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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 17th December, 2019

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W.P.(C) 8745/2017

SANJJIIV KKUMAAR

..... Petitioner

Through: Petitioner in person

Ms. Sonia Mathur & Mr. Gautam Narayan, Sr.

Advs. (*Amicus Curiae*) with Ms. Noor Rampal &

Ms. Shivani Vij, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Mrs. Suparna Srivastava & Mr. Tushar
Mathur, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE REKHA PALLI

JUDGMENT

D.N. PATEL, Chief Justice (Oral)

1. This writ petition has been preferred with the following prayers:

“1. To issue writ in the nature of mandamus or any other appropriate writ, order or directions, to declare Gender Specific Sections of IPC 375 & IPC 376 null, void and unconstitutional as per Article 13(2) of Indian Constitution as in current form IPC 375 & 376 are ultra-vires Articles 21 and 14 of Constitution of India, as after Right to Privacy Ruling where consent and bodily integrity of each citizen is now fundamental rights as a part of the freedoms and are intrinsic part of right to life and personal liberty under Article 21 and female and male both have equality before law and equal

protection of law under Article 14 guaranteed by Part III of the Constitution.

2. *To issue writ in the nature of mandamus or any other appropriate writ, order or directions, using Doctrine of Pari Materia to replace the IPC 375 and IPC 375 with Gender Neutral IPC 375 and IPC 376 of The Criminal law(amendment) Ordinance 2013 dated 3rd February 2013, No 3 of 2013, published in The Gazette of India (Extraordinary), as gender neutral IPC 375 and IPC 376 was enacted on the same subject but at different time, were law of the land from 3rd February 2013 to 1st April 2013.*

3. *To issue writ in the nature of mandamus or any other appropriate writ, order or directions, to declare The Criminal law(Amendment) Act 2013 dated 2nd April 2013, No 13 of 2013, published in The Gazette of India (Extraordinary), null, void and unconstitutional as per Article 13(2) of Constitution of India, as Indian Parliament by applying the Act Retrospectively [Ex Post Facto] from 3rd February 2013 did something beyond power vested on it and violated human rights of citizens and denied the people gender neutral laws(IPC 375, 376, 376D, 354A, 354C, 354D) of ordinance along with other specifics of law of the land as per the ordinance which was effective from 3rd February 2013 to 1st April 2013, thereby making the Criminal Amendment Act dated 2nd April 2013 ultra vires Article 20(1), 14 and 21 of Constitution of India.*

4. *Allow the applicant to file further pleadings before this Hon'ble Court.*

5. *Pass such other and further orders as this Hon'ble Court may deem just and proper in the facts and circumstances of the case."*

2. We have heard the learned counsel for both the sides and considered the facts and circumstances of the case including those emerging from the counter affidavit dated 22nd October, 2018 filed by Union of India, para 5 whereof reads as under:

“5. That it is submitted that even prior to the introduction of a Criminal Law (Amendment) Act, 2013, Section 375 and 376 of the IPC were gender specific and it was decided by the Legislature to retain the same. Moreover, it was strong demand of various women group that the said Sections should remain gender specific. It is submitted that the Protection of Children from Sexual Offences Act (POCSO) covers all sexual offences against a “child”. As per Section 2(d) of POCSO, a “child” is defined as any person below the age of 18 years, meaning thereby that the Act protects both male and the female child against sexual offences. Further, Section 377 of the IPC provides as under:

“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.

Further, vide Judgment dated 6.9.2018 in the case of Navtej Singh Johar & Ors. Union of India [WP(Crl) No. 76 of 2016], the Hon'ble Supreme Court, with utmost clarity has held that any act of the description covered under Section 377 between two individuals without consent of any one of them would invite penal liability under Section 377 of the IPC. Therefore, the ambit of Section 377 as it exists today would cover all non-consensual unnatural sexual acts by any person. It is thus submitted that keeping in view the ambit of the POCSO Act which covers all forms of sexual offences against minors and Section 377 of the IPC, it was felt that the existing definition of rape under Section 375 should be left untouched as the said provision alongwith Section 377 and the provisions under the POCSO Act are adequate to cover all sexual offences.”

3. Further paragraphs 5 and 6 of the counter affidavit dated 12th June, 2019 filed by Union of India read as under:

“5. That I state that the Law Commission had submitted its 172nd Report titled "Review of Rape Laws" wherein, the Commission recommended various changes for widening the scope of the offence under Section 375 of the IPC to make it gender neutral. Under the said Report, the Law Commission recommended substitution of the existing Section 375 of IPC with the following:

375. Sexual Assault: Sexual assault means-

(a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with -

*i) any part of the body of another person
or*

ii) an object manipulated by another person except where such penetration is carried out for properhygienic or medical purposes;

(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;

(c) introducing any part of the penis of a person into the mouth of another person;

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions:

First- Against the other person's will.

Secondly- Without the other person's consent.

Thirdly- With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly- Where the other person is a female, with her consent, when the man knows that he is

not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly- With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly- With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault."

The Commission had suggested various other changes in other sections namely Section 376, 376A-376D in the nature of enhancement of punishment with a minimum punishment of not less than 5 years. The Commission had also recommended addition of an 'Explanation' governing Sections 376B-376D which defined "Sexual Intercourse" to mean any of the acts mentioned in clauses (a) to (e) in the proposed Section 375. The Commission had further recommended insertion of a new Section as 376E dealing with unlawful sexual contact, deletion of Section 377 and enhancement of punishment under Section 509.

6. That I state that on receipt of the above said Report of the Law Commission of India, the Respondent held wide ranging consultations with various State Governments, Ministries of the Central Government, the National Commission for Women and various non-governmental organizations

engaged in empowerment of women and other stakeholders on the proposed changes in the IPC as recommended by the Law Commission of India. Pursuant thereto, a High Power Committee was constituted under the Chairmanship of the Home Secretary along with Secretaries of other related Ministries/Departments to draft a Bill incorporating the changes suggested by the Law Commission of India. Accordingly, after wide ranging consultation, a draft Criminal Law (Amendment) Bill, 2012 was finalized.”

4. In view of the aforesaid submissions set out in the counter affidavit, it appears that respondent – Union of India has already considered the Law Commission’s report and after due deliberations and discussions, a decision has been taken not to amend Sections 375 and 376 of the IPC at this stage.

5. Moreover, it has been submitted by the counsel for both the sides that in Writ Petition (Civil) No.1262/2018 before the Hon’ble Supreme Court, similar issue was involved and the writ petition was disposed of by the Hon’ble Supreme Court *vide* its order dated 12th November, 2018 which reads as under:

“Heard learned counsel for the petitioner and perused the relevant material.

We are not inclined to interfere at this stage as the issues raised pertain to legislations to be made by the Parliament, for which adequate recommendations have already been made by the Law Commission.

The petitioner may seek such other remedy, as may be available in law.

The writ petition is accordingly disposed of.”

6. In the light of the view taken by the Union of India after receiving the report of the Law Commission and also after due deliberations, a policy decision has been taken by the Union of India as stated hereinabove, we see

no reason to entertain this writ, hence, this writ petition is hereby dismissed at this stage.

CHIEF JUSTICE

REKHA PALLI, J

DECEMBER 17, 2019
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