

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S. B. Civil Writ Petition No. 2067/1999

Mahesh Chand Sharma S/o Shri Girraj Prasad Sharma, aged
48 years, R/o 10/677, Kaveri Path, Mansarovar, Jaipur.

.....Petitioner

Versus

1. State of Rajasthan through the Secretary, Department
of Home, Govt. of Rajasthan, Secretariat, Jaipur.

2. Additional Superintendent of Police, Jaipur city (north),
Jaipur.

3. Prabhu Devi W/o late Fateh Chand, R/o Mandi Khatikan,
Outside Char Darwaja, Jaipur.

4. Dharma Rani W/o Tikam Chand Haldenia 1/51, Jeen
Mata Ka Khurra, Surajpole Bazar, Jaipur.

.....Respondents

Connected With

S.B. Civil Writ Petition No 1247/2001

Dharma Rani w/o Shri Mahesh Kumar Sharma alias Tkam
Chand Haldeniya, aged 31 years, R/o 151, Jeen Mata Ka
Khurra, Ramganj Bazar, Jaipur.

.....Petitioner

Versus

1. State of Rajasthan through the Secretary, Department
of Home, Govt. of Rajasthan, Secretariat, Jaipur.

2. Director General of Police, Rajasthan, Jaipur.

.....Respondents

For Petitioner(s) : Mr. Ajeet Bhandari, Adv.
For Respondent(s) : Mr. GS Gill, AAG with
Ms. Vandana Sharma, Dy. GC

HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA

Judgment / Order

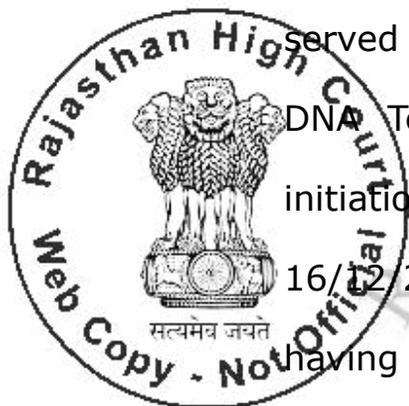
Reserved on 27/11/2018

Pronounced on 07/03/2019**Reportable**

1. These two writ petitions raise common question of law and are also in relation to same facts, hence are being decided jointly.

2. The petitioner Mahesh Chand Sharma, who was working as an Inspector in the Rajasthan Police, after having already served for 18 years in Indian Air Force, was asked to get his DNA Test conducted and was subsequently subjected to initiation of departmental enquiry vide memorandum dated 16/12/2000 during pendency of the writ petition alleging of having illicit relations with one Dharma Rani (petitioner in the connected writ petition) who is a Constable working in the Rajasthan Police; and also of having begotten a child from their illicit relations on 24/05/1997.

3. The petitioner Dharma Rani in the connected writ petition has been charge-sheeted vide memorandum dated 16/12/2000 of living with Mahesh Chand Sharma as husband and wife in House No.151, Jeen Mata Ka Khurra, Galta Road, Jaipur. She has been further charged of having stated during preliminary enquiry conducted on 16/08/1997 of having got married to one Mahesh Chand Sharma son of Bhagwati Prasad Sharma on 10/07/1989 at Udaipur and the marriage having taken place after performing Hindu rites and that she has been going to and fro to her in-laws place after taking leave and in the second statement, which she has submitted to the authorities on 24/12/1998, she has mentioned of the marriage having taken place at Udaipur in a temple which she



does not know and also does not know where her in-laws are staying in Udaipur and thus, has given misleading statements. The third charge levelled is again of misleading the authorities by giving wrong date of marriage as 10/07/1989 while in an application for taking casual leave she has mentioned of sudden marriage having taken place vide her application dated 13/07/1992 for leave from 08/07/1992 to 12/07/1992. The fourth charge levelled against her is of her father's statement contrary to her version wherein her father has refused to have performed "Ganya Dan" of his daughter Dharma Rani and has not participated in her marriage and thus there was no marriage performed by her with Mahesh Chand Sharma son of Bhagwati Prasad who has also not been produced during the course of preliminary enquiry. The further charge is that the petitioner Dharma Rani has mentioned name of father of her child Yogendra as Tikam Chand (Mahesh) Haldenia in the card of 'Janam Mahotsava' while in the nomination Form No. GA-126 (RSR) dt.12/04/1993, she has mentioned name of nominee as Mahesh Chand Sharma. The sixth charge levelled against her is of having illicit relations with Mahesh Chand Sharma, Police Inspector and of having begotten a child on 24/05/1997 and she alongwith Mahesh Chand Sharma, Police Inspector have conducted "Havan" prayer as husband and wife while performing birth ceremony of the child. Further allegation is of the petitioner Dharma Rani living with Mahesh Chand Sharma son of Shri Girraj Prasad, Police Inspector and



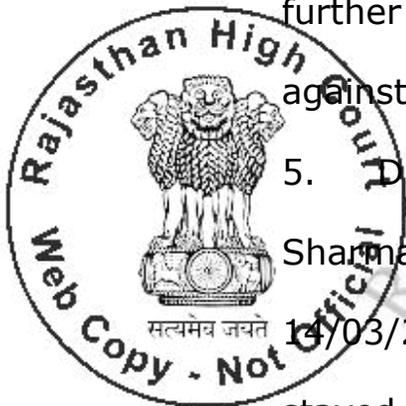
maintaining illicit relations and having acted in contravention of the Rajasthan Conduct Rules and tarnished police image in public and thus has committed misconduct.

4. The petitioner Mahesh Chand Sharma had originally filed writ petition only against the letter dated 30/01/1999 whereby he was directed to get his DNA Test conducted with further prayer to quash the enquiry which may be conducted against him.

5. During the pendency of writ, petitioner Mahesh Chand Sharma had been suspended from service vide order dated 14/03/2001 and this Court vide order dated 23/03/2001 stayed the operation of order of suspension till disposal of the writ petition and further proceedings of the departmental enquiry were also stayed till disposal of the writ petition. Petitioner Mahesh Chand Sharma has attained superannuation during pendency of writ.

6. Similarly, in writ petition of the petitioner Dharma Rani vide order dated 28/03/2001, the departmental proceedings as well as the order of suspension passed against her were also stayed. She is stated to be still in service while her son has grown more than 18 years of age.

7. Learned counsel for the petitioners Shri Ajeet Bhandari has submitted that the action of the respondents in asking the petitioner Mahesh Chand Sharma to get his DNA Test conducted was against all norms of service jurisprudence and the State or its authorities have no authority under service rules to ask for such test to be conducted and also it has no



relation with the working or field of duties which the petitioner has to perform. He submits that the respondents have conducted an enquiry which was beyond their jurisdiction. Merely on a complaint of neighbours of Dharma Bai including one Prabhu Devi. A fishing enquiry into the nature of personal relations of the petitioner could not have been conducted by the State authorities. The action amounts to maligning image of the petitioner and destroying his outstanding service career as well as his private family life and the purpose behind this was only to tarnish the image and deprive him of his further promotions. The action inherently suffers from malice in law and on facts.



8. The petitioner Dharma Rani has also given a statement that the child born to her is not on account of illicit relations with the petitioner Mahesh Chand Sharma and the family members of the petitioner have already given their statement in this regard pointing out that the petitioner does not have any illicit relation. It is submitted that the petitioner was also married to Pushpa Sharma in the year 1973 and had three children out of the wedlock. While the petitioner was in defence services, he also underwent vasectomy operation on 03/01/1978 which is already entered in his personal record maintained by the Indian Air Force. He had an unblemished career but the action of the respondents has resulted in tarnishing his public image.

9. There are two aspects which need to be addressed separately while deciding the present writ petitions.

10. The first aspect is with regard to factual pleadings taken up by the petitioners wherein, so far as the petitioner Mahesh Chand Sharma is concerned, he has raised objections; firstly to the letter by which he was asked to get his DNA Test conducted and secondly to the aspect relating to charge-sheet issued to him for having illicit relations with petitioner Dharma Rani and having procured a child from their relationship and thus having acted unbecoming of an officer and committed a misconduct within meaning of Rule 4 of the Rajasthan Conduct Rules, 1971.



11. Similarly, the petitioner Dharma Rani has raised two separate questions. Firstly, with regard to the factual aspect of her having illicit relation with petitioner Mahesh Chand Sharma and of having begotten a child from the said relationship and secondly, the other aspect of the question raised of parenthood of her son by her mentioning of a particular person as her husband and the authority of the State Government or its authorities to level allegations which intrude upon her private life and also affects privacy of her son.

12. The respondents have filed a reply and stated that merely because the petitioner has undergone basic vasectomy operation, it cannot be said that he has become infertile and has supported their action of initiating departmental enquiry.

13. Learned counsel for the petitioner has raised a larger question before this Court during course of arguments with

regard to the jurisdiction and the authority available with the State Government to initiate departmental proceedings in regard to the allegations of having illicit relationship. Learned counsel submits that in the present scenario and with the changes in the society and the laws as laid down by the Apex Court from time to time, right to privacy inherently also means right to live with a person of his own choice and such a private right relating to having sexual relationship with another adult female or male, as the case may be, would not come within the ambit of misconduct for the purpose of departmental proceedings under the Conduct Rules of 1971.



14. Learned counsel submits that Rule 4 of the Conduct Rules, 1971, which provides that leading an immoral life being an improper and unbecoming conduct, is to be interpreted differently. If an adult person is having sexual relations with another woman apart from his wife, it cannot be a subject matter for departmental proceedings for leading an immoral life. The Constitutional morality cannot be sacrificed at the alter of civil morality. A right to live with dignity inherently means a right to have a choice of ones own life and the sovereign cannot be allowed to affect the day to day personal life of an individual. An individual may have a particular relation with another independent of her job requirements. While she may not be allowed to get married again, her right to choose a partner for whom she has affection, cannot be denied or controlled by State or its authorities. Any rule which is understood in a manner to

deprive her of the said right would impinge upon her right to privacy and sovereignty over her body would amount to violence her fundamental right under Article 27 of the Constitution. While a Government servant may be under the control of the Conduct Rules but the Conduct Rules cannot be espoused to treat and hold a relationship between a man and a woman who may not be husband and wife as leading an immoral life therefore, the relations between the two petitioners could not be a subject matter of enquiry under the CCA Rules, 1958 nor their relationship can be said to come within the ambit of misconduct in terms of Rule 4(4) of the Conduct Rules of 1971, even if it is stated that the allegation is true although the petitioners have denied the same.

15. Learned counsel has taken this Court to various judgments passed by the Supreme Court and the observations made therein which shall be referred to at the relevant place in this judgment.

16. Per-contra, Mr. GS Gill, learned Additional Advocate General, appearing for the respondent-State has vehemently supported the action and submits that so far as service laws are concerned, the State has an exclusive authority and control on its employees. It is open for the State Government to put restrictions on the Government servants which may relate to various aspects of living in the society. Certain actions are settled norms of immorality like drinking and smoking in office premises and similarly of having illicit relationship. The word "illicit relationship" has to be construed

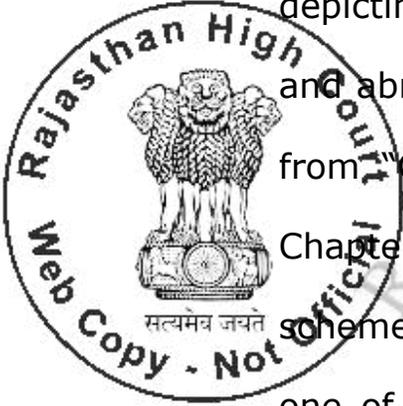


to mean relationship of having sexual intercourse with another person than her own spouse. Any action which affects a civilized society norms laid down and known as "Maryada", mean leading an immoral life. He submits that any conduct which creates conflict in society has to be treated as immoral. India i.e. "Bharat" as a country, has a long cultural background spreading over 5000 years. The norms which an Indian society believes in are those which have come to be accepted by experience of their forefathers and ancestors. The Indians still believe in monogamy in the society and when a person enters into second marriage, he shall be treated to have committed a misconduct. Having relationship, while his spouse is living, with another woman cannot be treated as a illusory offence. While the courts have declared Section 494 IPC as ultravires, the action of having relations with another woman cannot be said to be proper and has to be deprecated by the State. Once such an information has been received relating to a Government Servant of having illicit relationship, enquiry in this regard can always be conducted so as to maintain clean environment by the employer and there can be no exception to the same.

17. Mr. Gill, learned Additional Advocate General has also taken this Court to the replica of the calligraphist version of the Constitution of India wherein there is a photo lithography on each part of the Constitution giving illustrations of the culture of "Bharat". The illustrations show the "Mohenjodaro" period in Chapter-1, "Vedic" period showing scene from Vedic



Asram (Gurukul) in Chapter-2, epic period in Chapters 3 & 4 showing scenes from "Ramayana" (conquest of Lanka and recovery of Sita by Rama) and "Mahabharata" (Srikrishna propounding Gita to Arjuna); "Mahajanpada" and "Nanda" period in Chapter-5 & 6 showing scene from "Buddha's" life and "Mahaveer's" life. Chapter-7 illustrates "Mauryan" period depicting spread of "Buddhism" by emperor "Ashoka" in India and abroad and "Gupta" period in Chapter-8 depicting scenes from "Gupta" art and its development in different phases. Chapters 9 & 10 also illustrate "Gupta" period showing scheme from "Vikramaditya's" Court and the scenes depicting one of the ancient Universities (Nalanda)". Chapters 11, 12 and 13 are relating to the Medieval period showing scenes from "Orissan" Sculptures, Image of "Nataraja" and scenes from "Mahabalipuram" Sculptures showing "Bhagirath's" penance and the descent of "Ganga". Chapters 14 and 15 speak of "Muslim" period mentioning of portraits of "Akbar" and "Mugal" architecture and portraits of "Shivaji" and "Guru Govind Singh" respectively. Chapter 16 depicts British period by showing portraits of "Tipu Sultan" and "Lakshmi Bai" and the rise against the British conquest. Chapter 17 and 18 depict India's Freedom Movement showing portraits of the Father of the Nation Mahatma Gandhi, his Dandi March and Bapuji, the Peace-Maker and his tour in the riot affected areas of "Naokhali". Chapter 19 mentions revolutionary movement for the freedom taken up by "Netaji Subhash Chandra Bose" and the other portraits trying to liberate



Mother India. Chapters 20, 21 and 22 depict the natural features namely; scene of Himalaya, desert and ocean respectively.

18. With the assistance of the above, learned Additional Advocate General proceeds to argue that morality has different connotation in different societies and different countries. India as a nation follows the Constitutional will and the aforesaid illustrations raised in each chapter depict the rich cultural heritage of India which believed in a particular concept of life and method of living. It is his submission that in a country like India, there is no room for allowing an individual to enter into illicit relationship by having sexual relations with persons other than his own spouse and therefore, such actions, once they have come in knowledge of the department of the employer, who are bound to follow the constitutional goals, have to take departmental action and also severely punish if proved. If no action is taken, it is bound to create indiscipline and the image of the department is also tarnished.

19. Learned Additional Advocate General further submits that as per provisions of the Rajasthan Conduct Rules, 1971, the petitioners can be said to be leading immoral life and improper and unbecoming conduct of the petitioners was sufficient for conducting departmental enquiry against them in terms of the CCA Rules, 1958 and the charge-sheet issued to the petitioners cannot be said to be in any manner illegal, arbitrary or unjustified. Countering the contention of the



petitioners that it is only an inter-se relation between two of them and the State would have no reason to intrude in the private life of the petitioners, he submits that it would amount to allowing indiscipline amongst the forces and encourage persons to lead immoral life.

20. I have considered the submissions and the judgments relied upon.

21. Having noted aforesaid, this Court deems it appropriate to deal with the first argument of both the petitioners jointly and the second argument raising the larger question jointly in two parts as under:

22. **Part First:-** A letter was issued to the petitioner Mahesh Chand Sharma on 30/01/1999 whereby he was informed that in view of the enquiry being conducted on the basis of a complaint made against him and petitioner Dharma Rani, it is necessary that he alongwith Dharma Rani and the child remain present on 08/02/1999 before the Additional Superintendent of Police, Jaipur City (North) at 10.00 am so that their DNA Test may be conducted. This Court finds that such demand could not have been made by the concerned police officer for the purpose of conduct investigation at his own level. Neither he has an authority to get the DNA Test conducted nor it can be said that there was a criminal case registered against the petitioner Mahesh Chand Sharma. The petitioner Mahesh Chand Sharma has nowhere admitted of having relationship with petitioner Dharma Rani and has also submitted of having got vasectomy operation conducted



upon him. It is also to be noticed that if DNA Test is conducted relating to the child, it would amount to examining the paternity of the child and in departmental proceedings such a procedure cannot be allowed to be adopted as it would be beyond the purview of the authorities since the child cannot be said in any manner to be under the control of the concerned departmental authorities.



22.1 As regards the DNA Test of petitioner Dharma Rani and petitioner Mahesh Chand Sharma is concerned, such a course was not available for the departmental authorities for investigation on a private complaint. The Officer concerned has exceeded its jurisdiction and powers in issuing such a letter and the letter impugned is liable to be quashed and set aside.

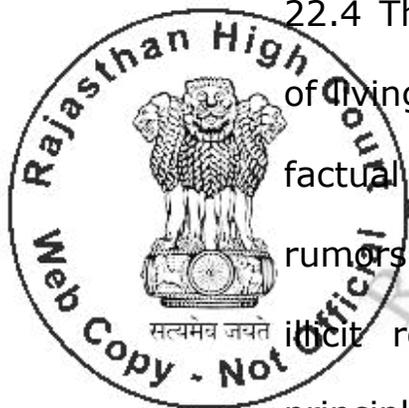
22.2 So far as the charge-sheet issued to the petitioners is concerned, the same has to be examined firstly with reference to the question whether such an allegation could be levelled on a person when there is no complaint by his wife or children with regard to such an act. Admittedly, since the wife and children of the petitioner Mahesh Chand Sharma have not made any complaint nor there is any such statement of his spouse or any other family member, merely on the basis of some complaint made by the residents of a particular colony, the department ought not have proceeded to initiate departmental proceedings. The preliminary enquiry conducted could not have been conducted on the basis of such complaint and it cannot be ruled out that such

complaints made by the individuals may be on account of several other considerations as have been alleged by the petitioner.

22.3 The departmental process cannot be started on the basis of private complaint and the fishing enquiry conducted on the said basis is held to be unjustified.

22.4 The aspect relating to illicit relationship or a relationship of living of a man and woman like husband and wife, require factual proof and on the basis of surmises and conjectures or rumors, a presumption cannot be drawn that a lady is having illicit relationship with a man. Witnesses tested on the principle of strict proof alone can be looked into for arriving to such conclusions. The departmental authorities on the basis of the doctrine of factum valet cannot impugn a person for such conduct and they should stay their hands to leave the matters to be decided by appropriate court of law. The conduct of the parties and the act that there is no allegation from wife of petitioner Mahesh Chand Sharma and the fact that he has already undergone vasectomy operation conducted and had already put in complete period of service with the Air Force and after having three children, making allegations based on some private complaint of strangers who had an axe to grind would be amounting to treading in dark waters and trying to catch fish by hand.

22.5 So far as petitioner Dharma Rani is concerned, it is also to be noted that the charge-sheet makes allegation of her not giving the correct information about parentage of her son. It



suffices to state that she has an exclusive right of choice of reproduction. In *Suchita Srivastava Vs. UT of Chandigarh*: (2009) 9 SCC 1, the Court recognized this right as right to procreate as well as to abstain from procreating holding that a woman has a right to privacy, dignity and bodily integrity.

22.6 In Bhabani Prasad Jena Vs. Orissa State Commission for Women: 2010(8) SCC 633, while

examining the right of husband for a direction for DNA Test of a child, the Apex Court held as under:-



21. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception."

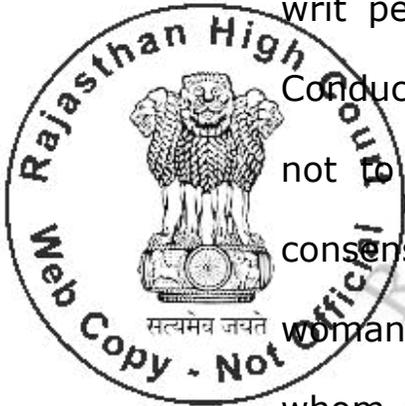
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22.7 In ABC Vs. State (NCT of Delhi): (2015) 10 SCC 1, the Supreme Court recognized the right of an unmarried mother not to disclose the paternity of the child and it would amount to violate her fundamental right to privacy, if she is compelled to disclose name and particulars of father of her child.

22.8 Keeping in view thereof, the charges levelled against the petitioner Dharma Rani, if enquired, would go contrary to the aforesaid principles laid down by the Supreme Court and would violate her fundamental rights.

23. **Part Second:-**The larger question raised in the present writ petitions is as to whether Section 4 of the Rajasthan Conduct Rules of 1971, which binds a Government servant not to lead an immoral life, would include in its ambit a consensual relationship entered between an adult man and woman and whether for such an action, the employer, with whom the individuals are working as employees, would be authorized to initiate departmental action and whether such an action having been taken by the department would amount to breach of the right of privacy and right to live with dignity.

23.1 What is an immoral life is a debatable question. The standards of living in a society, as laid down by it for an individual, is generally understood to be the concept of morality. There are certain aspects of mankind which are generally accepted as immoral and moral. For example, helping others, keeping promises, living an honest life are treated as virtues which are said to be moral while committing acts of murder, rape, cheating, lying and behaving in a manner different from others. Causing danger or apprehension in mind of others, is generally considered as acts of immorality. A person, who is upholding mutual



relationships being trustworthy, local, respectful and gratuitous, is said to be having high moral values by the people who are surrounding him and in the society where he is living. However, there may be circumstances where a particular sect of people or a particular community or residents of a particular area like tribals who may fix their different norms of living and for them certain actions may not be immoral.

23.2 Thus, polygamy is found to be ever common in Nepal. Amongst tribals also, there is a concept of men having several wives or even women living with single male. In Rajasthan, there are certain communities who believe in 'Nata' marriage i.e. where a lady, after marriage, may leave her husband and start living with another male with the consent of her father. Similarly, there is also a concept of keeping one's 'Bhabhi' who has become a widow as a wife.

23.3 While generally, it is held that being faithful to one's spouse and not having relations with any other woman is one of the concept of moral values, however, it has different connotations in different societies. Thus, what is understood to be leading a moral life in one particular society, may be treated as leading an immoral life in another.

23.4 If we look at the Indian mythology, we find that Indian Gods have had single wife and there are some Gods who have had more than one wife like Lord Ganesh who is said to have Ridhi and Siddhi as his life partners. Lord Indra is said to have several concubines known as "Apsaras". Lord



Krishna is said to have had 16000 "Ranis" but these are all mythological concepts having no concrete bases as such but the only aspect which can be understood is that of being faithful to the spouse alone and is a concept understood in relation to the new laws and norms laid down in the society.

23.5 In opposition to the aforesaid concept of mythology, there is another thought process and that is in relation to the individual's right of choice. Under Section 494 IPC, marrying again during lifetime of husband or wife is an offence. It is one of the offences relating to marriage and is a non-cognizable offence that is tried on the basis of a complaint made by husband or wife as the case may be.

23.6 In an article by Amelie Rorty published in Journal Ethics 2012 on the subject of "Use and Abuse of Morality, she states "Righteous and self-righteous people misappropriate the claims and language of morality placing themselves in the position of divinity, judging the world, praising and condemning according to their lights. The second abuse of morality is moral narcissism talking about purity of the heart. The third abuse of morality is that of claiming the high ground of justification or condemnation."

23.7 The concept of illicit relation i.e. of a married man living consensually with another woman or a woman living and having sexual intercourse with a married man is taken from the concept of adultery which was defined in Section 497 IPC. While the Supreme Court has declared Section 497 as ultravires in a case of **Joseph Shine Vs. Union of India**



[Writ Petition (Criminal) No.194 of 2017] (supra), the concept of illicit relationship with regard to leading of an immoral life has to be understood taking into consideration the right of an individual to privacy.

24. With regard to right of privacy, this Court finds that privacy has a very long history, it has its origins already in the ancient societies. Even the Bible has some passages where the violation of privacy appeared in its early form, where shame and anger followed the intrusion into someone's private sphere. It is enough to think of Adam and Eve, who started to cover their bodies with leaves in order to preserve their privacy. From a legal point of view, the Code of Hammurabi contained a paragraph against the intrusion into someone's home. The Roman law also regulated the same question. The idea of privacy traditionally comes from the difference between "private" and "public", which distinction comes from the natural need – as old as mankind – of the individual to make a distinction between himself/herself and the outer world. Of course the limits between private and public differ according to the given era and society, which will cause the on-going change throughout history of what people consider private. Plato illustrates this phenomenon in his dialogue 'the Laws', where the complete life of the individual was determined by the state and its aims, there was no place for individual freedom and autonomy. Thus the book describes a very extreme state (which in totality was never realised), some elements of it came true in ancient societies,



and the life of the individual was strongly influenced by the public interests. In the Medieval Age 'Privacy' did not exist as a societal value in today's sense, the individual existed as a member of a community, so his/her private life was affected by the constant "monitoring" conducted by other members. The appearance of "real" privacy relates to the transformation of these small communities: the appearance of cities. During the 19th century the new changes in the economy and in the society led to the transformation of the way people lived and these new changes had had consequences for privacy too, as physical and mental privacy were separated and started to evolve in two different ways. Due to urbanization, the population of cities started to grow and it led to the physical loss of privacy as people in cities had to live in crowded places. On the other hand, citizens could experience a new "type" of privacy, as they ceased to live under them. They recognized two phenomena that posed a threat to privacy: technological development (namely instantaneous photographs) and gossip, which became a trade in newspapers. Considering these changes, they were the first to demand the recognition of the right to privacy (which they defined as "the right to be let alone") as a separate and general right, as a right which ensured protection against not the violation of property rights, but the mere emotional suffering. Warren and Brandeis defined an already existing common law right as a stepping stone to the right to be let alone, such as the right to determine to what extents the



thoughts, the sentiments and emotions of the individual shall be communicated to others. The principle of this right was the "inviolable personality". The right to be let alone basically ensured protection against the unwanted disclosure of private facts, thoughts, emotions, etc.

25. The concept of privacy has to be looked into with respect to two view points. Firstly, from the point of view of an individual and secondly, from the point of view of the society. In a given circumstance, the society might treat privacy of an individual the way they allow him to remain while the individual will have an idea of privacy in a manner he feels society and its members must leave it for him. This conflict continues.

26. There is another concept and that is of adultery. It is a concept emerging from mutual faith which two partners living in relationship with each other have. Here again, a female may want to have relationship and have sexual enjoyment with another person without having any personal shame or mental constraint. However, another woman already in relationship by way of marriage or otherwise may object her partner of having sexual relationship of any kind with another woman who wants him. Thus, for woman 'a', it is not an adultery but for woman 'b' it is loss of faith if her partner has also started having relationship with another woman and woman may call it adultery and object. Thus, abiding disapproval of infidelity by the wife or partner is an adultery for that person.



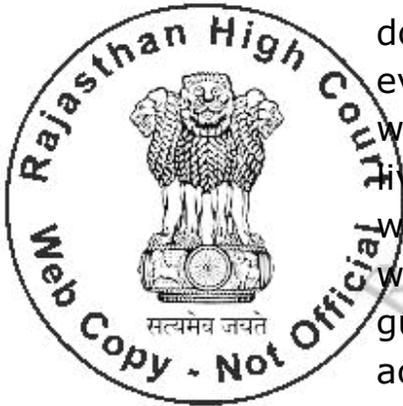
27. It is true that in the Indian society, promiscuous relationship or adulterous relationship is understood to mean in the present circumstances as a relation created between a male and a female person contrary to the norms laid down by the society. It may be live in relationship without getting married or it may be a relationship between a married man and a married woman or an unmarried man with a married woman and a married man and a unmarried woman. The Indian society does not accept such affairs to come within the definition of morality.



28. Interestingly, in one of the cases which came up before the Supreme Court namely; **Ministry of Finance and another Vs. S.B. Ramesh: (1998) 3 SCC 227**, wherein allegation was of Mr. SB Ramesh, an Income Tax Officer contracting second marriage with one K.R. Aruna while his first wife Smt. Anusuya was alive an the first marriage was subsisting and a charge-sheet was issued to him that he had been living with K.R. Aruna and also had begotten children from her and accordingly he had exhibited a conduct unbecoming of a Government servant. He was compulsorily retired in departmental proceedings. While setting aside the findings and the departmental proceedings, the Tribunal made certain observations which were quoted by the Supreme Court as under:-

“Though it would be ideal if sexual relationship is confined to legal wedlock, there is no law in our country which makes sexual relationship of two adult individuals of different sex, unlawful unless the relationship is adulterous or promiscuous. If

a man and a woman are residing under the same roof and if there is no law prohibiting such a residence, what transpires between them is not a concern of their employer. Such a life, if accepted by the society at large, without any displeasure or grudge, then it cannot be said that there is any moral turpitude involved in their living. In this case, there is no case that on account of the applicant living with Smt. K.R. Aruna, his reputation among the general public has been lowered or that, the public has been looking down on his conduct as immoral one. Therefore, even if factually, the allegation that the applicant who is already married to another woman is living with Smt. K.R. Aruna is proved to be true, we are of the considered view that, that alone will not justify a finding that the applicant is guilty of misconduct deserving departmental action and punishment."



29. In the aforesaid case of **Ministry of Finance and another Vs. S.B. Ramesh** (supra), the Supreme Court, while quoting as above, observed as under:-

"9. Immediately we prefer to record our total disapproval of the above observations of the Tribunal. We propose to deal with and rest our decision on the merits with reference to the findings of the Tribunal rendered on the basis of the facts relating to the case."

30. The law thereafter has progressed. In the case of **Joseph Shine Vs. Union of India [Writ Petition (Criminal) No.194 of 2017]**, the Constitutional Bench of the Supreme Court (Chandrachud, J.) vide its judgment dated 27/09/2018 held as under:-

"2. Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on

adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a 'discourse' about social structuring. However, the discourse of law is not homogenous. In the context particularly of Section 497, it regards individuals as 'gendered citizens'. In doing so, the law creates and ascribes gender roles based on existing societal stereotypes. An understanding of law as a 'discourse' would lead to the recognition of the role of law in creating 'gendered identities'



34. The decision in Shayara Bano, holds that legislation or state action which is manifestly arbitrary would have elements of caprice and irrationality and would be characterized by the lack of an adequately determining principle. An "adequately determining principle" is a principle which is in consonance with constitutional values. With respect to criminal legislation, the principle which determines the "act" that is criminalized as well as the persons who may be held criminally culpable, must be tested on the anvil of constitutionality. The principle must not be determined by majoritarian notions of morality which are at odds with constitutional morality.

In Navtej Singh Johar v. Union of India, ("Navtej")¹¹⁹ Justice Indu Malhotra emphasized the need for a "sound" or "rational principle" underlying a criminal provision:

"...Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle..."

Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community."

50. The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from

exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.

The opinion delivered on behalf of four judges in K.S. Puttaswamy v. Union of India has recognised the dangers of the "use of privacy as a veneer for patriarchal domination and abuse of women." On the delicate balance between the competing interests of protecting privacy as well dignity of women in the domestic sphere, the Court held:

"The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty."



31. Further, in the case of **Navtej Singh Johar & ors. Vs. Union of India through Secretary Ministry of Law and Justice [Writ Petition (Criminal) No.76 of 2016]**, the then Chief Justice of India Mr. Dipak Misra held as under:-

253 (iii) Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or

a minority group who have been deprived of even their basic rights since time immemorial.

253 (iv) Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

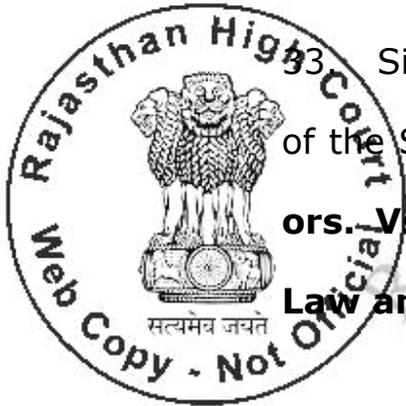


32. In the case of **K.S. Puttaswamy and another Vs. Union of India and others: (2017)10 SCC 1, Dr. Chandrachud, J.** has spoken as under:-

"118. Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions-the autonomy of the individual-and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

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Similar view has been also taken by nine Judges Bench of the Supreme Court in the case of **Navtej Singh Johar & ors. Vs. Union of India through Secretary Ministry of Law and Justice** (supra) holding as under:-

127. The fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life under Article 21 of the Constitution. In the international sphere, the right to live with dignity had been identified as a human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The constitutional courts 54 Human Rights Gay Rights by Michael Kirby, Published in 'Humane Rights' in 2016 by Future Leaders of our country have solemnly dealt with the task of assuring and preserving the right to dignity of each and every individual whenever the occasion arises, for without the right to live with dignity, all other fundamental rights may not realise their complete meaning.

131. In **Maneka Gandhi v. Union of India** and another⁵⁶, Krishna Iyer, J. observed that life is a terrestrial opportunity for unfolding personality and when any aspect of **Article 21** is viewed in a truncated manner, several other freedoms fade out automatically. It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.

134. It is not only the duty of the State and the Judiciary to protect this basic right to dignity, but the collective at large also owes a responsibility to respect one another's dignity, for showing respect for the dignity of another is a constitutional duty. It is an expression of the component of constitutional fraternity

34. Thus, keeping in view the observations of nine Judges Bench of the Supreme Court in the case of **K.S.**

Puttaswamy and another Vs. Union of India and others

(supra) wherein it was stated that "The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities,

whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably

regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights

which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers

of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'.

Yet in a democratic Constitution founded on the Rule of law, their rights are as sacred as those conferred on other citizens

to protect their freedoms and liberties.", the Constitutional morality will impact upon any law which deprives an

individual to his entitlement to a full and equal citizenship and the society or for that matter any employer cannot dictate

the expression of sexuality between the consented adults. A relationship between a man and a woman is a private affair.

The employer has nothing to do with it.



35. In the words of the Supreme Court in the case of **Navtej Singh Johar & ors. Vs. Union of India through Secretary Ministry of Law and Justice (supra)**, "Constitutional morality will supersede any culture or tradition". The Apex Court while dealing with the case under Section 377 IPC in the aforesaid matter, held "Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life."



36. Having noted above, this Court finds that the photolithography on each part of the Constitution as shown in the calligraphist version of the Constitution of India conveys another meaning and not what Mr. GS Gill, Additional Advocate General has sought this Court to understand. From Chapter-1 to Chapter-22, the illustrations depicted are from different periods starting from 'Mohan Jodro' period and ending upto the British period and the struggle for independence and the struggle of the Father of Nation for removal of casteism and to achieve an egalitarian society having equality as a concept permeating in all works of life of an individual. Thus, it depicts how a society continues to strive to achieve a better status and in the process, the concepts of the cultural norms of the society have to change.

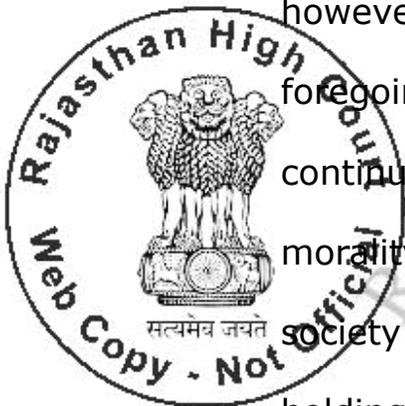
The pursuit is always towards the betterment and independent rights of an individual.

37. Having said so, it would also be appropriate to deal with the submissions of learned Additional Advocate General appearing for the respondent-State. While it is true that the Constitution of India depicts the history of India i.e. 'Bharat', however, as held by the Supreme Court, as noted above in foregoing paras, the evolution of a human mind is a continuous process. With the change of times, the concept of morality has to be understood according to change of the society and the concept which an individual citizen may be holding 100 years back, would not be the same with the progression of the human development. The law makers have to keep pace with the advancement of the society and the interpretation has to be done accordingly.

38. The view expressed by the Apex Court would equally be applicable where the question of relationship, between a man and a woman is to be examined. The norms of moralities of the society cannot supersede the right of privacy and right of choice of relationship of an individual and no person can be punished by his employer for such behaviour or relationship.

39. The Apex Court in the case of **Navtej Singh Johar & ors. Vs. Union of India through Secretary Ministry of Law and Justice (supra)**, has further held as under:-

"151. The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In



protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation."

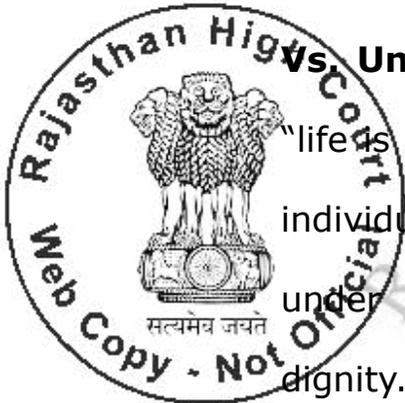
40. Thus, this Court cannot deny an individual to have sovereignty over his/her body and in view of the observations made by Justice Krishna Iyer in the case of **Maneka Gandhi**

vs Union of India and another: 1978(1) SCC 248 that "life is a terrestrial opportunity for upholding personality", an individual employee, only because of having accepted to work under the State Government, cannot be deprived of his dignity.

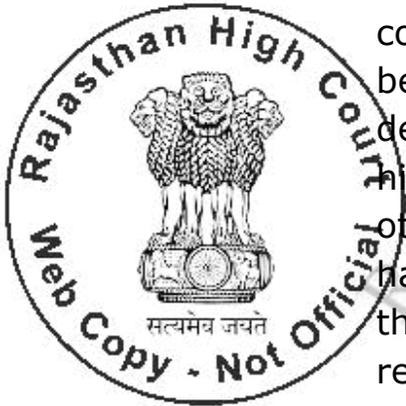
41. The right to live under Article 21 of the Constitution of India also means a right to live with dignity which also means right of choice and right of privacy.

42. In **Navtej Singh Johar & ors. Vs. Union of India through Secretary Ministry of Law and Justice (supra)**, the then Chief Justice of India Dipak Misra and Justice A.M. Khanwilkar have held as under:-

"132. Dignity is that component of one's being without which sustenance of his/her being to the fullest or completest is inconceivable. In the theatre of life, without possession of the attribute of identity with dignity, the entity may be allowed entry to the centre stage but would be characterized as a spineless entity or, for that matter, projected as a ruling king without the sceptre. The purpose of saying so is that the identity of every individual attains the quality of an —individual being|| only if he/she has the dignity. Dignity while expressive of choice is averse to creation of any dent. When biological



expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is denied. Such a situation urges the conscience of the final constitutional arbiter to 56 (1978) 1 SCC 248 demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals. This is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary pre-requisite that consent is the real fulcrum of any sexual relationship."



43. Thus, this Court feels that a human dignity attaches to itself also a right of concept of autonomy and also a right to take ones own decisions for himself or herself relating to his/her body and choices of his/per partner for whom he or she wishes to live or have sexual intercourse. These choices and selections cannot be a subject matter of departmental proceedings and no employer can be allowed to do moral policing on its employees which go beyond the domain of his public life.

44. In view of the above discussions and observations, this Court is of the opinion that an act of relationship entered by an individual with another female or male as the case may be while is/her spouse is alive would be an act of amounting to adultery and would be considered as an immoral act so far as the Indian society is concerned. It is not to be appreciated. The same would, however, not be a ground for initiating

departmental proceedings by the employer and it be left best for the person who may be affected individually to take remedy and proceed against him/her in civil law or for initiating divorce proceedings as the case may be.

45. Thus, this Court concludes that the respondents had no authority to issue letter dated 30/01/1999 directing the petitioners to undergo DNA Test alongwith child of Dharma Rani and the action of suspending the petitioners and issuing subsequently memorandum dated 16/12/2000 under Rule 16 of the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 is found to be illegal and unjustified and the same is quashed and set aside and further, it is held that the State Government shall not initiate departmental proceedings on the basis of a complaint of any person against a Government servant alleging therein of the said Government servant having extra-marital relationship with another man or woman whether married or unmarried.

46. Consequently, both the writ petitions are allowed with all consequential benefits and it is held that the petitioner Mahesh Chand Sharma, who has attained superannuation during pendency of the writ petition shall be entitled to all retiral and post retiral benefits and similarly, the petitioner Dharma Rani shall also be entitled for all the consequential benefits.

(SANJEEV PRAKASH SHARMA),J

Raghu

