

MANU/OR/0200/2020

Equivalent/Neutral Citation: 2020(214)AIC751, 2020(II)ILR-CUT514, 2020(II)OLR709

IN THE HIGH COURT OF ORISSA AT CUTTACK

Writ Petition (Criminal) No. 57 of 2020

Decided On: 24.08.2020

Chinmayee Jena **Vs.** State of Odisha and Ors.

Hon'ble Judges/Coram:

S.K. Mishra and Savitri Ratho, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Clara D' Souza, S. Soren and H.B. Dash

For Respondents/Defendant: Saswata Pattnaik, Addl. Govt. Advocate and Arun Kumar Budhia

Case Note:

CONSTITUTION OF INDIA, 1950 - Articles 226 and 227-Writ petition in the nature of Habeas Corpus seeking recovery of partner and making serious allegations of violation of the constitutional rights under Articles 14 and 21-Self determination of gender and self-expression-Whether falls within the realm of personal liberty guaranteed under the Constitution-Held, yes.

"Taking into consideration the aforesaid principles of human right, the Hon'ble Supreme Court at Paragraph-74, held that the recognition of one's gender identity lies at the heart of the fundamental right to dignity. It was further held by the Hon'ble Supreme Court that gender constitutes the core of one's sense of being as well as an integral part of a person's identity; legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under the Constitution. At paragraph-75, the Hon'ble Supreme Court referred to Article 21 of the Constitution and indicated that Articles 21 guarantees the protection of personal autonomy of an individual. Quoting Anuj Garg vs. Hotel Association of India, (2008) 3 SCC 1, the Hon'ble Supreme Court reiterated that the personal autonomy includes both the negative right of not to be subject to interference by others and positive rights of individuals to make decisions about their life, to express himself and to choose what activity take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution. The above view was taken by Hon'ble Sri Justice K.S.P. Radhakrishnan in the aforesaid judgment. Concurring with Hon'ble Sri Justice K.S.P. Radhakrishnan, Hon'ble Dr. Justice A.K. Sikri held that the basic spirit of our Constitution is to provide each and every person of the nation, equal opportunity to grow as human being, irrespective of race, caste, religion, community and social status, Hon'ble Dr. Justice A.K. Sikri further quoted Granville Austin, who analyzing the functioning of Indian Constitution in the last 50 years, has described three distinguished strands of the Indian Constitution. They are: (i) protecting national unity and integrity, (ii) establishing of institution and spirit of democracy; and (iii) fostering social

reforms. The strands are mutually dependent and inextricably intertwined in what he elegantly describes as a seamless web. There cannot be social reforms till it is ensured that each and every citizen of the country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words "We the People". The most important gift to the common person given by the Constitution is fundamental rights which may also be called Human Rights. The concept of equality in Article 14 so also the meaning of words life, liberty and law in Article 21 has been considerably enlarged by judicial decision. Anything, which is not reasonable, just and fair, is not treated to the equal and is, therefore, violative of Article 14." [11]

"Law is a reflection of current social values or norms. Social norms undergo change with time and law keeps abreast with the same Courts recognize these changes and rule on the same. The oft quoted maxim-love knows no bounds has expanded its bounds to include same sex relationships. A reading of the Supreme Court judgments will indicate that individual rights have to be balanced with social expectations and norms. The freedom of choice is therefore available to the two individuals in this case who have decided to have a relationship and live together and society should support their decision. The decisions of the Hon'ble Supreme Court in NALSA vs. Union of India : (2014) 5 SCC 438, Anuj Garg vs. Hotel Association of India : (2009) 3 SCC 1 and, Navtej Singh Johar vs. Union of India : (2018) 10 SCC 1 referred to and discussed by S.K. Mishra J., have settled the law regarding the right of a person for self determination of his/her sex/gender and consequently the right to have a live in relationship. Therefore the observations of the Hon'ble Apex Court in the case of Shakti Vahini vs. Union of India : (2018) 7 SCC 192, will also apply to this case. In the Shakti Vahini case, the Hon'ble Court was dealing with the distressing fallout of "honour crimes" and the illegal activities of "khap panchayats" and laid down various preventive, remedial and punitive measures for dealing with the same by stating the broad contours and modalities. Observations in the said judgment, which are relevant for the present case are quoted below. "Assertion of choice is an inseparable facet of liberty and dignity and that is why the French philosopher and thinker, Simone Weil, has said:-" Liberty, taking the word in its concrete sense consists in the ability to choose." xxx xxx xxx "45. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, 20 the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice If the right to express one's choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness When two adults marry out of their own volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they

are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law"---." [14]

JUDGMENT

S.K. Mishra, J.

1. The petitioner originally belonging to female gender, has exercised his rights of self gender determination and preferred to be addressed as he/his. Therefore, we have recognized the petitioner's right to be treated as a male and referred him as he/him/his.

2. This judgment arises out of an application filed under Article 226 and 227 of the Constitution of India, 1950 in which the petitioner-Chinmayee Jena @ Sonu Krishna Jena, aged about 24 years has approached this Court with the grievance that his life partner "Rashmi" (not the original name, which is withheld) has been forcibly taken away by her mother and uncle, i.e. Opposite Party Nos. 5 and 6. The petitioner, therefore, prays for issuance of a writ of Habeas Corpus directing opposite parties to produce his partner of the petitioner before the Court and to pass appropriate orders.

3. In course of hearing, Ms. Clara D' Souza along with Ms. S. Soren, learned counsel for the petitioner urged that both the petitioner and his life partner (Rashmi) are major and have been enjoying consensual relationship since, 2017. They were studying in one school and later on, in one college. After finishing their studies, the petitioner got a private job at Bhubaneswar and was staying on rent in a housing colony of Bhubaneswar. The learned counsel for the petitioner relying upon the joint affidavit by Chinmayee Jena @ Sonu Krishna Jena and Subhashree Priyadarshini Samal, which is sworn before the Executive Magistrate, Bhubaneswar on 16.03.2020 and contents of the writ petition, argued that both of them fell in love with each other in 2011. Thereafter, they decided to stay together. It was also contended by the learned counsel for the petitioner that, as per the ratio decided by the Hon'ble Supreme Court in the case of National Legal Services Authority vs. Union of India and others, MANU/SC/0309/2014 : (2014) 5 SCC 438, self-determination of gender is an integral part of personal autonomy and self-expression and falls with the realm of personal liberty guaranteed under Article 21 of the Constitution. It is further submitted that in the aforesaid judgment, the Hon'ble Supreme Court has given weightage to follow the psyche of the person in determining sex and gender and prefer the "Psychological Test" instead of "Biological Test". According to the petitioner, as per the ratio decided by the Hon'ble Supreme Court in the aforesaid case, he availed certification of Gender Dysphoria for Trans Man from Dr. Amrit Pattojoshi, D.P.M., M.D. (Neuro-Psychiatry), Central Institute of Psychiatry, Ranchi on dated 25.01.2020 (Annexure-3). The Dr. Amrit Pattojoshi has issued the living certificate. We find it expedient to quote the exact findings given by the expert.

" Date: 25/01/20

CERTIFICATION OF GENDER DYSPHORIA TRANS MAN To Whom It may Concern:

I have assessed the individual (sex assigned at birth: female, gender identity: male, Date of Birth: 02/03/1996, assigned name: Chinmayee Jena, father: Bibhuti Bhusan Jena, preferred name: Sonu Krishna Jena, preferred pronouns: He/him) who consulted me regarding acute discomfort with his assigned

gender.

On taking detailed case history, I have found that the client has had gender dysphoria (diagnosis, DSM-V)/gender incongruence (diagnosis, ICD-11) from an early age.

The individual is living in the preferred gender in real life and undergone two (number of) sessions of psychiatric evaluation since 30/11/19.

The individual has no psychotic symptoms or other psychiatric morbidities. The only diagnosis is that of gender dysphoria.

The client is well informed about his condition and treatment options. Considering that his cognitive functions are normal, and he is legally an adult, he is fully capable of taking medical decisions.

In my opinion he is psychiatrically fit to undergo gender-affirming procedures (hormone therapy/gender affirming surgery/others please specify _____)." ."

Dr. Amrit Pattojoshi

D.P.M., M.D. (Neuro-Psychiatry), Central Institute of Psychiatry, Ranchi

Regd. No. 14110

Professor and HoD, Hi-tech Medical College and Hospital

Bhubaneswar"

4. From the aforesaid certification, it is clear that the petitioner had gender dysphoria (diagnosis, DSM-V)/gender incongruence (diagnosis, ICD-11) from an early age after two sessions of psychiatric evaluation since 30.11.2019. The doctor opined that the petitioner has no psychotic symptoms or other psychiatric morbidities. The only diagnosis is that of gender dysphoria. In other words, it means that the petitioner is a major having no psychological problem, except gender dysphoria/gender incongruence and that he has cognitive functions, which are normal and, therefore, being an adult, he is capable of taking medical decision.

5. Then, the learned counsel for the petitioner relied upon Annexure-4, which is a copy of affidavit jointly sworn by the petitioner and his partner before the Executive Magistrate, Bhubaneswar. It is evident from the affidavit that both the petitioner and his partner were living together in a live-in relationship at the same place. It is further clear that they have sworn the affidavit in the light of the Supreme Court decision in the case of NALSA vs. Union of India (supra).

6. While they were residing so, in a live-in relationship, on 09.04.2020, mother and uncle of the petitioner's partner came to the house of the petitioner and forcibly took the petitioner's partner against her will. It was done against her will even though both the petitioner and his partner have attained the age of majority and decided to stay together and be life partner. It was further contended that in the provisions of Protection of Women from Domestic Violence Act, 2005, legislature has acknowledged live-in relationship by giving rights and privileges. Therefore, the learned counsel for the petitioner contends that even if the parties, who are living together in a 'live-in relationship' though they belong to the same gender, are not competent to enter into

wedlock, but still they have got a right to live together even outside the wedlock. Thereafter, the petitioner filed a report before the Inspector In-Charge, Khandagiri Police Station, Khandagiri, Bhubaneswar and the Inspector In-Charge, Bari Police Station, Bari, Jajpur. But, the police authorities have not taken any action. The petitioner, when came to know that the family members of his partner are going to forcibly arrange her marriage with someone else, filed this writ application for issuance of a writ of Habeas corpus.

7 . The Opposite Party Nos. 1 to 4, being the State Government functionaries, represented by Mrs. Saswata Pattnaik, learned Addl. Government Advocate, have not filed any counter affidavit. Recognizing right of persons belonging to the same gender for live-in relationship, Mrs. Saswata Pattnaik, learned Addl. Government Advocate submitted that the State is willing to carry out any orders passed by this Court.

8 . Notice was sent to the Opposite Party nos. 5 and 6 and they have appeared by engaging Mr. Arun Kumar Budhia, learned counsel. They have not filed any counter affidavit in the case. While issuing notice, this Court has directed the Superintendent of Police, Jajpur i.e. Opposite Party No. 2 to ascertain wishes of "Rashmi", petitioner's partner and whether she wants to stay with the petitioner and also to ensure her marriage should not be solemnized against her will. Thereafter, on 10.08.2020, we directed the Superintendent of Police, Jajpur to secure attendance of the victim and have a video conferencing with her on 17.08.2020. We have talked over phone with the lady, who was identified by the S.P., Jajpur, as the lady, who happens to be the daughter of Opposite Party No. 5 and who is in a relationship with the petitioner. We have conversed with her. It was explained to her that merely because the writ petition has been filed making allegation of illegal restraint, she was not under obligation or compulsion to join the company/society of the petitioner and she could stay with her family, if she chose to do so. But, she categorically stated that she wants to join the petitioner without any further delay but the order was not passed on that day and it was deferred to 19.08.2020 on the prayer of Mr. A.K. Budhia, learned counsel for the Opposite Party Nos. 5 and 6. On 19.08.2020, the learned counsel for the Opposite Party Nos. 5 and 6 again sought for adjournment and the matter was directed to be listed on 20.08.2020. But, as the Bench did not function on that day, it was listed on 21.08.2020. Mr. A.K. Budhia, learned counsel, while admitting that the legal position has been set at rest by judgments passed by the Hon'ble Supreme Court on the rights of the individuals belonging to the same gender, has expressed his concern about the well being of the daughter of the Opposite Party No. 5. He prays that, if any, order is passed in favour of the petitioner, then appropriate safeguards should be given to the petitioner's partner for her well being and safety.

9 . In the case of National Legal Services Authority vs. Union of India (Supra), the Hon'ble Supreme Court has taken into consideration the views of the United Nations, other human rights bodies, gender identity and sexual orientation and has quoted extensively from Yogyakarta Principles. It is appropriate to take note of the exact words used by the Hon'ble Supreme Court in the aforesaid case. We are quoted hereunder:

" 23. United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the

law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to States human rights obligations.

24. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Reference to few Yogyakarta Principles would be useful.

YOGYAKARTA PRINCIPLES:

25. Principle 1 which deals with the right to the universal enjoyment of human rights, reads as follows:-

"1. The right to the universal enjoyment of human rights.- beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

(a) embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

(b) amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

(c) undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

(d) integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

2. The rights to equality and non-discrimination.-Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such

discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

(a) embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

(b) repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(c) adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

(d) take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

(e) in all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

(f) take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

3. The right to recognition before the law.- recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each

persons self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a persons gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

- (a) ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- (b) take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- (c) take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex including birth certificates, passports, electoral records and other documents reflect the persons profound self-defined gender identity;
- (d) ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- (e) ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- (f) undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

4. The right to life.- Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

- (a) repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the

same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

(b) remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

(c) cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

6. The right to privacy.- Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to ones sexual orientation or gender identity, as well as decisions and choices regarding both ones own body and consensual sexual and other relations with others.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

(b) repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(c) ensure that criminal and other legal provisions of general application are not applied to de facto criminalise consensual sexual activity among persons of the same sex who are over the age of consent;

(d) Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

(e) release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of

consent, or is related to gender identity;

(f) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others

9. The right to treatment with humanity while in detention.- Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

(a) ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

(b) provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;

(c) ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

(d) put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

(e) ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;

(f) provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;

(g) undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality identity.

18. Protection from medical abuses.- No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

(b) take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

(c). establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

(d) ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

(e) review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

(f) ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

19. The right to freedom of opinion and expression.-Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation

and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

(b) ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

(c) take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

(d) ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

(e) ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

(f) ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

26. The UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity. United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:-

"32. Sexual orientation and gender identity.- 'Other status' as recognized in Article 2, para (2), includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivors pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."

10. From the Yogyakarta principles, it is evident that all humans have the universal right of enjoyment of human rights, right to equality and non-discrimination, the right to recognition before the law, right to life, the right to privacy and right to treatment with humanity while in detention etc. It was also repealed that all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex, who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them; remit sentences of death and release all those currently waiting execution for crimes relating to consensual

sexual activity among persons who are over the age of consent. Several such resolutions were passed, which have been quoted above.

11. Taking into consideration the aforesaid principles of human right, the Hon'ble Supreme Court at Paragraph-74, held that the recognition of one's gender identity lies at the heart of the fundamental right to dignity. It was further held by the Hon'ble Supreme Court that gender constitutes the core of one's sense of being as well as an integral part of a person's identity; legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under the Constitution. At paragraph-75, the Hon'ble Supreme Court referred to Article 21 of the Constitution and indicated that Article 21 guarantees the protection of personal autonomy of an individual. Quoting *Anuj Garg vs. Hotel Association of India*, MANU/SC/8444/2007 : (2008) 3 SCC 1, the Hon'ble Supreme Court reiterated that the personal autonomy includes both the negative right of not to be subject to interference by others and positive rights of individuals to make decisions about their life, to express himself and to choose what activity take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution. The above view was taken by Hon'ble Sri Justice K.S.P. Radhakrishnan in the aforesaid judgment. Concurring with Hon'ble Sri Justice K.S.P. Radhakrishnan, Hon'ble Dr. Justice A.K. Sikri held that the basic spirit of our Constitution is to provide each and every person of the nation, equal opportunity to grow as human being, irrespective of race, caste, religion, community and social status, Hon'ble Dr. Justice A.K. Sikri further quoted Granville Austin, who analyzing the functioning of Indian Constitution in the last 50 years, has described three distinguished strands of the Indian Constitution. They are: (i) protecting national unity and integrity, (ii) establishing of institution and spirit of democracy; and (iii) fostering social reforms. The strands are mutually dependent and inextricably intertwined in what he elegantly describes as a seamless web. There cannot be social reforms till it is ensured that each and every citizen of the country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the people of India and that is why it is given by the people to themselves as expressed in the opening words "We the People". The most important gift to the common person given by the Constitution is fundamental rights which may also be called Human Rights. The concept of equality in Article 14 so also the meaning of words life, liberty and law in Article 21 has been considerably enlarged by judicial decision. Anything, which is not reasonable, just and fair, is not treated to the equal and is, therefore, violative of Article 14.

12. The Hon'ble Supreme Court of India in the case of *Navtej Singh Johar vs. Union of India*, (2008) 10 SCC 1 has held that Section 377 of the Indian Penal Code, 1860, which penalizes self-same couples, transgresses Article 14, 15, 19 and 21 of the Constitution of India. In that case, the Hon'ble Supreme Court has held that (i) Section 377 of the IPC, in so far as it criminalises consensual sexual conduct between two adults of the same sex, is unconstitutional; (ii) members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including liberties protected by the Constitution; (iii) the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation; (iv) members of the LGBT community are entitled to the benefit of equal citizenship, without discrimination, and to equal protection of law; and the earlier decision of the Supreme Court in *Koushal's* case is overruled.

13. Thus, taking into consideration the aforesaid authoritative pronouncements of the

Hon'ble Supreme Court, there is hardly any scope to take a view other than holding that the petitioner has the right of self-determination of sex/gender and also he has the right to have a live-in relationship with a person of his choice even though such person may belong to the same gender as the petitioner.

Therefore, we allow the writ application (criminal) and direct that the petitioner and the daughter of the Opposite Party No. 5 have the right to decide their sexual preferences including the right to stay as live-in partners. The State shall provide all kind of protection to them, which are enshrined in Part-III of the Constitution of India, which includes the right to life, right to equality before law and equal protection of law. Hence, we direct the Opposite Party No. 2 to clear the way by taking appropriate administrative/police action to facilitate Rashmi to join the society of the petitioner. However, we are also alive to the apprehensions of the Opposite Party No. 5, mother of the girl. Hence, we further direct that the petitioner shall take all good care of the lady as long as she is residing with him and that the Opposite Party Nos. 5 and 6 and the sister of the lady would be allowed to have a communication with her both over phone or otherwise. They have the right to visit the lady in the residence of the petitioner. The lady shall have all the rights of a woman as enshrined under the Protection of Women from Domestic Violence Act, 2005. The Opposite Party No. 3, Inspector In-Charge of the Khandagiri Police Station, Khandagiri, Bhubaneswar shall obtain a written undertaking (to that effect) from the petitioner and shall keep a copy thereof in his office and send the original to this Court to form a part of this record. It should be sent in the address of the Registrar General of this Court.

Savitri Ratho, J.

(concurring)

I have carefully gone through the well considered decision of my Brother Mr. S.K. Mishra, J. I whole heartedly agree with his reasoning and ultimate conclusion. But since this is an unusual case, and alongwith the rights of the two individuals who have exercised their right to live together, the interest of two other individuals will be affected because of the mindset of the society they live in, I want to supplement the same with some reasons and observations.

14. Law is a reflection of current social values or norms. Social norms undergo change with time and law keeps abreast with the same Courts recognize these changes and rule on the same. The oft quoted maxim - love knows no bounds has expanded its bounds to include same sex relationships. A reading of the Supreme Court judgments will indicate that individual rights have to be balanced with social expectations and norms. The freedom of choice is therefore available to the two individuals in this case who have decided to have a relationship and live together and society should support their decision. The decisions of the Hon'ble Supreme Court in NALSA vs. Union of India : MANU/SC/0309/2014 : (2014) 5 SCC 438, Anuj Garg vs. Hotel Association of India : (2009) 3 SCC 1 and, Navtej Singh Johar vs. Union of India : (2018) 10 SCC 1 referred to and discussed by S.K. Mishra J., have settled the law regarding the right of a person for self determination of his/her sex/gender and consequently the right to have a live in relationship. Therefore the observations of the Hon'ble Apex Court in the case of Shakti Vahini vs. Union of India : MANU/SC/0291/2018 : (2018) 7 SCC 192, will also apply to this case. In the Shakti Vahini case, the Hon'ble Court was dealing with the distressing fallout of "honour crimes" and the illegal activities of "khap panchayats" and laid down various preventive, remedial and punitive measures for dealing with the same by stating the broad contours and modalities. Observations in the said judgment, which are

relevant for the present case are quoted below.

"Assertion of choice is an inseparable facet of liberty and dignity and that is why the French philosopher and thinker, Simone Weil, has said:-

" Liberty, taking the word in its concrete sense consists in the ability to choose."

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"45. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their own volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law"--..

15. But taking the mindset of the society in which Opp Party No 5 lives, and which is embodied in the mindset of Opp. party No 5 herself, it will take some time for her to accept the decision of Rashmi. Her mindset is apparent from the submissions of her counsel Mr. A.K. Budhia which are referred to in the next paragraph.

16. In this case, although no counter affidavit has been filed on behalf of the Opp parties No 5 and 6, Mr. A.K. Budhia learned counsel has submitted that the mother of the partner of the petitioner had been widowed at an early age and has brought up her two daughters undergoing great hardship and sacrifice and like all Indian mothers had educated her daughter with the hope that she would stand on her feet and ultimately settle down (get married). She is disturbed with the decision of her daughter and is hopeful that given time, her daughter would change her mind. She is also worried about the future of her daughters - Rashmi who has decided to lead a life which is different from what is expected by society and her younger daughter.

17. Ms. D'Souza learned counsel for the petitioner had responded to these submissions by stating that the petitioner would ensure that the relationship between the petitioner and Rashmi would not affect the latter's relationship with her mother and the petitioner would ensure that Rashmi stays in touch with her mother and sister and extends monetary support to them.

18. It goes without saying that Rashmi's decision will affect her mother - Opp. party No. 5 and her younger sister, both mentally and socially. But on account of the possibility of social stigma or mental turmoil caused to them, Rashmi's right to select her life partner, cannot be stifled or negated. However, while recognizing the right of

Rashmi, this Court cannot remain oblivious to the pain and tribulations of the mother and sister who have to live in society. It is well known when a girl decides to settle down with (marry) a person of her choice, usually her family members especially her parents, view the decision with trepidation, believing that they would have found a better candidate for her. In this case because of the nature of choice, this trepidation is multiplied. Therefore while exercising her right to reside with the partner of her choice, Rashmi should not forget her duty towards her mother and younger sister i.e. to look after their financial, social and emotional well being.

19. The Legislature has of course recognized the financial plight of parents and senior citizen who are often neglected by their offspring by enacting the "The Maintenance and Welfare of parents and Senior Citizens Act, 2007" whose provisions of which can be invoked by Opp. party No 5 if the need arises. But, it is made that the Opp. Parties No 5 and 6 should not create problems in the life of petitioner and Rashmi.

20. It is also clarified that merely because Rashmi will join the company of the petitioner on account of our intervention, there is no bar for her to separate ties with the petitioner in case their relationship falls apart or she wants to go back to her mother, whatever be the reason. As regards well being of the daughter of Opp. Party No 5, my brother S.K. Mishra, J. has taken care by imposing suitable conditions. But it is made clear that the petitioner apart from taking care of Rashmi should not compel or coerce Rashmi to leave the society of the petitioner against her will.

21. We hope and trust that the petitioner and his partner Rashmi will lead a happy and harmonious life so that their family members have no cause for worry and society has no excuse to raise a finger at them.

The WP (CRL) is accordingly allowed.

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