

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRWP No.5669 of 2020 (O&M)

DATE OF DECISION: 07.08.2020

Manjinder Kaur and another

.....Petitioners

versus

State of Punjab and others

.....Respondents

CORAM:- HON'BLE MRS. JUSTICE ALKA SARIN

Present: Mr. Rajesh Gupta, Advocate for the petitioners

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ALKA SARIN, J.:

1. Heard through video conferencing.
2. The present petition has been filed under Articles 226/227 of the Constitution of India seeking a direction to respondent Nos.1 to 3 to protect the life and liberty of the petitioners at the hands of respondent Nos.4 to 10.
3. Both the petitioners are major and both are of the female sex. It has been stated in the petition that they have known each other for the last two years and have a liking for each other. They intend to be in a live-in-

relationship and stay in Ludhiana in a rented accommodation. However, the respondent Nos.4 to 6, who are family members of petitioner No.1, and respondent Nos.7 to 10, who are family members of petitioner No.2, are against their relationship. It is alleged that the petitioners have been receiving serious threats from their family members. The petitioners had filed a representation before respondent No.2 on 23.07.2020 (Annexure P-3) for protection of their life and liberty but no action has been taken upon the same. Hence, the present petition.

4. Notice of motion to the official respondents.

5. Mr. Randhir Singh Thind, DAG, Punjab, on the asking of the Court, has joined the proceedings through video conferencing and accepts notice. The State counsel was supplied an advance copy of the petition.

6. I have heard the learned counsel for the parties.

7. The petitioners in the present case are both girls and are contemplating to live together in a live-in-relationship. Since both the petitioners belong to the same sex, they are facing threats from their respective families who are dead-against the said relationship. The social unacceptability of a relationship between the same sex is the concern of the present petitioners, who are living in constant fear.

8. A Constitution bench of the Supreme Court in a very elaborate judgment in the case of *Navtej Singh Johar & Ors. vs. Union of India, through Secretary, Ministry of Law and Justice, reported as (2018) 10 SCC 1*, held that insofar as Section 377 of the Indian Penal

Code, 1860 criminalizes consensual sexual acts of adults in private, it is violative of Articles 14, 15, 19 and 21 of the Constitution of India. While reaching its landmark decision the Court *inter-alia* observed:

“140. Presently, we shall focus on the aspect of sexual orientation. Every human being has certain basic biological characteristics and acquires or develops some facets under certain circumstances. The first can generally be termed as inherent orientation that is natural to his/her being. The second can be described as a demonstration of his/her choice which gradually becomes an inseparable quality of his/her being, for the individual also leans on a different expression because of the inclination to derive satisfaction. The third one has the proclivity which he/she maintains and does not express any other inclination. The first one is homosexuality, the second, bisexuality and third, heterosexuality. The third one is regarded as natural and the first one, by the same standard, is treated to be unnatural. When the second category exercises his/her choice of homosexuality and involves in such an act, the same is also not accepted. In sum, the 'act' is treated either in accord with nature or against the order of nature in terms of societal perception.

143. From the aforesaid, it has to be appreciated that homosexuality is something that is based on sense of identity. It is the reflection of a sense of emotion and expression of eagerness to establish intimacy. It is just as much ingrained, inherent and innate as heterosexuality. Sexual orientation, as a concept, fundamentally implies a pattern of sexual attraction. It is as natural a phenomenon as other natural biological phenomena. What the science of sexuality has led to is that an individual has the tendency to feel sexually attracted towards the same sex, for the decision is one that is controlled by neurological and biological factors. That is why it is his/her natural orientation which is innate and constitutes the core of his/her being and identity. That apart, on occasions, due to a sense of mutuality of release of passion, two adults may agree to express themselves in a different sexual behaviour which may include both the genders. To this, one can attribute a bisexual orientation which does not follow the rigidity but allows room for flexibility.

144. The society cannot remain unmindful to the theory which several researches, conducted both in the field of biological and psychological science, have proven and reaffirmed time and again. To compel a person having a certain sexual orientation to proselytize to another is like asking a body part to perform a function it was never designed to perform in the first place. It is pure science, a certain manner in which the brain and genitals of an individual function and react. Whether one's sexual orientation is determined by genetic, hormonal, developmental, social and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation.

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Justice Dr. Dhananjaya Y. Chandrachud, in his concurring judgment, had held as under :

“408. The right to privacy is intrinsic to liberty, central to human dignity and the core of autonomy. These values are integral to the right to life under Article 21 of the Constitution. A meaningful life is a life of freedom and self-respect and nurtured in the ability to decide the course of living. In the nine judge Bench decision in Puttaswamy, this Court conceived of the right to privacy as natural and inalienable. The judgment delivered on behalf of four judges holds:

"Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights..."

Justice Bobde, in his exposition on the form of the 'right to privacy' held thus:

"Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man."

Justice Nariman has written about the inalienable nature of the right to privacy:

"...Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights that the citizens of this country may enjoy despite the governments that they may elect. This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being. The recognition of such right in the fundamental rights chapter of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments..."

Justice Sapre, in his opinion, has also sanctified 'privacy' as a natural right:

"In my considered opinion, "right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth... It is indeed inseparable and inalienable...it is born with the human being..."

These opinions establish that the right to privacy is a natural right. The judgment of four judges in Puttaswamy held that the right to sexual orientation is an intrinsic part of the right to privacy. To define the scope of the right, it is useful to examine the discussion on the right to sexual orientation in judicial precedents of this Court.

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420. An individual's sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her own desires and proclivities. The self-determination of sexual orientation is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual. Such an interpretation of autonomy has implications for the widening application of human rights to sexuality. Sexuality cannot be construed as something that the State has the prerogative to legitimize only in the form of rigid, marital procreational sex. Sexuality must be construed as a fundamental experience through which individuals define the meaning of their lives. Human sexuality cannot be reduced to a binary formulation. Nor can it be defined narrowly in terms of its function as a means to procreation. To confine it to closed categories would

result in denuding human liberty of its full content as a constitutional right. The Constitution protects the fluidities of sexual experience. It leaves it to consenting adults to find fulfilment in their relationships, in a diversity of cultures, among plural ways of life and in infinite shades of love and longing.”

Justice Indu Malhotra, in her concurring judgment, held as under :

*“521. HOMOSEXUALITY - NOT AN ABERRATION
BUT A VARIATION OF SEXUALITY*

521.1. Whilst a great deal of scientific research has examined possible genetic, hormonal, developmental, psychological, social and cultural influences on sexual orientation, no findings have conclusively linked sexual orientation to any one particular factor or factors. It is believed that one's sexuality is the result of a complex interplay between nature and nurture.

Sexual orientation is an innate attribute of one's identity, and cannot be altered. Sexual orientation is not a matter of choice. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality.

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528. History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'.”

9. In the light of the law laid down by the Apex Court and in view of the facts of the present case, this Court has no hesitation in holding that the petitioners are entitled to protection of their life and

liberty as envisaged under Article 21 of the Constitution of India regardless of the nature of their relationship. Article 21 of the Constitution of India guarantees protection of life and personal liberty, it lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law.

10. The social unacceptability of any relationships can in no manner be a deterrent to granting protection under Article 21 of the Constitution of India. The judgment of the Apex Court in *Navtej Singh Johar & Ors.* (*supra*) has had far-reaching effects, though complete social acceptability of such like relationships is yet to be achieved. The petitioner-girls may face ostracization because of the nature of their relationship and are allegedly facing many hurdles and threats. Despite people becoming more open about their sexuality, there are several who are having difficulty and the fear is still present to admit their sexual status in society. The petitioners in the present case have taken a bold step and wish to lead their lives on their own terms. The petitioners are both major and have every right to live their lives as they desire within the four corners of the law. Society cannot determine how an individual should live her or his life. The Constitution of India guarantees every individual the right to life, and the choice of a partner is an important facet of the right to life. In the matter of *Shafin Jahan vs. Asokan K.M., (2018) 16 SCC 368*, the Supreme Court reiterated the right of choice of an adult. It was *inter alia* held:-

“86. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and

reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.

87. In *K.S. Puttaswamy v. Union of India* [*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1] , this Court in a decision of nine Judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality: (SCC pp. 498-99, para 298)

“298. ... The autonomy of the individual is the ability to make decisions on vital matters of concern to life. ... The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. ... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.”

A Constitution Bench of this Court, in *Common Cause v. Union of India* [*Common Cause v. Union of India*, (2018) 5 SCC 1] , held: (SCC p. 194, para 346)

“346. ... Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives.”

The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.”

11. In view of the above, the present petition is hence disposed off with a direction to the Commissioner of Police, Ludhiana, respondent No.2, to consider the representation of the petitioners dated 23.07.2020 (Annexure P-3) seeking protection of their life and liberty. Till the decision of the representation, official respondent Nos.1 to 3 shall ensure the safety and security of both the petitioners. It is, however, made clear that any observations made above shall neither be treated as a stamp of this Court qua the relationship between the petitioners nor as an opinion on the contentions raised in the present petition.

12. The petition stands disposed off accordingly.

(ALKA SARIN)
JUDGE

07.08.2020
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<u>NOTE:</u> Whether speaking/non-speaking: Speaking Whether reportable: YES/NO
