

BURNISHED LAW JOURNAL**JOSEPH SHINE V. UNION OF INDIA**
(DECriminalISATION OF ADULTERY)**2018 SC 1676****INTRODUCTION:-**

Adultery, in India, is defined under section 497 of the Indian Penal Code, 1860. The judgment has overruled all the previous judgments that upheld the criminalization of adultery. Section 497 came into purview several times and it was held valid by the Supreme Court until this case was filed wherein it clearly struck down the 158 year old Victorian Morality Law on Adultery. It was pronounced on 27th September 2018 in the case of Joseph Shine v. Union of India.¹ A non-resident of Kerala, Joseph Shine filed this petition, raising questions on the constitutionality of the section 497 IPC.

Section 497² states that-

“Whoever has sexual intercourse with a person who is and whom he knows and reason to believe to be the wife of another man, without the consent or connivance of that man. Such sexual intercourse does not amount to the offence of rape and is guilty of adultery.” Section 497 further states that a man found guilty of adultery shall be punishable with imprisonment of either description for a term, which may extend to the five years or with fine or both.

After this judgment, adultery is legal but not yet ethical from society's perspective. The marriage is based upon the confidence of partner in each other. The court denied from interfering in personal and moral lives of the peoples. Hence, adultery is now just a civil wrong for which the remedy is divorce.

¹2018 SC 1676

² Section 497, Indian Penal Code, 1860

PROCEDURAL BACKGROUND

There were several times before this wherein the question rose on the constitutional validity of section 497 of Indian Penal Code and section 198 of Criminal Procedure Code before the of Supreme Court of India.

This matter started from the case of *Yusuf Abdul Aziz v. State of Bombay* where the husband was accused of adultery via., Section 497 of Indian Penal Code. As soon as the complaint was filed, the husband approached Bombay High Court for checking the constitutional validity of the provisions under article 228 of the Constitution of India. The case was decided against the husband and Justice Chagla made an observation.He opined :-

“A challenge has been put before the court, which was only to the restriction on treating a wife as an abettor.”

This provision was considered to be the violation of Article 14 of the Indian Constitution, But the court held that this provision was been protected by Article 15(3) of the constitution of India which provides for special provisions for women and children.

The history shown of Section 497 clearly indicates that adultery law always favors husband, for him to reserves an ownership over the sexual relationship of his wife. Therefore, the section has never been in the favor of the women. This law provides that any person who is engaged in sexual relation with the wife of another man and the husband of that women gives his consent for the same then the same won't be charged for adultery. This clearly denotes that how women are considered as an object in the hands of their husbands.

In another leading case of *Sowmithri Vishnu vs. Union of India*³, certain challenges were made before the court on the basis of three grounds:-

1. Section 497 does not provide any right to wife to present women with whom her husband had committed adultery.
2. This section also does not include any right to the wife to prosecute her husband for the act of adultery.
3. This section does not cover cases where husband is been accused for the sexual relations with unmarried women.

³1985 Supp SCC 137.

Justice Chandrachud, in this case stated that going by literal interpretation of the definition, the offence of adultery could be committed only by men and not by women. He added that the case has failed to deal with the real problem i.e. constitutional Jurisprudence which have direction on validity of section 497.

In another case, *V Revathi v. Union of India*⁴ the court held that this section does not permit either the husband of the offending wife to prosecute her nor it wife of the offending husband for being disloyal to her. Therefore, neither of the spouses can bring a charge against their disloyal nor offending spouses. Hence, this section does not discriminate on the basis of sex.

FACTS OF THE CASE:

Joseph Shine, a non- resident keralite challenged the constitutionality of the section 497 of Indian Penal Code read with Section 198(2) of CRPC. The petitioners contended that Section 497 of IPC turns out to be an impediment in the attainment of gender justice. It was asserted that since as per section 497, adultery is an offence by a man against another man, the section fails to meet with the requirement of equal treatment before the law and no discrimination against any citizen on the basis of sex 'only'. The core reason behind this petition was to shield Indian men from being punished for extra marital relationships by vindictive women or their husbands. Petitioner's close friend in Kerala committed suicide after a women co-worker made malicious rape charge on him. Further section 497 is a dangerous occurrence of gender unfairness and male patriotism. The conventional framework, under which section 497 was drafted, is no longer applicable in modern society.

Issues Involved:

- (i) Whether section 497 of IPC and Section 198(2) of CrPC is constitutionally valid?
- (ii) Whether section 497 of IPC discriminates on grounds of sex 'only'?
- (iii) Whether Adultery should be treated as a criminal offence?
- (vi) Whether the provision contained in Section 497 of IPC and Section 198 of CrPC is fit as per today's constitutional morality?
- (v) Whether section 497 comes under the beneficial legislation ambit provided to women by Article 15(3) of the Constitution?

JUDGEMENT

⁴(1988) 2 SCC 72

In December 2017 Joseph Shine filed a petition challenging the validity of Section 497. The three judges bench transferred the case to five judges bench saying that the presumptions made are too old fashioned.

While hearing the matter previously the court held that the law seemed to be based on certain social presumptions, the court struck down the law and declares that the husband is not the master of the wife.

The judgment has the following things:-

1. Section 497 is arbitrary and is constitutionally invalid

Section 497 disposes women from her right, self-respect and privacy. It is considered as the violation of her right to life and personal liberty by accepting the notion of marriage that overthrows the true equality. It is very much important in a relationship the expectations that one has from the another. When both the spouses respect each other with equality and respect then only the respect has been established.

This section denies the substantive equality as it lay down that women are not able to give their free consent for the sexual acts and to be considered as a sexual property by their spouses. Hence, Section 497 violates of Article 14,15,21 of Constitution of India.

2. Adultery is no longer be a criminal offence

Adultery is to be considered as a personal offence whereas a crime is committed against the society as a whole. Adultery does not fit in the ambit of crime, as it would interfere between the other privacy aspects of marriage. Therefore, adultery can be considered as a civil wrong and is a valid ground for divorce.

3. Husband is not the master of his wife

The judgment in the case has the core focus on the issue that the wife is not a servant of the spouse. That means the husband is not the master of the wife. They have equal status in the society and should be given equal opportunity to put forward their ideas.

ANALYSIS AND CONCLUSION OF THE CASE:-

In the recent verdict the Supreme Court has declared section 497 of Indian penal code to be not in the category of criminal offences. The court has restricted the institution of marriage on which strong foundation of Indian society is based. Now Adultery is only considered as a civil wrong and would be used a ground of divorce. Every aspect has pros and cons. The reasons are not so much convincing and hence this cannot become *Lex Loci*.

In the *State of UP v. Deoman Upadhyaya*,⁵ the Supreme Court founded that:-

” In considering the constitutionality of a statute on the ground whether it has given equal treatment to all persons similarly circumstanced, it has to be remembered that the legislature has to deal with practical problems. The question is not to be judged by merely enumerating other theoretically possible situations to which the statute may have been, but has not been, applied.”

Adultery also affects the children and its associated family of each spouse. As the divorce is only option left, the families are left in lurch. The current judgment does not provide for any remedies for those children who are born out of such adulterous marriage.

It was well observed by Justice Frankfurter in *Trop vs Dulles*⁶, “All power is, in Madison’s phrase, of an encroaching nature. Judicial power is not immune from this human weakness. It must always be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint on it is self-restraint. The Court must observe fastidious regard for limitations on its own powers, and thus preclude the Court giving effect to its own notions of what is wise and politic.”

As observed by the Supreme Court in *Government of Andhra Pradesh v. P Laxmi Devi*⁷, “Adjudication must be done within the system of historically validated restraints and conscious minimization of the judges preferences”, and as held in *State of Bihar v. Kameshwar Singh*⁸. “The legislature is the best judge of what is good for the people by whose suffrage it has come into existence.”

The instant consequences will be that the suicide rates in marital relationships will increase now and then prosecution under Section 306 will take place.

CONCLUSION

Section 497 consisted loopholes in it despite being a provision that protects the institution of marriage. It would have been balanced if the amendment were made instead of striking down the section 198 of CrPC. It must be clearly understood that the removal of this provision does not necessarily mean that there are no legal consequences for engaging in adultery. The consequences of adultery need not be criminal, and a remedy may be found in civil law, where adultery already has a place and is a ground for divorce in personal laws.

⁵1960 AIR 1125

⁶(1958) 356 US 86

⁷2001 AIR para 54

⁸1952 1 SCR 889