

**IN THE SUPREME COURT OF INDIA  
(CRIMINAL ORIGINAL JURISDICTION)  
I.A. NO. 100253 OF 2018  
IN  
WRIT PETITION (CRL) NO. 194 OF 2017**

**IN THE MATTER OF:**

JOSEPH SHINE

...PETITIONER

Versus

UNION OF INDIA

...RESPONDENTS

**AND IN THE MATTER OF:**

1. AWAAZ-E-NISWAAN
2. AKSHARA
3. SANDHYA GOKHALE
4. CHAYANIKA SHAH

...APPLICANTS

**SUMMARY OF ARGUMENTS ON BEHALF INTERVENER/ APPLICANTS  
IN I.A NO. 100253/2018**

1. Section 497 is a pre-constitutional statute, and despite the protection afforded to it under Article 372 of the Constitution of India, it is not immune from this Hon'ble Court examining its vires, especially in light of recent exposition of constitutional law, especially in the field of Right to Privacy, Right to Dignity, Right to Freedom of Choice and Right to Gender Equality.
2. **Section 497 is violative of Article 14 of the Constitution.**
  - 2.1 Article 14 permits reasonable classification i.e. (i) classification based on 'intelligible differentia' (ii) that intelligible differentia must have a rational nexus to the object sought to be achieved.
  - 2.2 With respect to Section 497, the 'classification' is based on the 'sex' of the parties to the marriage. Section 497 gets attracted only when a female sex ie. The woman/wife has voluntary sexual intercourse without the husband's consent, with a man other than her husband. This reduces a woman to 'chattel/property' and the essence of crime lay in a man having "invaded the property" of the husband. Section 497 serves to penalize the "encroachment"/"loss" suffered by the

husband. This is an anathema to the equality principle under Article 14.

2.3 Since remedy exists by way of a divorce under various laws, criminalization of Adultery via Section 497 is rendered redundant and otiose. Eg:-

- i. Section 13 Hindu Marriage Act, 1955
- ii. Section 32(d) Parsi Marriage and Divorce Act, 1936
- iii. Section 10 Divorce Act, 1869
- iv. Section 2 Dissolution of Muslim Marriage Act, 1939.
- v. Section 27 Special Marriages Act, 1954.

2.4 As per the Respondent/UOI, the ostensible object of Section 497 is to protect and preserve the sanctity of marriage. However, Section 497 does not penalize a husband if he has sexual intercourse with an unmarried woman, or a widow or even a Transgender. Though sanctity of marriage is broken in such a situation, the law (Section 497) does not recognize it. Moreover, if the husband "consents", then intercourse of a man with that husband's wife is not Adultery. This too is inimical to the sanctity of marriage.

2.5 Section 497 treats unequals as equals, treats married women equally with those married women who have separated from their husbands or widows, who form separate classes.

2.6 It denies women autonomy, self-determination and respect which a liberal democratic constitutional regime cannot countenance.

2.7 The object of Section 497 IPC is thus irrational and discriminatory. It does not serve any legitimate purpose. It is sexist, irrational, arbitrary and discriminatory.

2.8 If object is illogical, unfair and unjust; the classification will have to be held unreasonable: **PI see (1989) 2 SCC 145 - Deepak Sibal Vs. Punjab University.**

2.9 The Courts can strike down a law if the classification results in inequality or palpable arbitrariness: **PI see (2005) 1 SCC 394- E.V. Chinnaiah Vs. State of A.P & Ors. at Para 98.**

- 2.10 Section 497 lacks deterrence value. No empirical data has been collected by the 'National Crime Records Bureau' (**NCRB**). - NCRB does not even collect data / statistics of Section 497 prosecutions .
- 2.11 Though adultery may be considered as a moral wrong, it cannot be treated as a criminal offence **(2010) 5 SCC 600 - S. Khushboo Vs. Kanniammal & Anr. at para 46 [Pre-Marital Sex case]** – Morality and Criminality are not co-extensive. Article 14 too does not permit selective application of morality to men and women as postulated under Article 14.
- 2.12 Proportionality: - Law relating to restriction of Fundamental Right/ freedoms can be tested on the anvil of proportionality **(2001) 2 SCC 386- Om Kumar Vs. Union of India** at para 35. Section 497 would fail the proportionality test.
- 2.13 A statute, which may have been valid in line with societal conditions at the time of its enactment, may lose its validity with changes in time, domestically and internationally. **[Please see (2008) 3 SSC 1 at Para 26 "Anuj Garg Vs. Hotel Association of India"]**. At the time of the enactment of Section 497 in 1860, Hindu and Muslim men, both were permitted to have more than one wife. Therefore it was illogical to provide for offence of Adultery qua the husband.
- 2.14 Article 51A(e) inter-alia provides 'renounce practices derogatory to dignity to women'. This Hon'ble Court has repeatedly stressed on India's commitment to International Law **[Please see Para 148/Pg 422 of Puttaswamy]**. International Human Rights Laws have to read into Part III of the Constitution. This Hon'ble Court has for long rejected judicial insularity, especially in the context of Fundamental Rights.
- 2.15 Section 497 is incompatible with **CEDAW 1979** (Convention on Elimination of Discrimination against Women). Article 1 of CEDAW prohibits all forms of discrimination against women. Article 5 enjoins all States to appropriate measures to modify social and cultural

pattern of conduct of man with a view to achieve elimination of prejudices and inferiority of women.

2.16 *In Lawrence Vs. Texas 539 U.S. 558 (2003)* – the US Supreme Court (majority opinion of Justice Anthony M Kennedy held :-

*“5. The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices, common to a homosexual lifestyle. The Petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. The Right to Liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government”.*

The aforesaid ratio applies *pro tanto* to the instant case. A similar analogy can be drawn for striking down the vires of Section 497 IPC.

2.17 Any decision of this Hon'ble Court striking down Section 497 IPC cannot be interpreted as a stamp of approval of this Hon'ble Court to adultery. Any decision of this Hon'ble Court in favour of the Petitioners is not a value-loaded statement or an affirmation of the practice of adultery but merely adjudication that criminalization of Adultery, in the present form as contained in Section 497 IPC, is ultra vires the Constitution of India, in the present day and age.

3. **Section 497 violates Article 15(1) of the Constitution and is not saved by Article 15(3).**

3.1 It singles out the wife, excludes the husband.

- 3.2 It renders a woman's consent to sexual activity irrelevant.
- 3.3 It subsumes a woman's choice/privacy to that of the husband.
- 3.4 It restricts private autonomous choices of married woman whilst placing no such corresponding constraints on the married man.
- 3.5 It renders free will of a married woman nugatory which is manifestly discriminatory on the grounds of sex. Section 497 is not saved by Article 15(3) which states that nothing in Article 15 shall prevent the State from making special provision for women and children. Article 15(3) mandates affirmative measures that seek to strengthen women's equality and position and not denigrate/mutilate it. This Hon'ble Court in *Yusuf Aziz* had repelled the plea for prosecution of women under Section 497 on the ground of protection available in terms of law made under Article 15(3). However such "protection" is itself an example of an invidious discrimination and laws which strike at the Right of Privacy, Right to Freedom of Choice and Right to Dignity of a Married Woman cannot be considered as a "special provision" aimed at securing the interests of women.

**4. Section 497 violates Article 21 of the Constitution especially Right to Dignity which has been held as a facet of Article 21.**

- 4.1 In *K.S. Puttaswamy vs. Union of India (2017) 10 SCC 1*- this Hon'ble Court held that Privacy is an intrinsic element of Article 21 (Right to life and liberty) [See Para 96, 313, 320, 322, 406, 407, 411, 535 and 536].
- 4.2 Privacy also entails right to choose one's own sexual partner [Puttaswamy @ paras 119, 127, 146, 271, 298 and 323]. Right to choose one's partner- *Shafin Jahan Vs. Asokan- 2018 SCC Online SC 343*
- 4.3 Dignity is the core underlying principle that unites the fundamental rights of the Constitution [Puttaswamy at paras 119, 525, 609 and 644].

- 4.4 This Hon'ble Court has held Right to Personal Liberty includes Right to Autonomy. [Pl see **NALSA Vs. Union of India (2014) 5 SCC 438 at para 73 and Puttaswamy Paras 271, 297-299, 521** for autonomy of individuals on matters intimate to human life].
- 4.5 By allowing the husband and not the wife, to prosecute for Adultery, a woman would have to face indignity of prosecution of her sexual partner even when her consent is there. Her husband would be able to override her consent.
- 4.6 Section 497 makes matters of private life of a married woman public. It violates certain inviolable aspects of her privacy. Just because a (married) woman does not need to face prosecution under Section 497 does not mean that she will not suffer indignity. Such prosecutions will entail elaborate salacious discussion of explicit details of a woman' relationship, personal conversation interaction etc.
- 4.7 Section 497 has a chilling effect on the autonomy and social conduct of women.
- 4.8 Section 497 is blatantly sexist. It seeks to control a woman and her sexuality, making her solely liable for preserving "sanctity of marriage", while making husband immune from it. Section 497 propagates sex stereotyping based on male and female sex and behavior. The main partner of an "adulterous woman" is liable for prosecution because he has "seduced" the wife of another man. This perpetuates gender disparities and propagates stereotypes that a woman's virtue is determined by her sexual conduct. Section 497 fails the inquiry of review as per strict scrutiny test applied by this Hon'ble Court in Anuj Garg (supra).
- 4.9 Section 198 Cr. P.C. provides prosecution for offences against marriage. Section 198(2) :- No person, other than husband of the woman shall be deemed to be aggrieved by offence of Section 497 or

498 under IPC. In the absence of the husband, some other man taking care of woman on behalf of the husband may file complaint, with the leave of the Court.

4.10 Adultery under Section 125 Cr. P.C.:- For purposes of granting maintenance, adultery is one of the factors that needs to be considered under section 125(4) and 125(5) Cr. P.C. Under Section 125(4) no wife is entitled for maintenance from her husband if she is “living in adultery”. Under Section 125(5) the Magistrate can cancel an order of maintenance, *inter alia* on the grounds that the wife in whose favour order of maintenance is made, is living in adultery. These provisions are ex facie discriminatory and constitute an affront to the dignity of women which cannot be countenanced.

## 5. Gender Equality is a part of the “Basic Structure” of our Constitution.

5.1 As held by this Hon’ble Court in ***Puttaswamy [Para 291/Page 495]***, Fundamental Rights “are neither isolated silos nor watertight compartments”. They are interlinked and intertwined. Alongwith justice, liberty, equality, fraternity and dignity, this Hon’ble Court ought to declare ‘Gender Equality’ to form part of the “basis structure” doctrine.

5.2 This Hon’ble Court has already held in “**Jeeja Ghosh v Union of India**” – **2016 7 SCC 761**, that Equality is a part of Basic Structure of the Constitution. Gender Equality is an inextricable part of the omnibus doctrine of Equality. Without Gender Equality, the overall goal of Equality cannot be achieved.

5.3 A Constitution Bench of this Hon’ble Court in ‘**Madras Bar Assn. v. Union of India**’ - **(2014) 10 SCC 1**, at page 156, relied on the law laid down by **L CHANDRA KUMAR V UNION OF INDIA – (1997) 3 SCC 261** held:

*“95. Reference may also be made to the decision rendered by this Court in L. Chandra Kumar v. Union of India. The instant decision was rendered by a Constitution Bench of seven Judges. The question which arose for determination in the instant judgment was whether the power conferred upon Parliament and the State*

Legislatures vide Articles 323-A(2)(d) and 323-B(3)(d) totally excluding the jurisdiction of “all courts” except the Supreme Court, under Article 136 of the Constitution, violated the “basic structure” of the Constitution. ....On the issues which are relevant to the present controversy, this Court observed as under: (L. Chandra Kumar case, SCC pp. 300-302 & 310-11, paras 76-79 & 96-99)

“76. To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The doctrine of basic structure was evolved in *Kesavananda Bharati* case. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat and Grover, JJ., Hegde and Mukherjea, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In *Indira Gandhi* case<sup>64</sup>, Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country (supra at pp. 751-52). This approach was specifically adopted by Bhagwati, J. in *Minerva Mills* case (at pp. 671-72) and is not regarded as the definitive test in this field of constitutional law.

[Emphasis Supplied]

5.4 Therefore, it is respectfully prayed that Section 497 be struck down as ultra-vires and unconstitutional.

DRAWN & FILED BY:

[SUNIL FERNANDES]

Advocate for the Interveners

NEW DELHI

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