CASE COMMENT: JOSEPH SHINE v. UNION OF INDIA

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*The decision in **Joseph Shine v. Union of India** received wide public acclaim along with a torrent of pointed and popular attack as the offence of adultery was struck down as a criminal offence. A myopic and categorical approach towards the gender biased provision of Section 497 of the Indian Penal Code ushered the Court in an unpromising direction. A standoff between particularity and predictability was evident as was the hesitation of the Court to take the road less travelled.*

*While the foundational premise of **Joseph Shine** was to uphold equality, liberty, dignity and privacy as supreme Constitutional values, the overarching effect of their application, simmers down the significance of the judgment. Though it explicitly placed heavy reliance on the need of recognising women to be their own persons, the inadvertent outlook of the Court comes across as crass and contradictory.*

In making a verdict on maintaining the sanctity of matrimonial homes, an overly sanitised perspective only created a murkier position. The precedent sounds the death knell for the failure of the promise to fulfil Constitutional commitments. The Comment goes on to discuss the scope and interpretational principles of this case.

Adultery is a legal quandary which contains elements of biblical cadence in it. The provision criminalises sexual intercourse with a married woman and exclusively punishes only the man

for such an act. It enfolds within itself a mirage of sanctuary, solely for women, from criminal prosecution. To remove the ripples of illusive protection, the constitutionality of the same was challenged.

Into this gulf came ***Joseph Shine v. Union of India***, wherein the Hon'ble Supreme Court of India laid the judicial debate to rest by striking down Section 497 of the Indian Penal Code (hereinafter referred to as the "**IPC**") along with Section 198(2) of the Code of Criminal Procedure (hereinafter referred to as the "**CrPC**"). It teed up like no other case the questions of Constitutional interpretation in a doctrinal abyss.

Joseph Shine required the Court to consider an ageing Section 497 of the IPC and Section 198(2) of the CrPC. The case was viewed as a potential catalyst in the jurisprudence of substantive equality. Four critical opinions were wielded by the 5 (five) Judge Constitutional Bench. A collection of dissimilar approaches; they still converged on the same locus which bore homogeneity of thought, intention and reasoning.

The decision of striking down the impugned provisions derived gravitational momentum from a conjoint reading of Articles 14, 15 and 21 of the Constitution. Adjoining the same and giving impetus to the unanimous decision were the principles of non-discrimination and individual autonomy.

In the first vision, as rendered by *Justice Dipak Mishra*, for himself and *Justice A.M. Khanwilkar*, equality endorses a progressive society which lacks social dominance of one sex over the other. It rejects selective protection to women by coming down heavily on account of them being criminally exempted from prosecution as abettors. On a closer reading, it implies that the consent or connivance extended by the husband, would validate sexual intercourse of another man with his wife. The act of a married man engaging in sexual intercourse with a widow, unmarried or divorced woman, does not constitute adultery under Section 497. Askew with contradictions and incongruities, the clandestinely cloaked Section 497 fails even on its purported purpose of punishing the person who puts the matrimonial home at stake. Section 198(2) of the CrPC treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 of the IPC and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It fails to recognise the ethos of Constitutional equality as the impugned provisions

deem the wife to be a subservient chattel of her husband. Barring all earlier discussions on sexual agency and individualistic autonomy, the Court found that the whole scenario is a subset of the private realm and hence, to attach criminality to the same would be a blatant transgression on part of the State. This view, thus, warranted the matter to be at the zenith of personal family life and hence, invalidated Section 497 of the IPC and Section 198(2) of the CrPC as unconstitutional.

In the second version, as penned by *Justice Rohinton Fali Nariman*, unbroken and undisputed history and religious texts testify as to adultery being a sin and thus, punishable. He pointed out that Section 497 of the IPC was bad for want of constitutionality as it is a patent instance of male chauvinism and insensitive perversion of equality. The law was not conducive to the modern society and in the light of such revelation, it was unreasonable. Further, it was opined that the impugned legislation was not an instance of protective discrimination as it was drafted by a foreign legislature, which contravenes the mandate of Article 15(3) of the Constitution. It was, thus, declared that Section 497 of the IPC and Section 198(2) of the CrPC are violative of Articles 14, 15(1), and 21 of the Constitution of India and hence, invalid.

The third view, as envisaged by *Justice Dr. Dhananjaya Y. Chandrachud*, sets forth an extensive chronicle of social transformation. Heavily censuring the sexist notion of treating men as the seducers, it was borne that, on marriage, a woman does not contract away her sexual agency to her husband. Legislative provisions which further the cause to the contrary only root such perceptions deeper in the society. *Justice Chandrachud* proceeded to flesh out the intricately woven aspect of privacy invasion from the intimate relations of man and wife. By providing paternalistic protection to women while in actuality, running against them, Section 497 of the IPC failed Article 21. He noticed the various patent incompatibilities and held that Section 497 is unconstitutional as it violates Articles 14, 15 and 21 of the Constitution, is manifestly arbitrary and antithetical to the constitutional guarantees of liberty, dignity and equality.

In a sagacious account written by *Justice Indu Malhotra*, the veil of presumption of constitutionality is lifted from Section 497 in view of it being a pre-constitutional law. It was observed that Section 497 was replete with various anomalies which on their own prerogative rendered it as a manifestly arbitrary piece of legislation. Further, the qualifying text of the

impugned provision demonstrated a blatant lack of reasonable classification. Such classification does not hold ground and thus, fails when tested on the anvil of Article 14. The misplaced conjecture about Article 15(3) saving Section 497 was disintegrated. In her learned opinion, Article 15(3) was a devise to gain access to better socio-economic opportunities. It could not be used as a garb to escape penal consequences. Criminal sanction could not be appended to it as adultery was not a wrong against the public.

The outcome of ***Joseph Shine*** is best explained as representing a half-hearted triumph of constitutional morality over social morality. The articulation of various robust visions of libertarianism set forth in depth the countervailing egalitarian view. The 4 (four) opinions are merely lip service for what is attempted to be a bizarrely progressive verdict.

One response to the questions on constitutionality in the light of the modern society is text book formalism. An alternative best response to the same is to formulate clear legal doctrines which foster rule of law in its letter and spirit. The former is safe and plays by the rules in the book but the latter breaks rank and gives terrain to coherence and conducive functionality. In destabilising the settled legal position, the Court subverted the real issue and did not move towards an active departure. The decision decries the imposition of canons repeatedly used; ones that are hailed as popular and successful. The diminution of the same comes across in the lacklustre of dynamism displayed by the Court.

The decision was wrong to adopt an aggressive and formalistic approach in the present instance. Section 497 of the IPC could viably be read down to make it gender neutral so that both men and women could be punished for adultery. The act of adultery is hypothetically capable of being committed by both the man and woman, however, only the man is liable for criminal offence. Though criminal law proceeds on gender neutrality, this provision is an aberration to the same. The Court could have paved the way for a more certain, formulaic and closed ended outcome. By perusing this model against the backdrop of the present instance, the Court would have conclusively determined on the real issue of equality rather than sidestepping to determine on ancillary matters which would countervail the essence of the decision. To strike it down as a criminal offence altogether while endangering the sanctity of marriages should have been a last resort; one to be used only sparingly. All visions, however, eclipse this most fundamental one.