTQ community.

Every other country in the world at some point of time has come across the question of rights of LGBTQ community, some have formulated a solution while others are still in the process of discovering it. Canada as compared to other countries has well established laws concerning the rights of the members of the LGBTQ community. Similarly in the United States members of LGBTQ community have the right to get married but are still facing discrimination in several other matters. As compared to these two countries India is far behind but as it is rightfully said “a journey of thousand miles begins with a single step”, by decriminalizing the part of section 377 penalizing consensual sexual acts between adults, India has taken its first step and some day would definitely reach its destination.

¹² Dr. Avtar Singh and Dr. Harpreet Kaur, Introduction to Interpretation of Statutes, 47, LexisNexis India Pvt Ltd, 4th edition 2019.

¹³ Dr. Kumud Ranjan Singh, Indian Polity and Constitutional Issues, 81, Arihant Publication (India) Ltd 2011.

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