

SMT. SOWMITHRI VISHNU

v.

UNION OF INDIA & ANR.

May 27, 1985

[Y.V. CHANDRACHUD, C.J., R.S. PATHAK AND AMARENDRA
NATH SEN, JJ.]

Indian Penal Code, s. 497—Constitutional validity of.

During the pendency of a divorce petition against the petitioner/wife on the grounds of desertion and adultery, the husband also filed a complaint against one Dharma Ebenezer u/s. 497 of the Penal Code charging him with having committed adultery with the petitioner. Thereafter the petitioner filed this writ petition for quashing the complaint on the grounds (1) that s. 497 of the Penal Code is violative of Art. 14 of the Constitution because, by making an irrational classification between men and women, it unjustifiably denies to women the right which is given to men. This argument rests on the following three grounds - (i) Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery; (ii) Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and, (iii) Section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free licence under the law to have extramarital relationship with unmarried women; and (2) That the right to life includes the right to reputation and therefore if the outcome of a trial is likely to affect the reputation of a person adversely, he or she ought to be entitled to appear and to be heard in that trial and since s. 497 does not contain a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is bad as violating Art. 21 of the Constitution.

Dismissing the writ petition,

HELD: 1 (i) The law, as it is, does not offend Art. 14 or 15 of the Constitution. The offence of adultery by its very definition, can be committed by a man and not by a woman; The argument of the petitioner really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Where such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. Such arguments go to the policy of the law, not to its constitutionality, unless while implementing the policy, any provision of the Constitution is infringed. Therefore, it cannot be accepted that in defining the offence of

A adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. However, it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone. [745 E-F; G-H; 746A]

B 1 (ii) Section 497 does not envisage the prosecution of the wife by the husband for 'adultery'. The offence of adultery as defined in that section can only be committed by a man, not by a woman. Indeed, the section provides expressly that the wife shall not be punishable even as an abettor. No grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in s. 497 is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law.

[746 D-G]

D 1 (iii) Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or, perhaps, invites a civil action by the wife for separation. The legislature is entitled to deal with the evil where it is felt and seen most; A man seducing the wife of another. [746H; 747A]

E (2) It is correct to say that s.497 does not contain a provision for hearing the married woman with whom the accused is alleged to have committed adultery. But, that does not justify the proposition that she is not entitled to be heard at the trial. There is no doubt that if the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. There is nothing, either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected directly and immediately, by the decision of the court. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in s 497 cannot render that section unconstitutional as violating Art. 21. [748 A-D:]

G *Francis Coralie v. Union Territory* AIR 1981 SC 736 & *Board of Trustees, Port of Bombay v. Nadkarni*, AIR 1983 SC 109 referred to.

Yusuf Abdul Aziz v. The State of Bombay [1954] SCR 930 followed.

H (3) In the instant case, there was general agreement that since the petitioner's husband has already obtained divorce against her on the ground of desertion, no useful purpose will be served by inquiring into the allegation whether she had adulterous relationship with Dharma Ebenezer, against

whom the husband has lodged a complaint u/s. 497 of the Penal Code- Accordingly, the Court quashed that complaint and directed that no further proceedings will be taken therein. [74 C]

ORIGINAL JURISDICTION : Writ Petition No. 845 of 1980.

(Under Article 32 of the Constitution of India)

Mrs. Nalini Chidambaram and *Miss Seita Va'dyalingam* for the Petitioner.

B. Datta and *R.N. Poddar* for the Respondent No. 1.

Miss Lily Thomas for the Respondent No. 2.

The Judgment of the Court was delivered by.

CHANDRACHUD, C.J. By this petition under Article 32 of the Constitution, the petitioner challenges the validity of section 497 of the Penal Code which defines the offence of 'adultery' and prescribes punishment for it. A few facts, interesting but unfortunate, leading to this petition are these :

The petitioner filed a petition for divorce against her husband on the ground of desertion. The trial court dismissed that petition, holding that the petitioner herself had deserted the husband and not the other way about. Thereafter, the husband filed a petition for divorce against the petitioner on two grounds : firstly, that she had deserted him and secondly, that she was living in adultery with a person called Dharma Ebenezer. The petitioner conceded in that petition that in view of the finding recorded in the earlier proceeding that she had deserted her husband, a decree for divorce may be passed against her on the ground of desertion. So far so good. But, the petitioner contended further that the Court should not adjudicate upon the question of adultery since it was unnecessary to do so. That plea was opposed by the husband. He contended that he was entitled to obtain a decree of divorce against the petitioner not only on the ground of desertion but also on the ground of adultery and that, there was no reason why he should be denied an opportunity to show that the petitioner was living in adultery. The husband's contention was accepted by the trial court but, in a revision application filed by the petitioner, the High Court accepted her plea and held that since, the finding recorded in the earlier petition was binding on the parties, a decree for divorce had to be passed in favour of the

A husband on the ground of desertion and that, it was unnecessary to inquire into the question of adultery. We are informed at the Bar that, pursuant to the High Court's view, a decree for divorce has already been passed in favour of the husband on the ground that the petitioner had deserted him.

B While his petition for divorce was pending against the petitioner, the husband filed a complaint against Dharma Ebenezer under section 497 of the Penal Code charging him with having committed adultery with the petitioner. This writ petition has been filed by the petitioner for quashing that complaint on the ground that the very provision which creates the offence of 'adultery',
C namely, section 497 of the Penal Code, is unconstitutional.

Section 497 is one of the six sections in Chapter XX of the Penal Code, which is entitled 'Of Offences Relating to Marriage'. Section 497 reads thus :

D "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery,
E and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

F By reason of section 198(1) of the Code of Criminal Procedure, 1973, no Court can take cognizance of an offence punishable under Chapter XX of the Penal Code except upon a complaint made by some person aggrieved by the offence. Sub-section (2) of section 198 provides that, for the purposes of sub-section (1), "no person other than the husband of the woman shall be deemed to be
G aggrieved by any offence punishable under section 497 or section 498 of the Penal Code". Section 498 prescribes punishment for enticing or taking away or detaining a married woman with criminal intent.

H Mrs. Nalini Chidambaram, who appears on behalf of the petitioner, contends that Section 497 of the Penal Code is violative of Article 14 of the Constitution because, by making an irrational classification between man and women, it unjustifiably denies to women the right which is given to men. This argument rests on the

following three grounds : (1) Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery; (2) Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and, (3) Section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free licence under the law to have extra-marital relationship with unmarried women. The learned counsel complains that Section 497 is flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism'. It is urged that the section may, at first blush, appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the section is a kind of 'Romantic Paternalism', which stems from the assumption that women, like chattels, are the property of men.

These contentions have a strong emotive appeal but they have no valid legal basis to rest upon. Taking the first of these three grounds, the offence of adultery, by its very definition, can be committed by a man and not by a woman : "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man ... is guilty of the offence of adultery." The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Were such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. For example, an argument could be advanced as to why the offence of robbery should be punishable with imprisonment for ten years under section 392 of the penal Code but the offence of adultery should be punishable with a sentence of five years only : 'Breaking a matrimonial home is not less serious a crime than breaking open a house'. Such arguments go to the policy of the law, not to its constitutionality, unless, while implementing the policy, any provision of the Constitution is infringed. We cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the legislature

A to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone. The Law Commission of India in its 42nd Report, 1971, recommended the retention of Section 497 in its present form with the modification that, even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The suggested modification was not accepted by the legislature. Mrs. Anna Chandi, who was in the minority, voted for the deletion of Section 497 on the ground that "it is the right time to consider the question whether the offence of adultery as envisaged in Section 497 is in tune with our present day notions of woman's status in marriage". The report of the Law Commission shows that there can be two opinions on the desirability of retaining a provision like the one contained in Section 497 on the statute book. But, we cannot strike down that section on the ground that it is desirable to delete it.

D Insofar as the second of the three grounds is concerned, section 497 does not envisage the prosecution of the wife by the husband for 'adultery'. The offence of adultery as defined in that section can only be committed by a man, not by a woman. Indeed, the section provides expressly that the wife shall not be punishable even as an abettor. No grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, we revert to the same point: Who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute.

H The self-same answer holds good in the case of the third ground also. Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or, perhaps, invites a civil action by the wife for separation. The legislature is entitled to deal

with the evil where it is felt and seen most : A man seducing the wife of another. Mrs. Chidambaram says that women, both married and unmarried, have changed their life style over the years and there are cases where they have wrecked the peace and happiness of other matrimonial homes. We hope this is not too right but, an underinclusive definition is not necessarily discriminatory. The alleged transformation in feminine attitudes, for good or bad may justly engage the attention of the law-makers when the reform of penal law is undertaken. They may enlarge the definition of adultery to keep pace with the moving times. But, until then, the law must remain as it is. The law, it is, does not offend either Article 14 or Article 15 of the Constitution. Incidentally, the demand of the petitioner that sexual relationship of a husband with an unmarried women should also be comprehended with in the definition of 'adultery' is a crusade by a woman against a woman. If the paramour of a married woman can be guilty of adultery, why can an unmarried girl who has sexual relations with a married man not be guilty of adultery ? That is the grievance of the petitioner.

Mrs Chidambaram has challenged the validity of section 497 on yet another ground, namely, that it violates Article 21 of the Constitution. Relying upon the decisions of this Court in *Francis Coralie v. Union Territory*⁽¹⁾ and *Board of Trustees, Fort of Bombay v. Nadkarni*⁽²⁾, counsel argues that the right to life includes the right to reputation and, therefore, if the outcome of a trial is likely to affect the reputation of a person adversely, he or she ought to be entitled to appear and be heard in that trial. A law which does not confer upon such a person the right of being heard is violative of Article 21. This argument, for its better appreciation, may be put in a concrete shape by taking a hypothetical example : The husband 'A' wants to get rid of his wife 'B'. He colludes with his friend 'C' and prosecutes him for committing adultery with 'B'. C's trial for adultery is mere pretence because, he and A are *ad idem* that he should be convicted for committing adultery with B. The argument of the counsel is that the real victim of such a prosecution is the wife B because, it is her reputation which is most importantly involved and assailed. Since section 497 does not contain a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is said to be bad.

(1) AIR 1981 SC 746

(2) AIR 1983 SC 109

A Counsel is right that section 497 does not contain a provision for hearing the married woman with whom the accused is alleged to have committed adultery. But, that does not justify the proposition that she is not entitled to be heard at the trial. We have no doubt that if the wife makes an application in the trial Court that she should be heard before a finding is recorded on the question of
B adultery, the application would receive due consideration from the Court. There is nothing, either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected, directly and immediately, by the decision of the Court. In fact, instances are not unknown in criminal law where, though the prosecution is in the charge
C of the Public Prosecutor, the private complainant is given permission to cversee the proceedings. One step more, and the wife could be allowed a hearing before an adverse finding is recorded that, as alleged by her husband, the accused had committed adultery with her. The right of hearing is a concomitant of the principles of
D natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in section 497 cannot render that section unconstitutional as violating Article 21.

E Instead of embarking upon this disussion, we could have as well dismissed the writ petition by relying upon the decision of a Constitution Bench of this Court in *Yusuf Abdul Aziz v. The State of Bombay*,⁽¹⁾ which held that section 497 of the Penal Code does not offend Articles 14 and 15 of the Constitution. However, the petitioner's counsel had many more arguments to advance and since,
F more than 30 years have gone by since the decision in *Yusuf Abdul Aziz* was given, we thought that we might examine the position afresh, particularly in the light of the alleged social transformation in the behavioural pattern of women in matters of sex.

G Though it is true that the erring spouses have no remedy against each other within the confines of section 497 of the Penal Code, that is to say, they cannot prosecute each other for adultery, each one has a remedy against the other under the civil law, for divorce on the ground of adultery. 'Adulter' under the civil law has
H a wider connotation than under the Penal Code. If we were to accept the argument of the petitioner, Section 497 will be obliterated

(1) [1954] SCR 930.

from the statute book and adulterous relations will have a more free play than now. For then, it will be impossible to convict anyone of adultery at all. It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationship is punishable by law. Stability of marriages is not an ideal to be scorned.

There was general agreement before us that since the petitioner's husband has already obtained divorce against her on the ground of desertion, no useful purpose will be served by inquiring into the allegation whether she had adulterous relationship with Dharma Ebenezer, against whom the husband has lodged a complaint under section 497 of the Penal Code. Accordingly, we quash that complaint and direct that no further proceedings will be taken therein.

In the result, the writ petition is dismissed. There will be no order as to costs.

M.L.A.

Petition dismissed.