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SUPREME COURT ON SECTION 377 IPC: THE FOUNDATION OF AN INCLUSIVE WORK ENVIRONMENT FOR LGBT COMMUNITY IN INDIA?

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On 6 September 2018, a five-judge constitution bench of the Supreme Court of India pronounced its verdict on the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC) in the case of *Navtej Singh Johar & Ors. v Union of India* (Writ Petition (Criminal) No. 76 Of 2016) (Navtej Singh Case).

The Genesis

- "377. Unnatural offences: Whoever voluntarily has **carnal intercourse** 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 fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section"

- Section 377 of the IPC was challenged in *Naz Foundation v Government of NCT of Delhi and Others* ((2009) 111 DRJ 1), (Naz Foundation). The Delhi High Court read down provisions of section 377 of IPC that it deemed violative of Articles 14, 15 and 21 of the Constitution of India. The High Court stopped short of declaring Section 377 unconstitutional in its entirety. Non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors were still treated as criminal acts attracting prosecution. The Delhi High Court opined that social morality must succumb to the concept of constitutional morality.
- The Naz Foundation judgment was overturned by the Supreme Court of India in *Suresh Kumar Koushal & Anr v Naz Foundation & Others* ((2014) 1 SCC 1) (Suresh Kumar Koushal). A two-judge bench amongst other things stated that the LGBT community comprised only a "*minuscule fraction of the total population*" and that the mere fact that the powers under Section 377 were misused by the police were not a reflection of the constitutional validity of the Section. Further, it was held that Section 377 IPC applied irrespective of age and consent and that it did not criminalize a particular person or identity or orientation. Section 377 only identified certain acts which, when committed,

would constitute an offence. The Bench further observed that such a prohibition regulated sexual conduct regardless of gender identity and orientation.

The aftermath of Suresh Kumar Koushal

- The retrograde reversal by the Supreme Court of the Naz Foundation judgment created an uproar in civil society, liberal circles, large sections of the media (as well as international agencies) leading to a demand for the reconsideration of the two Judge Bench decision by a larger Supreme Court Bench.
- In 2017, a 9 judge bench of the Supreme Court in *K.S. Puttaswamy v Union of India* (2017) 10 SCC 641, unanimously ruled that the Constitution established a fundamental right to privacy creating a zone of personal autonomy within which the State cannot intrude. Some of the judges openly doubted the correctness of the Suresh Kumar Koushal judgment. The judges led by Justice Chandrachud who stated that 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” laid the jurisprudential foundation for the Navtej Singh Case.
- A writ petition challenging the Suresh Kumar Koushal judgment was referred to a larger constitution 5 judge bench which unanimously overruled Suresh Kumar Koushal judgement. The Supreme Court pronounced 4 separate judgments –
 - first by the Chief Justice of India writing for himself and A.M. Khanwilkar
 - second by Justice Rohinton Nariman
 - third by Justice Dhananjay Chandrachud
 - fourth by Justice Indu Malhotra

While the primary effect of the Navtej Singh Case was to overrule Suresh Kumar Koushal and uphold the reading down of Section 377 by the Delhi High Court in the Naz Foundation case there are several strong observations to be found in all the 4 judgments which amount to a firm rebuke to an overbearing state which seeks to regulate consensual activities between adult citizens.

Specific findings in Navtej Singh judgement:

- Violation of Article 14: Section 377 of IPC lacked a reasonable nexus with the object of protecting women and children, as the non-consensual acts which have been criminalized by virtue of Section 377 of IPC have already been designated as penal offences under Section 375 of IPC and under the POCSO Act. On the contrary, the presence of Section 377 of IPC in its present form has resulted in a distasteful and objectionable collateral effect whereby even ‘consensual acts’, which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owing to some inherent characteristics defined by their identity and individuality, have been wrongfully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution.

- Violation of Article 15(1): Section 377 of IPC imposed discrimination grounded on the basis of sexuality on an entire class of persons (LGBT). This was a clear contravention of Article 15(1) of the Constitution.
- Violation of Article 19: Public order, decency and morality as grounds to limit the fundamental right of expression including choice cannot be accepted as reasonable restrictions to uphold the validity of Section 377 of IPC. Section 377 of IPC takes within its fold private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality. Further, any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception. Section 377 of IPC amounted to an unreasonable restriction as it made carnal intercourse between consenting adults within their private space, a criminal offence. This was held to be manifestly overboard and vague but also had a chilling effect on an individual's freedom of choice. Therefore, the restriction imposed by Section 377 is unreasonable and does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner.
- Violation of Article 21: Section 377 abridges both human dignity as well as the newly articulated fundamental right to privacy. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep, the right of every individual including that of LGBT to express their choices in terms of sexual inclination without fear of prosecution or criminal prosecution. Section 377 IPC, in its present form, is violative of the right to dignity and the right to privacy under Article 21 of the Constitution.
- The expression "against the order of nature" has neither been defined in Section 377 IPC nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. The court held that sexual intercourse that was not performed for procreation could not per se be held to be "against the order of nature".
- The choice of whom to partner with, the ability to find fulfilment in sexual intimacy and the right to not be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation. The LGBT community in India are entitled to the equal protection of laws and are entitled to be treated in society as human beings without any stigma being attached to any of them.
- The Supreme Court has directed the Union of India to take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals, and initiate programs to reduce and finally eliminate the stigma associated with such persons. In the light of the observations contained in this judgment, the Union of India has also been directed to provide sensitization and awareness training to all government officials, especially police officials in respect of the plight of such persons.

COMMENT

The LGBT community has historically been vulnerable to violence, harassment, discrimination, exclusion, stigmatisation and prejudice both in society at large and at the workplace. The Navtej Singh Case is a great win for the LGBT community in that homosexual acts have now been decriminalised. Employers, especially MNCs will now have the option of adopting anti-discrimination policies in line with their global norms. However, it is worth noting the Navtej Singh amounts to only decriminalisation and does not recognize 'same sex relationships'.

As a same sex couple does not have legal recognition in the manner of a married heterosexual couple, the ability for *even willing* employers to provide provident fund, pension and gratuity and other benefits that cover spouses or partners of LGBT employees will have to be analysed on a case by case basis. Extending such benefits to a same sex partner nominated by an employee will also depend on third party service providers such as insurers, pension and provident fund authorities etc. This includes the treatment of expatriate same sex couples who have been duly married or entered into 'civil unions' abroad and conflict of law questions that may arise in the context of adoption, maintenance, succession and inheritance. It is only the legally recognised relatives (such as children, parents) of LGBT employees who will be eligible for benefits. The recognition of same sex relationship as valid and having the same footing as a heterosexual marriage is likely to require an appropriate legislation which is still some years away. It will also require a great societal transformation and a more liberal and progressive outlook by the ruling dispensations. Till such time this happens, the LGBT community will continue to be at a disadvantage despite the eloquent rhetoric and strong language used by the learned Justices. As the verdict does not validate or legalise same sex relationships, further guidance by the courts and positive action by the Government of India may be helpful in clarifying the obligations and duties of businesses towards their employees.

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