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ADULTERY IS NOT A PUNISHABLE OFFENCE – IS A BOON OR A BANE

By S Shalini

Adultery means a man having sexual intercourse with a married woman, knowingly and believing that she is a wife of some other man, without the knowledge or consent of her husband. Such, sexual intercourse is not a rape but it is an adultery and the punishment for adultery is imprisonment up to five years, or fine or both. The offence is non-cognizable, bailable, non-compoundable and is triable by a Magistrate of the first class. In India, the adulteress is not punishable as an abettor but only the adulterer is punishable as an abettor in adultery¹.

An accused person abducted the wife of another person, and engaging in adultery with her, and marrying her with her permission, he is guilty of an offence under section 497 of IPC, as he knowingly or reason to believe that the woman is the wife of another person. The adulterer need not to know that whose wife she is and her permission is irrelevant under section 497 of IPC².

In India, adultery considered as an offence against marriage and an absolute exemption given to a woman involved in adultery. Women in this country were in a position, where special legislation was needed to protect them, not because they had a different sex than men, which is why there is discrimination against them. It is from this perspective that one finds in section 497 a position in law that takes a sympathetic and charitable view of the weakness of women in this country³.

Section 198 of the Criminal Procedure Code says that “No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence. For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable

¹ Section 497 of the Indian Penal Code, 1860 (Act No. 45 of 1860).

² B. M. Gandhi, “Indian Penal Code” 692 (Eastern Book Company, Lucknow, 2nd edn., 2006).

³ R. N. Saxena and R. P. Upadhyay, “The Indian Penal Code” 427 (Central Law Publications, Allahabad, 15th edn., 1998).

under section 497 or section 498 of the said code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the court, make a complaint on his behalf⁴.

As per the law, in adultery, the husband of the adulteresses is the only person permitted to file a case against the adulterer but not against his wife and the wife of the adulterer also not permitted to file a case against the adulterer i.e., her husband and the adulteress i.e., the wife of another person with whom her husband committed adultery. Adultery is the ground for divorce against the offenders i.e., Adulterer and adulteress, by the victims. Other than the specified, the victims cannot take any legal action against the offenders.

The following are the decisions was given by the learned Supreme Court Judges relating to adultery. In the case of *Yusuf Abdul Aziz v. State of Bombay*⁵, section 497 was challenged as violating Articles 14 and 15 of the Constitution, the Supreme Court held that the argument overlooked provision of Article 15(3) which permitted State to make special provision for women. Article 14 is general and must be read with other provisions which set out the ambit of fundamental rights. Sex is sound classification and although there can be no discrimination in general on that ground, the condition itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in section 497.

In the case of *Sowmithri Vishnu v. Union of India*⁶, once again challenged the section 497 of the Indian Penal Code. The Supreme Court upholding the validity of the provision and observed that “We cannot accept that in defining the offence of adultery so as to restrict the class 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 Legislation 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 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 Legislation. The Supreme Court accepted that there can be two opinions on the desirability of retaining a provision like the one contained in section 497, but refused to strike

⁴ The Code of Criminal Procedure Code, 1973 (Act No. 2 of 1974).

⁵ AIR 1954 SC 321

⁶ AIR 1985 SC 1618

down that section on the ground that it is desirable to delete it. The alleged transformation in feminine attitudes may engage the attention of the law-makers when the reform of penal law is undertaken”.

In the case of *V. Revathi v. Union of India*⁷, the court observed that the section 497 of the Indian Penal Code is so designed that a husband cannot prosecute the wife for defiling the sanctity of the matrimonial tie by committing adultery. Thus, the law permits neither the husband of the offending wife to prosecute his wife, nor does the law permit the wife to prosecute the offending husband for being disloyal to her. ‘Thus, both the husband and wife as disabled from striking each other with the weapon of criminal law.

As per the above judgments, only adulterer is punishable because he is the seducer of an offence but not the adulteress. The adulteress also should be punishable equally with the adulterer and it is appropriate because she is also a part and parcel of an offence to commit it knowingly, otherwise it constitutes a rape. Accordingly, the law needs to confer a right on the aggrieved women to prosecute an adulterer husband and similarly, the amendments to the law is necessary. By these changes in law, ensures gender justice and also would be in consonance of Articles 14, 15 and 21 of the Indian Constitution⁸.

Adultery is not possible with a woman who has not given consent for it, a widow, a divorced woman, an unmarried woman, or with a woman whose husband given a consent to it or conspires at it. A husband cannot commit an adultery with his own wife⁹.

PRESENT POSITION IN INDIA

By the decision of the Supreme Court, in the case of *Joseph Shine v. Union of India*¹⁰, Joseph Shine challenged the legality of Section 497 read with Section 198(2)22 of the Cr. P.C., in the highest Court of India. Section 497 deals with adultery. It stipulated that a guy who had sexual relations with another person's wife without his consent would be punished. Consenting women, on the other hand, were free from any punishment under this rule. This provision also did not allow a woman to bring a complaint against her husband if she discovered that he was

⁷ AIR 1988 SC 863

⁸ Dr. G. B. Reddy, “Women and The Law” 91(Gogia Law Publications, Hyderabad, 6th edn., 2007).

⁹ B. M. Gandhi, “Indian Penal Code” 692, 693 (Eastern Book Company, Lucknow, 2nd edn., 2006).

¹⁰ (2019) 3 SCC 39; AIR 2018 SC 4898.

having sexual relations with another woman. As a result, this provision was deemed discriminatory, and the Supreme Court, taking a progressive stance, knocked down the 158-year-old adultery legislation. In its decision, the court deemed Section 497 of the IPC unconstitutional, ruling that it violates Articles 14, 15, and 21 of the Constitution. Section 198(2) of the Cr. P. C is likewise invalid to the degree that it applies to Section 497 of the IPC, according to the court.

In India, since, the inception of section 497 of IPC, adultery is a punishable offence i.e., adulterer is punishable not adulteress, but the today's position is that the adultery is not punishable offence but it is only a ground for divorce. It means adulterer and adulteress both are not punishable.

Instead of giving the rights to sue to the victims, the existing rights also rescinded by the court. Instead of punishing the wrong doers, they are led free in the society without the punishment. The offenders are offenders, punishment should be given to the offenders without gender bias. Law always punishes the offender never leaves them free in the society, but prior to the above-mentioned case only the adulterer is punishable but not the adulteress. By the Joseph Shine case, both the offenders of adultery are not punishable. Punishing both the parties would have been a good contribution to the society.

NEED TO BE CHANGE



The 42nd Law Commission Report, suggested to the section 497 of IPC is that the adulteress also should be punishable along with the adulterer with whom she had a sexual intercourse other than the husband. Exemption of a wife from punishment under section 497 of IPC is removed. The changed section as follows - "Section 497 of IPC – If a man has sexual intercourse with a woman 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, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both"¹¹. The recommendations made by the 42nd Law commission were not accepted by the legislature till now.

¹¹ The Law Commission of India, 42nd Report, 2nd June 1971 Para 20.18; Pg. no. 327.

The Malimath Committee in its report on Reforms of Criminal Justice System recommended that Section 497 of The Indian Penal Code, 1860 concerning offence of Adultery be amended. The Committee recommended that “the wife who has sexual intercourse with a married man, by substituting the words ‘whosoever has sexual intercourse with the spouse of any other person is guilty of adultery’”. The Committee’s opinion is that to punish the women along with men who participated in committing the adultery under section 497 of IPC¹².

The recommendations made by the 42nd Law commission and by the Malimath Committee should be accept by the legislature and punish both the offenders under section 497 of IPC.

CONCLUSION

In India, the marriage is one of the important concepts in the society which molds into the ordering of the domestic life. The marriage is having a good value in the society. Through marriage creates a legal relationship between the parties to the marriage and children, and the children are considered as legitimates. In ancient India, outside the marriage any relation with a woman other than the wife considered as illegal and no status, until he is going to marry that woman. If anyone commits adultery they are punishable according to the societal norms and the law. When the Indian Penal Code was enacted, the provision of the Act declares that the adultery is a criminalised and punishable. Even the Personal Laws states that the adultery is a ground for divorce. Adultery was challenged before the court of law and the court also expressed that the man who is involved in adultery will be punishable but not the adulteress as per the law. Punishing one person and the other left free itself is a discrimination but by the Joseph shine case, adultery was decriminalised but considered as a ground for divorce. Instead of punishing both were left free in the society. Now a days, in society, considers that the adultery is legalized and no punishment for committing adultery as per Indian Penal Code.

Law should change when it is good to the society but not when it violates the foundations of the society and eradicating the evil from the society. Decriminalising the section 497 of IPC is

¹² https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf (Accessed on 3 April, 2023).

not suitable to the Indian Society and even though society is a developed one. Development should teach a good thing, safeguard the values of a society but not to ruin the systems in the society. Which is against the society is an offence but that it is considered as not an offence. Not punishing the adultery is not a boon but a bane.

