

III NATIONAL MOOT COURT COMPETITION

5-8 MARCH, 2009



Organised by

Jamia Millia Islamia, New Delhi, India

COMPROMIS FOR THE MOOT COURT COMPETITION

Venue

Faculty of Law, Jamia Millia Islamia, Jamia Nagar, New Delhi- 110025,
India

IN THE SUPREME COURT OF INDIA

Voices for Queer Rights

vs.

Union of India

1. Shreedharan, a 30 year old Indian citizen, is an accountant by profession and is gay (homosexual) by sexual orientation. His parents have had divorce, long back when he was 17 years of age. He has done his schooling from Boston, MA and graduated from Philadelphia, PA with specialization in Financial Accounting.
2. In 2003 after working in America for a few years, he decides to return to his father, in India. His father, an old man of 75 years of age, stays alone at his Gurgaon based residence, whose wife i.e. Shreedharan's mother remarried after a few months of their divorce. Within a few weeks of his arrival, Shreedharan gets a job with a Multinational Corporation based in Mumbai as an accountant.
3. In March, 2003 Shreedharan and his father shifted to Mumbai, and rented a flat at Bandra which was situated at a distance of 1 KM from his office. In the winters of November, 2003 Shreedharan's father died due to cardiac arrest. This changed Shreedharan's life and he becomes very sad and alone. Time passes for him as a relentless flow and he tries to cope up with his expanding professional liabilities.
4. The feeling of being a homosexual in a homophobic Indian society surrounds him greatly and he develops fears and complexes in his mind. On the one hand, he dreams of leading a happy social life where there is dignity and respect for him despite his perverted sexual orientation but when he wakes up, he finds himself in the midst of harsh realities where there is fear and loathing for homosexuals in the minds of people in this country. He develops strong physical as well as mental urges to settle down with another queer fellow of his age, which as per his thinking is no crime, because he feels that to led a life with dignity and respect is

ones legitimate right. Therefore, to live happily along with another gay man under agreement in the same flat as a couple, at par with straight couples, was no offence as per him. He finds himself perplexed and jealous of his colleagues and friends who being heterosexuals or straight men are either getting married or are living in a relationship with a girl, as there is neither any interference by the state nor by the society.

5. Rahul, another queer folk who is 28 years of age joins the same office where Shreedharan works. With the pace of time Shreedharan and Rahul become good friends and they fall in love with each other. They find themselves sharing strong bonds of understanding and commitment with each other and therefore both of them mutually decide to reside with each other under the same roof. Hence, Rahul shifts to Shreedharan's rented flat. They started residing together; happily without caring about how the society will perceive such a relationship between a man and a man.
6. On an unfortunate day of March 2006, Shreedharan's landlord bursts into his flat without informing him and finds both of them in a compromised position involved in sexual acts .He had gone their to collect the rent. Seeing them in such a position, and without letting them utter a word, the landlord rushes to the nearby police station and lodges an FIR stating that his tenant has been using his flat for committing "unnatural offences ". Police raided the flat, seized some material(s) and arrested Shreedharan and Rahul. The media sensationalized the arrests, describing the police action as the busting of a sex racket. Both of them were remanded to judicial custody on 28th March, 2006; they were allegedly beaten up. They were charged under Sections 377 (unnatural offences) of the Indian Penal Code. Their bail applications were rejected twice, first by the chief judicial magistrate (CJM) and then by the district judge, Mumbai. The CJM denied bail, stating that "the work of the accused is like a curse on society". The Sessions Judge upheld the arguments of the prosecution, which alleged that the “accused persons have been indulging in unnatural sexual activities against the order of

nature which as a result is polluting the entire society by encouraging others to indulge and abet in this crime.”

7. Finally, in December, 2006 Shreedharan and Rahul are being awarded an imprisonment for a term of seven years by the lower court. They preferred an appeal against the sentence in the Bombay High Court.
8. In between this span, Shreedharan writes a book while being in the jail about the journey of a gay man in a homophobic Indian society. He tries to bring up the general loathing, fear and sense of insecurity in the mind of a common man about a homosexual. He somewhat reproduces his own story, of how law can destroy the life and career of two young men, just because they are born as homosexuals. In the epilogue of his book, he throws some open questions to the readers and asks them to make a rethink. These questions are:
 - Do Homosexuals have no right to lead a happy life *at par* with that of other straight members of the society?
 - Do adult homosexuals have no right to marry or at least form a civil union with a partner of their choice under an agreement?
 - Why is Gay love made criminal whereas straight love is given full and unconditional support of law and the society?
 - Why is it so, that when two adult heterosexuals consensually cohabit or enter into sexual activities in private, its no crime, but the moment two adult gays enter into consensual sexual activities in private, it is held as criminal under the age-old, obsolete and archaic laws of Indian criminal legal system?

He finally decides to give his book the title “Being Homosexual, Is that a sin?”. Within a very short span of its release, the book becomes a Bestseller in the Indian as well as in the Western Market.

9. Naturally, by then, media also changed its stereotypic perception about gays and as a result of the huge success of this book; the major national news agencies provided a lot of focus on the issues pertaining to Gay Rights. Various

- programmes, talk shows and discussions were organised by the media at various levels of the society, which involved enormous public participation. For the first time in the history of Indian Democracy, queer issues were raised openly at such a mass level by the media. Meanwhile, this kind of a pro-human rights campaign, grabbed a lot of public support.
10. The media highlighted the ongoing exploitation and discrimination of homosexuals done in the hands of the law as well as the judiciary in a country which is based on a constitutional scheme, a constitution which stands on the pillars of the liberal ideas of democracy, fraternity, liberty and equality. All these kinds of stories in the print and electronic media surrounding the Gay Rights charged the queer community and persuaded them to raise their voices in protest, against section 377. The incident of the recent judgment of a Bombay Court in Shreedharan's and Rahul's case alarmed and disturbed the queer community in India, and made it clear to them that the threat of Section 377 being used as a means of criminalization of gay sex was a concern that needed to be urgently addressed.
 11. Subsequently, 'pride marches' were organised at various metros such as Mumbai, Delhi, Bangalore and Kolkata to celebrate the queer freedom and to protest against section 377, which criminalises gay sexual activities such as sodomy calling it an 'unnatural offence'. Although, these protest marches were mainly organised by the queer groups and certain NGO's working in this area, but it also involved immense participation from the homosexual community as well as the common masses. Along with the growing social support, the leading media houses also started regularly raising Gay Rights issues.
 12. In the midst of all this, on 1st March, 2008 a NGO named "*voices for queer rights*" was formed by some renowned national and international human right activists which included people from a multitude of professions such as journalism, law, social work, film making etc. which was started as a registered charitable trust. It was also registered under the Foreign Contribution Regulation

Act so that it can receive funds from both inside India and abroad. The main objectives of this NGO were:

- Reaching out to marginalized populations infected and affected by HIV.
- To sensitize the society and these communities as such, about the prevalence of HIV, as well as highlight issues related to Sexuality and Sexual Health.
- Providing a healthy and happy life, (a life full with dignity and freedom at par with the other fellow citizens of the society) for the sexual minorities i.e. the lesbians, gays, bisexuals and trans-gender people.

13. In December, 2008 “*voices for queer rights*” filed a writ petition in Supreme court under Article 32 of the Constitution of India asking that Section 377 be repealed .The petitioner prayed that Section 377 should be repealed because it violates the right to privacy and discriminates against people with a particular sexual orientation. It asked that private consensual sex between adult gays be decriminalized.

14. The thrust of the petition is to challenge the law as a violation of the right to privacy and equality; to question the legislative intent as being arbitrary and outdated; to challenge the effect of the law as being discriminatory on the grounds of sexual orientation; and as having a damaging impact on the lives of the queer community in the country.

- The petition points the main impact on the queer community as the violation of the right to life as a result of HIV/AIDS prevention work being impeded, and the MSM (men having sex with men) community going underground, i.e., refusing to publicly avail the HIV-prevention options such as condoms, out of fear of being arrested.
- The petition contends that the proscription of "non-procreative sexual activity" violates the right to life because a person's sexual preferences are an inalienable component of his fundamental rights guaranteed to him under the Constitution and various international legal instruments of which India is a party.

- Section 377's prohibition of non-procreative sexual acts criminalizes predominantly homosexual relations and is propelled by a prejudicial and irrational notion of the term 'sex'. Section 377 creates the grounds for vagueness and discrimination as it disproportionately affects homosexuals because it violates their right to engage in private sexual acts between consenting adults.
 - The right to freedom of speech and expression is necessary for the overall development of one's personality, character and orientation. By the criminalization of a particular sexual conduct, particularly those engaged in by sexuality minorities, section 377 imposes a culture of silence around these issues. It restricts an individual's ability to make personal statements about one's sexual preference, as well as discuss, broadcast, circulate and publish material with respect to one's sexual preference.
15. In its response, the Government of India contented that "while the right to respect for private and family life is undisputed, interference by public authority in the interest of public safety and protection of health and morals is equally permissible this is precisely what Section 377 does". The government claims an act that is technically unlawful cannot be rendered legitimate simply because it took place on a consensual basis. It goes on to say, "Section 377 has been applied to cases of assault where bodily harm is intended and deletion of the said section can well open the floodgates of delinquent behavior and be misconstrued as providing unbridled license for the same".
16. The writ has been set for hearing in the Supreme Court of India on 6th March, 2009. The mooters shall prepare brief for the petitioner/NGO namely "*voices for queer rights*" and also the respondents namely the Union of India.
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