

Case Comment

SUSHMA & OTHERS V. THE
COMMISSIONER OF POLICE
W.P. NO.7284 OF 2021

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Abstract—The invisible and neglected social crisis of sexual minorities i.e. LGBTQIA+ needs proper redressal. Further, we need to acknowledge the LGBT movement inside and outside judicial forums battling for their human and constitutional rights. This social crisis results in contradiction between conservative societal ideological and modern ideas and human rights. This is true in case of LGBT people who are marginalized by the larger section of people. The long waited jurisprudential development is happening and breaking all legislative and social barriers which oppressed and suppressed our LGBT brethren. The main jurisprudence of the Indian Courts includes, inter alia Naz Foundation, Suresh Kumar Koushal, Navtej Singh Johar, Arun Kumar and Sushma cases. This case comment tries to critically analysis the latest case of Sushma and Others v. The Commissioner of Police to find out the addition of rights to the LGBT jurisprudence of the Indian Courts. This case is concerned with Lesbian and their right to marriage and to find a family.

Keywords: LGBT, Sexual variance, Natural feeling, Oppression and Human Right.

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*“There are many branches on the tree of life. There is no one way to be, and there is room for everyone to be who they are”.*¹

This Madras High Court case pronounced by Justice Anand Venkatesh is one of the few Indian jurisprudence deals with the rights of the LGBTQIA+ people. This judgment follows the path laid down by the *Navtej Singh Johar v. Union of India*.² The autonomy of human body and privacy jurisprudence created by *Joseph Shine v. Union of India* and *K. S. Puttaswamy v. Union of India* declared it as the fundamental rights respectively.³ It is a sample case of how society is reacting to same sex orientation and the need to show more sensitivity and empathy towards such couples is in the interest of humanity. To note, heterosexuality is not the only natural sexual orientation. Queer is in existence from time immemorial and it is proved by Hindu Scriptures, mythologies and temple iconographies. Queer people have everything to lose than the so called ‘normal persons’. The global jurisprudence and queer movements created a conducive environment in main streaming the sexual minorities. Sometimes, to learn complex and difficult things, we need to unlearn the learnt lessons in life.

The petitioners are major lesbian couples filed writ of mandamus to direct their parents not to interfere in their life; to safeguard them from police harassment and to give police protection. The Court duly acknowledged the crucial issue of de-stigmatization of LGBTQIA+ couple relationships. So, the Court consciously took different approach in disposing this case and the proceedings happened in-camera in the Judge’s Chamber. They declared that their friendship blossomed into love. In their statement, the Court saw clarity in their mutual relationship. They wanted to be partners to each other for life. The Court held talks with the petitioners and their parents to know their mental status before delivering the judgment.

The petitioners fled their hometown Madurai and are currently residing at Chennai supported by an NGO called International Foundation for Crime Prevention and Victim Care or simply PCVC. The Court facilitated one-to-one talk with the petitioners and their parents. The Judge is of the view that this case is like sailing in uncharted waters. Further, the Judge declared that he needed training and report from Counseling Psychologist to understand the whole spectrum of LGBT rights issue and to solve this case. The Judge was critical of himself not to deliver scholarly judgment but a speaking order of his true and honest feeling about this issue. This shows his great humility, empathy, and compassionate understanding of the issue at hand. He tried to break

¹ *S. Sushma v. Commr. of Police*, 2021 SCC OnLine Mad 2096.

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. It is held in that case that homosexuality is neither unnatural nor it is a mental disorder or a disease.

³ See generally, *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 and *Joseph Shine v. Union of India*, (2019) 3 SCC 39 : 2018 SCC OnLine SC 1676.

his own pre-conceived notion in this process of self-evolution of thought. Also, he tries his best to understand the petitioners' and parent's feelings. The parents requested to allow regular interaction with their daughters, and it was guaranteed.

The Court appointed Specialist in Counseling Psychologist Ms. Vidya Dinakaran to give counseling to the parties and to submit her report in a sealed cover. This report dealt with the falsified notion of sex, gender, sexual orientation and how we need to understand these terminologies. Also, it dealt with the mental status of the petitioners and their parents. The specialist pointed out the high level of mental trauma of the petitioners and they wish to be in contact with their respective parents. The petitioners perfectly understood their relationship and its consequences. To note, the parents are more concerned on the stigma and security to their family, and they viewed that a life of celibacy is more dignified than same-sex relationship. They are also confused regarding lineage, adoption and other normal consequences which ensue from heterosexual relationship. It is the notional understanding that relationship which cannot procreate is invalid. Also, it is seen as shameful, abnormal and abominable. This lead to heteronormative understanding that opposite sexual relationship is normal and dehumanizes homosexuality. The understanding of genitals do not have major role to the concept of soulful companionship. We need to understand 'sex' 'sexual orientation' and 'gender identity' are independent from each other.

It is noted by the specialist that the parents feel great amount of shame, fear and social disdain for their daughter's homosexual relationship. They were completely exhausted with the litigation process and also equally disheartened with their daughter's choice of life partners.⁴ They decided to let go their daughters not out of acceptance but of sheer hopelessness of getting their daughters back. It is paramount to note, one of the parents told her daughter's happiness is fundamental to their life but they concern for their daughter's safety.

The counsel requested the Court to order guidelines to deal with similar cases to ensure same sex couple's dignity and their safety. In this direction, the Judge requested some time to understand the whole issue at hand, it will enable him to pronounce soulful and rational order and to avoid superficial understanding on a cognitive level. The Judge noted the organic flow of proceeding due to transparent and honest sharing of thoughts and beliefs by the parties to the case. The petitioners expressed their concern of lack of homosexual narratives and so mere understanding of the issue poses difficulty in justice delivery. Also, the judge may also lack exposure and personal experience towards the LGBT community in general and Lesbian relationship in particular. There is a misconception about homosexuality from sexual connotation. It confines

⁴ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368 : 2018 SCC OnLine SC 343.

relationships only to sex and not compassionate point of view. The judge understands the existing prejudice about the homosexual couple's relationship only to indulge in sex. It is more of companionship which is inherent to human beings as well as all creatures. This is a universal feeling.

We need to acknowledge and address the binary problem of sex, gender and sexuality. The problem arises from the movement when child is assigned a male or female status based on their private part. Thus, it left no room for people who born with organs that do not fit with the so called 'normal bodies'. The term 'intersex' refers to external sexual anatomy, internal organs and chromosomes. Also, the Court slightly touches upon the innate qualities of male and female.

The Court addressed the issue of pathologization of sexuality outside heterosexuality. The diagnostic guidelines and surgical intervention are dehumanizing the community for as such they are. In many instances, gender reassignment surgeries are forced on them. Sometimes, these surgeries are taken by such persons due to societal pressure and so there is no free consent. To note once again, homosexuality is not a condition of organs or brain or psychological anomaly. It is natural and it should be acknowledged and accepted by the whole society as such. The ill-conceived notion of LGBT people by the society at large is highly detrimental to their physical and mental health which makes mainstreaming much difficult in the years to come. We need general acceptance of the society to de-conceive as well as re-conceive the prevailing notion on homosexuality. The study conducted by the Mental Health and Neuro sciences, Bangalore said 50% of transgender persons have attempted suicide before turning 20 years of age. This will drastically reduce suicide rate and self-harm by the LGBT people.

The Court observed the backward notion of penile penetration as a legitimate form of sexual life. The Respondents raised the significance of sex to derived emotional intimacy and satisfaction. The Court tries to understand sex as a factor in matrimonial harmony in same-sex marriage. The homosexuality is seen as perverted relationship. The Court debated, discussed, and evolved itself from the historical evidences to modern day scientific analysis on the issue of LGBT rights. It noted in this judgment the four purusharthas or principles guiding a human life. They are as follows (1) Dharma, (2) Arth, (3) Kama and (4) Moksha. Here Kama regulates the sexual life. For any healthy relationship love and integrity are the important things.

The Judge noted that a judge is a public servant who serves for the well-being of the society. If he cannot achieve this, then such person is unfit for this honorable post. This jurisprudence will be condemned by the conservatives in the society but the next generation who are more aware, sensitive, compassionate, empathetic and inclusive will ripe the benefits emanates from this critical and well-thought processed judgment.

We never ever understand the pain of LGBT people *inter alia* mockeries, ridicules, sexual violence and neglect of their own families. Their sexual identity is deep felt and visceral which cannot be changed by any external manipulation and surgical intervention. There are many treatments including aversion therapy, shock treatment including homosexual pornographic stimuli, chemical castration, electro convulsion therapy, religious and spiritual treatment. Sometimes, corrective rape of lesbian women and Trans masculine persons are carried out with the consent of their parents itself due to queer phobia among people. We need to understand they are one among our self. Once again, we need reaffirming the concept of 'Unity in Diversity' in terms of human relations in our slow evolving conservative Indian society.

As the voice of this oppressed community is getting louder and stronger and so we cannot turn deaf ears now, we must evolve to these changing times and needs of our fellow human beings. This case once again talks about inclusivity and justice for the LGBT community as a whole. The society must rapidly evolve its understanding of morality and certain notion of tradition that hinders societal growth towards social justice for the invisible, neglected, segregated people of our own. We should start generating awareness to our children that homosexual, gay, lesbians are not anathema. It is part of natural law i.e. principle of differences and variability of human behaviour.

Our myopic view of Section 377 of IPC needs to be liberalized and broadened. The Judge noted "nature does not enforce Victorian morality. Nature has always stood for diversity".⁵ Gender identity, gender expression, biological sex, sexual orientation operates independently from one another.⁶ The terminologies in our curriculum which discriminates and causes ill-conceived prejudice like Sodomy, lesbianism, oral sex as sexual offences and transvestism as a sexual perversion should not be omitted but need to be neutral in their meaning. The painful and cruel two finger test must be banned. The need for sensitization and criminalization of harassment of LGBT people are felt stronger ever than before.

The different between sex and sexual orientation was pointed out by NALSA Judgment.⁷

"Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant

⁵ *Ibid.*, p.42.

⁶ He noted the same sex behaviour in more than 450 species. Thus, sexual activities other than heterosexual is complete natural and labeling it as unnatural sex is unnatural and artificial human classification. The phenomenon observed in the parthenogenesis of the New Mexico Whiptail lizard species, a completely female only species which lays egg that hatches without fertilization by the male species. It is also part and parcel of nature.

⁷ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

people with heavy sexual orientation, and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual, etc. Gender identity is different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, Sterilization or harmony therapy, as a requirement for legal recognition of the gender identity".⁸

We need to keep in mind that all human rights are universal, interrelated, interdependent and indivisible.⁹ If religious belief and religious practices are part of religious freedom, then there is nothing wrong in interpreting sexual orientation is included in sex as laid down in article 15 (1). Sexual autonomy is an essential aspect of the right of privacy. It also includes right to dignified life and right to choose life partner.

As the Transgender Persons (Protection of Rights) Act, 2019 and Transgender Persons (Protection of Rights) Rules, 2020 are in right direction towards achieving social justice for our fellow LGBT brothers and sisters. We need more changes accordingly at the ground level. This writ petition is kept pending and issued continuing mandamus. The Court Ordered *inter alia* to maintain list of NGOs helping LGBT community; accommodation by the concerned ministry; awareness to eliminate prejudicial against LGBT people; separate prison from cis individuals to avoid sexual assault on them and change in school curriculum.

⁸ *Ibid.*

⁹ See generally, Yogyakarta Principles.