'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

MISCELLANEOUS APPLICATION NO. 2204 OF 2020
IN
WRIT PETITION (CRIMINAL) NO. 194 OF 2017

JOSEPH SHINE **Petitioner(s)**

VERSUS

UNION OF INDIA **Respondent(s)**

WITH

MISCELLANEOUS APPLICATION NO. 1702 OF 2021
IN
WRIT PETITION (CRIMINAL) NO. 194 OF 2017

O R D E R

K. M. JOSEPH, J.

MISCELLANEOUS APPLICATION NO. 2204 OF 2020
IN
WRIT PETITION (CRIMINAL) NO. 194 OF 2017

(1) Applications for intervention and impleadment are allowed.

Signature Not Verified
Digitally signed by Nidhi Ahuja
Date: 2021.02.17 16:05:16 IST
Reason:

(2) This miscellaneous application is filed by the Union of India seeking the following clarification:

> **"(a) That persons subject to Army Act, Navy Act and Air Force Act, by virtue of Article 33 of the Constitution of India, being a distinct class, any promiscuous or adulterous acts by such persons should be allowed to be governed by the provisions of Sections 45 or 63 of the Army Act, Sections 45 or 65 of the Air Force Act and Sections 54(2) or 74 of the Navy Act being special legislation and considering the requirements of discipline and proper discharge of their duty."**

(3) The applicant is seeking clarification of the judgment of this Court reported in *Joseph Shine* v. *Union of India* (2019) 3 SCC 39. It must be noticed that the applicant was the sole respondent in the said case.

(4) The reasons which have driven the applicant to seek the clarification are as follows:

It is the case of the applicant that this Court has undoubtedly proceeded to find Section 497 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC' for brevity) as unconstitutional as it offended Articles 14, 15 and 21 of the Constitution

of India. However, it is the case of the applicant that officers of the Armed forces are subject to statutory provisions, viz., Army Act, 1950, Navy Act, 1957 and the Air Force Act, 1950 (hereinafter referred to as 'Acts').

(5) Our attention is further drawn to Article 33 of the Constitution which reads as follows:

> **"33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.— Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,—**
>
> **(a) the members of the Armed Forces; or**
>
> **(b)the members of the Forces charged with the maintenance of public order; or**
>
> **(c)persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or**
>
> **(d)person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a)to (c),**
>
> **be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."**

(6) It is the case of the applicant that the

impression has been generated and is sought to be perpetuated that in the light of the judgment of which the clarification is sought, nothing more would survive even if a case is made otherwise under relevant provisions of the Acts in question.

(7) Ms. Madhvi Divan, learned Additional Solicitor General, who appears on behalf of the applicant, drew our attention, as an illustration, to the following provisions of the Army Act, 1950 (hereinafter referred to as '1950 Act' for brevity).

Chapter VI deals with offences thereunder. Our attention is drawn to Section 45:

> **"45. Unbecoming conduct. Any officer, junior commissioned officer or warrant officer who behaves in a manner unbecoming his position and the character expected of him shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and, if he is a junior commissioned officer or a warrant officer, be liable to be dismissed or to suffer such less punishment as is in this Act mentioned."**

(8) She further draws our attention to Section 63:

> **"63. Violation of good order and discipline. Any person subject to this Act**

> **who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and military discipline shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."**

(9) Finally, she drew our attention to Section 69:

> **69.Civil offences. Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,-**
> **(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and**
> **(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.**

(10) She would immediately point out that in the light of the judgment of this Court in *Joseph Shine*

(supra), since Section 497 IPC has been struck down as unconstitutional and it being a civil offence within the meaning of Section 69 of the 1950 Act, it may not be open to the authorities to proceed against an officer under Section 69. However, it is the further case that it will not preclude the authorities from invoking Section 45 and/or Section 63 of the 1950 Act. There are similar provisions also in the Navy Act and in the Air Force Act.

It is her submission that the words adulterous acts would bear the meaning which is assigned to it in the dictionary. So also the word promiscuous. They need not be found integrally connected with Section 497 IPC as such.

(11) The members of Armed Forces, according to her, are a class apart. She also drew our attention to the objects and reasons of the 1950 Act. It is pointed out that the law was enacted to provide for an exhaustive Code. It is a complete Code. It provides for self-regulation. According to her, the decision of this Court in *Joseph Shine* (supra) must be viewed in the context of the institution of

Marriage. It was not rendered in the context of a workplace. Expanding further, learned Additional Solicitor General would point out that the setting in which the Armed Forces operate makes it a unique workplace. Discipline among the members of the Force is a matter which is indispensable. Discipline would indeed be impaired, according to her, if the high moral ground to be occupied by the officers is diluted. The obstacle for the authorities invoking Sections 45 and 63 of the 1950 Act as also the corresponding provisions in the other two Acts will ultimately result in a situation where, in the sensitive Forces, which the Armed Forces are, it would engender and breed rank indiscipline. The Forces which act as one and proceed on the existence of a sense of brotherhood would face breakdown of their morale. This was not what was in contemplation of this Court when it pronounced Section 497 IPC as unconstitutional. Section 497 IPC has been struck down on the basis that it offended Articles 14, 15 and 21 of the Constitution. The Court it is contended was

distressed by the resort to values of a bygone era [the Victorian era] and the considerations which persuaded this Court to hold Section 497 IPC as unconstitutional are not germane for the purposes of deciding on the validity or the legality of actions taken under Sections 45 and 63 of the 1950 Act. She, in fact, did point out that there was an element of discord even in the matter of right of privacy which has been advocated in the judgment of one of the learned Judges whereas it has not been so evidenced in the judgment of another Judge. There is a command structure in the Armed Forces which it is indispensable to maintain. Such command structure would be disturbed. She would, in this regard, ask us to focus attention on the words 'unbecoming conduct' in Section 45 of the 1950 Act. She would submit that in a case where the officer is charged with what is unbecoming conduct and it consists of an act of adultery, nothing can stand in the way of the authorities taking action.

(12) Pertinently, the learned ASG would also point out that the provisions are gender neutral and it

does not suffer from the vice found by this Court when it struck down Section 497 IPC. Whoever, it may be, man or woman, who acts in a manner which is found to be unbecoming can be proceeded against, therefore, under Section 45 of the 1950 Act. Equally, she drew our attention to Section 63 and points out the importance of the words 'military discipline', viz-a-viz, good order. In other words, any act or omission which is not specified in the Act and is found to be prejudicial to good order and military discipline would invite action under Section 63. She even went to the extent of pointing out that it can lead to a mutiny. She would submit that an unrestful breakdown has, in fact, occurred.

(13) She would further point out that Union of India is faced with the following situation:

If an action is taken under Sections 45 and 63 of the 1950 Act, it is being challenged. The bone of contention raised by the officer/personnel is that the action is tabooed by virtue of the judgment of this Court. This has led to a number of cases piling up. There is a certain amount of chaos.

This does not conduce to discipline being maintained in the Armed Forces.

(14) Ms. Madhavi Divan, learned Additional Solicitor General, would submit that this Court may, at least, clarify that the judgment of this Court was not concerned with and does not deal with the provisions in question under the Acts.

(15) We also have had the benefit of hearing Ms.Anannya Ghosh and Mr. K. Parameshwar, learned counsel. They are counsel who appear for intervenors. It is pointed out by them that the application for clarification may not be allowed.

(16) They would submit that no case is made out for ordering clarification. Proceedings would have to be decided on the facts as are relevant to each case. The application for clarification may not be the solution to the problem which is projected by the applicant. In the individual cases where this question may arise, it is for the applicant to work out its remedies and this Court may not issue an omnibus clarification.

(17) Mr. Kaleeswaran Raj, learned counsel, appears for the petitioner-Joseph Shine in the judgment sought to be clarified.

He would submit that the application for clarification may not be entertained. In this regard, he drew our attention to an Order of this Court in *Supertech Limited* v. *Emerald Court Owner Resident Welfare Association and Others* (Miscellaneous Application No. 1572 of 2021 in Civil Appeal No. 5041 of 2021). The Court notices that the applicant therein was seeking the following prayers:

> **"(a) Modify the judgment dated 31.08.2021...to the extent that the Applicant may demolish a part of tower T-17 as stipulated in paragraph 6 hereinabove;**
> **(b) Pass an order of status quo in respect of Towers 16 & 17 in Emerald Court, Plot No. 4, Sector 93A, NOIDA till final orders are passed in the present application."**

(18) No doubt, this Court has proceeded to go into the question as to the maintainability of the application. In doing so, the Court has followed the judgment by this Court in *Delhi Administration*

v. *Gurdip Singh Uban and Others* (2000) 7 SCC 296:

> **"In successive decisions, this Court has held that the filing of applications styled as "miscellaneous applications" or "applications for clarification/modification" in the guise of a review cannot be countenanced. In *Gurdip Singh Uban* (supra), Justice M Jagannadha Rao, speaking for a two-Judge Bench of this Court observed:**
>
> > **"17.We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.**
>
> **Order XL Rule 3 states as follows:**
>
> **"3. Unless otherwise ordered by the Court, an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party...."**
>
> **In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of "no**

hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for "clarification" or "modification", — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. (See in this connection a detailed order of the then Registrar of this Court in *Sone Lal* v. *State of U.P.* [(1982) 2 SCC 398] deprecating a similar practice.)

18. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers."

(19) This view apparently has found acceptance in

the subsequent judgments. It was found undoubtedly in the facts of the said case that the application sought substantive modification of the judgment. Thereafter, undoubtedly, this Court also held as follows:

> **"12 The hallmark of a judicial pronouncement is its stability and finality. Judicial verdicts are not like sand dunes which are subject to the vagaries of wind and weather (See *Meghmala* v *G Narasimha Reddy*, (2010) 8 SCC 383). A disturbing trend has emerged in this court of repeated applications, styled as Miscellaneous Applications, being filed after a final judgment has been pronounced. Such a practice has no legal foundation and must be firmly discouraged. It reduces litigation to a gambit. Miscellaneous Applications are becoming a preferred course to those with resources to pursue strategies to avoid compliance with judicial decisions. A judicial pronouncement cannot be subject to modification once the judgment has been pronounced, by filing a miscellaneous application. Filing of a miscellaneous application seeking modification/clarification of a judgment is not envisaged in law. Further, it is a settled legal principle that one cannot do indirectly what one cannot do directly [*"Quando aliquid prohibetur ex directo, prohibetur et per obliquum*"].**

(20) He would submit that there is no occasion for the applicant to file the present application.

(21) Learned counsel for the petitioner in the main case would, in fact, agree with the applicant that the questions which have been raised in the application seeking clarification were not those which arose for consideration in the judgment sought to be clarified. This Court was concerned with the validity of Section 497 IPC. It pronounced on the same. It had nothing to do with the provisions under the Acts.

(22) He would submit that no occasion has arisen for this Court to clarify the order accordingly. In fact, this Court posed the following question. In a given case, the authority is presented with the following set of facts. An officer is proceeded against under Section 45 of the 1950 Act; the charge against him is adultery; it is alleged, in other words, that he has committed adultery within the meaning of Section 497 IPC which has been struck down. Mr. Kaleeswaram Raj, learned counsel for the original petitioner, very fairly submits that, the fact that Section 497 IPC has been struck down may not stand in the way of the authorities proceeding

against the officer with the aid of the provisions contained in Section 45 of the 1950 Act. Of course, he adds that the decision must finally depend upon the play of facts.

(23) This Court in the case in question was concerned only with the validity of Section 497 IPC and Section 198 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.' for brevity). This Court spoke through separate but concurrent judgments. Apart from the lead judgment of Hon'ble Mr. Justice Dipak Misra, former Chief Justice of this Court, and with whom, Hon'ble Mr. Justice A. M. Khanwilkar concurred, the other learned Judges wrote separate opinions. However, they agreed that Section 497 IPC and Section 198 Cr.P.C. were unconstitutional. The premise on which the provision was struck down was that it offended Articles 14, 15 and 21 of the Constitution.

In this case, this Court had no occasion, whatsoever, to consider the effect of the provisions of the Acts in question. In fact, we may notice

that it is not as if this Court approved of adultery. This Court has found that adultery may be a moral wrong (per Hon'ble Ms. Justice Indu Malhotra). This Court has also held that it will continue to be a ground for securing dissolution of marriage. It has also been described as a civil wrong.

(24) In view of the fact that the scheme of the Acts in the context, in particular, of Article 33 of the Constitution did not fall for the consideration of this Court, we must necessarily observe and clarify that the judgment of this Court in *Joseph Shine* v. *Union of India* (2019) 3 SCC 39 was not at all concerned with the effect and operation of the relevant provisions in the Acts which have been placed before us by the applicant. In other words, this Court was neither called upon nor has it ventured to pronounce on the effect of Sections 45 and 63 of the 1950 Act as also the corresponding provisions in other Acts or any other provisions of the Acts.

(25) We only make this position clear and dispose of

the miscellaneous application.

Pending applications stand disposed of.

MISCELLANEOUS APPLICATION NO. 1702 OF 2021
IN
WRIT PETITION (CRIMINAL) NO. 194 OF 2017

(26) Application for impleadment is allowed.

(27) The miscellaneous application stands disposed of. Pending applications stand disposed of.

……., J.
[K.M. JOSEPH]

……., J.
[AJAY RASTOGI]

……., J.
[ANIRUDDHA BOSE]

……., J.
[HRISHIKESH ROY]

……., J.
[C.T. RAVIKUMAR]

New Delhi;
January 31, 2023.