

**(2018) 2 Supreme Court Cases 189**  
(Record of Proceedings)

- a* (BEFORE DIPAK MISRA, C.J. AND A.M.  
KHANWILKAR AND DR D.Y. CHANDRACHUD, JJ.)<sup>§</sup>  
Writ Petition (Crl.) No. 194 of 2017, decided on December 8, 2017  
JOSEPH SHINE .. Petitioner;  
*Versus*  
*b* UNION OF INDIA .. Respondent  
*With*  
(BEFORE DIPAK MISRA, C.J. AND A.M.  
KHANWILKAR AND DR D.Y. CHANDRACHUD, JJ.)  
Writ Petition (Crl.) No. 194 of 2017, decided on January 5, 2018  
*c* JOSEPH SHINE .. Petitioner;  
*Versus*  
UNION OF INDIA .. Respondent  
Writ Petition (Crl.) No. 194 of 2017, decided on December 8, 2017  
*With*  
*d* Writ Petition (Crl.) No. 194 of 2017, decided on January 5, 2018  
**Constitution of India — Arts. 21, 14, 15 and 32 — Gender equality and gender sensitivity — Social progression and perceptual shift with regard to position and rights of women — Constitutional validity of S. 497 IPC and 198(2) CrPC — In view of change in position and rights of women, validity of S. 497 IPC and S. 198(2) CrPC, though upheld by earlier judgments, requires reconsideration at present — Hence, matter referred to Constitution Bench**  
*e* — Ordinary criminal law proceeds on gender neutrality — But concept of gender neutrality seems to be absent in S. 497 as prima facie a charge of adultery under S. 497 IPC cannot be brought against an erring woman but only against an erring man, when fact remains that both should have been liable for the criminal offence — Secondly, it is doubtful whether the erring woman  
*f* should be presumed as a victim in all circumstances — But such a presumption seems to have been there in S. 497 IPC on basis of which earlier judgments have upheld it — Thirdly, language of S. 497 IPC tantamounts to subordination of woman and affects her independent identity when offence thereunder is destroyed if consent or connivance of husband is established — Fourthly, time has come when society must realise that a woman is equal to a man in every  
*g* field — S. 497 IPC prima facie seems to be quite archaic — Penal Code, 1860 — S. 497 — Criminal Procedure Code, 1973, S. 198(2) (Paras 3 to 15)

*h* § **Ed.:** Given the nature of these orders, they have been published in SCC, together, in chronological order, by the date of the order, as one combined report with the citation: (2018) 2 SCC 189. This is to facilitate a holistic view of the matters decided in such orders. Furthermore, to make it possible to search for a particular order by date as well, in SCC Online, each order has been reported separately with an independent citation with reference to the page on which it falls in SCC, in the combined report of all the orders i.e. (2018) 2 SCC 190 and (2018) 2 SCC 193.

*Yusuf Abdul Aziz v. State of Bombay*, 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri LJ 886; *Sowmithri Vishnu v. Union of India*, 1985 Supp SCC 137 : 1985 SCC (Cri) 325; *V. Revathi v. Union of India*, (1988) 2 SCC 72 : 1988 SCC (Cri) 308; *W. Kalyani v. State*, (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445, *doubted and matter referred to Constitution Bench*

SS-D/59654/CR

Advocates who appeared in this case :

Kaleeswaram Raj and Suvidutt M.S. (Advocate-on-Record), Advocates, for the Petitioner;

R. Balasubramanian, B.V. Balaram Das and Sachin Sharma, Advocates, for the Respondent.

*Chronological list of cases cited*

*on page(s)*

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|---|--|
| 1. (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445, <i>W. Kalyani v. State</i>                        | 191a-b, 194a   |
| 2. (1988) 2 SCC 72 : 1988 SCC (Cri) 308, <i>V. Revathi v. Union of India</i>                    | 191a, 192a, 194a, 195a                                 |
| 3. 1985 Supp SCC 137 : 1985 SCC (Cri) 325, <i>Sowmithri Vishnu v. Union of India</i>            | 191a, 191c-d, 191d, 194a, 194c-d, 194d, 196c-d, 196e-f |
| 4. 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri LJ 886, <i>Yusuf Abdul Aziz v. State of Bombay</i> | 191a, 191c-d, 191d, 194a, 194c, 194c-d, 196c           |

**(2018) 2 SCC 190**

**ORDER dated 8-12-2017**

(BEFORE DIPAK MISRA, C.J. AND A.M.

KHANWILKAR AND DR D.Y. CHANDRACHUD, JJ.)

Writ Petition (Cri.) No. 194 of 2017

1. Heard Mr Kaleeswaram Raj, learned counsel for the petitioner.

2. In this petition, preferred under Article 32 of the Constitution of India, the petitioner has challenged the constitutional validity of Section 497 of the Penal Code, 1860 and Section 198(2) of the Criminal Procedure Code. The said provisions read as under:

“497. *Adultery*.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

“198. *Prosecution for offences against marriage*.—(1) \* \* \*

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.”

3. The learned counsel submits that the said provisions have been treated to be constitutionally valid in three judgments, namely, *Yusuf Abdul Aziz v. State of Bombay*<sup>1</sup>; *Sowmithri Vishnu v. Union of India*<sup>2</sup> and *V. Revathi v. Union of India*<sup>3</sup>. He has also drawn our attention to the decision in *W. Katyani v. State*<sup>4</sup> wherein a two-Judge Bench of this Court, after referring to the provision, observed thus: (SCC p. 360, para 10)

“10. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence.”

4. On a perusal of the judgment in *Yusuf Abdul Aziz case*<sup>1</sup>, it seems that the provision was upheld on the basis of Article 15(3) of the Constitution.

5. In *Sowmithri Vishnu case*<sup>2</sup>, the Court while relying on the principles laid down in *Yusuf Abdul Aziz case*<sup>1</sup> opined that the provision is *intra vires*. For the said purpose, the Court has expressed the view thus: (*Sowmithri case*<sup>2</sup>, SCC p. 142, para 9)

“9. ... Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried woman. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or, perhaps, invites a civil action by the wife for separation. The legislature is entitled to deal with the evil where it is felt and seen most: A man seducing the wife of another. Mrs Chidambaram says that women, both married and unmarried, have changed their lifestyle over the years and there are cases where they have wrecked the peace and happiness of other matrimonial homes. We hope this is not too right but, an under-inclusive definition is not necessarily discriminatory. The alleged transformation in feminine attitudes, for good or bad may justly engage the attention of the lawmakers when the reform of penal law is undertaken. They may enlarge the definition of “adultery” to keep pace with the moving times. But, until then, the law must remain as it is. The law, it is, does not offend either Article 14 or Article 15 of the Constitution. Incidentally, the demand of the petitioner that sexual relationship of a husband with an unmarried woman should also be comprehended within the definition of “adultery” is a crusade by a woman against a woman. If the paramour of a married

1 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri LJ 886

2 1985 Supp SCC 137 : 1985 SCC (Cri) 325

3 (1988) 2 SCC 72 : 1988 SCC (Cri) 308

4 (2012) 1 SCC 358 : (2012) 1 SCC (Cri) 445

woman can be guilty of adultery, why can an unmarried girl who has sexual relations with a married man not be guilty of adultery? That is the grievance of the petitioner.”

6. In *V. Revathi case*<sup>3</sup>, the learned Judges took the family as the platform and gave emphasis on the matrimonial unit and thereafter observed: (SCC pp. 76-77, para 5)

“5. Section 497 of the Penal Code and Section 198(1) read with Section 198(2) of the Criminal Procedure Code go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit. The community punishes the “outsider” who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring “man” alone can be punished and not the erring woman. It does not arm the two spouses to hit each other with the weapon of criminal law. That is why neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination based on sex. While the outsider who violates the sanctity of the matrimonial home is punished a rider has been added that if the outsider is a woman she is not punished. There is thus reverse discrimination in “favour” of the woman rather than “against” her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus, there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus, no discrimination has been practised in circumscribing the scope of Section 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer.”

7. Prima facie, on a perusal of Section 497 of the Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed

3 *V. Revathi v. Union of India*, (1988) 2 SCC 72 : 1988 SCC (Cri) 308

a in the section that the fulcrum of the offence is destroyed once the consent or  
 the connivance of the husband is established. Viewed from the said scenario,  
 the provision really creates a dent on the individual independent identity of  
 a woman when the emphasis is laid on the connivance or the consent of the  
 husband. This tantamounts to subordination of a woman where the Constitution  
 confers equal status. A time has come when the society must realise that a  
 woman is equal to a man in every field. This provision, prima facie, appears  
 to be quite archaic. When the society progresses and the rights are conferred,  
 b the new generation of thoughts spring, and that is why, we are inclined to issue  
 notice.

8. Issue notice, fixing a returnable date within four weeks. Dasti, in  
 addition, is permitted.

(2018) 2 SCC 193

ORDER dated 5-1-2018

(BEFORE DIPAK MISRA, C.J. AND A.M.

KHANWILKAR AND DR D.Y. CHANDRACHUD, JJ.)

Writ Petition (Crl.) No. 194 of 2017

c 9. Heard Mr Kaleeswaram Raj, learned counsel for the petitioner and Mr R.  
 Balasubramanian, learned counsel along with Mr B.V. Balaram Das, learned  
 d counsel for the Union of India.

10. This Court on 8-12-2017<sup>5</sup>, at the stage of admission, had passed the  
 following order: (*See* paras 2-7, above)

e “2. In this petition, preferred under Article 32 of the Constitution  
 of India, the petitioner has challenged the constitutional validity of  
 Section 497 of the Indian Penal Code, 1860 and Section 198(2) of the  
 Criminal Procedure Code. The said provisions read as under:

f ‘497. *Adultery*.—Whoever has sexual intercourse with a person who  
 is and whom he knows or has reason to believe to be the wife of  
 another man, without the consent or connivance of that man, such sexual  
 intercourse not amounting to the offence of rape, is guilty of the offence  
 of adultery, and shall be punished with imprisonment of either description  
 for a term which may extend to five years, or with fine, or with both. In  
 such case the wife shall not be punishable as an abettor.’

g ‘198. *Prosecution for offences against marriage*.—(1) \* \* \*  
 (2) For the purposes of sub-section (1), no person other than the  
 husband of the woman shall be deemed to be aggrieved by any offence  
 punishable under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care  
 of the woman on his behalf at the time when such offence was committed  
 may, with the leave of the Court, make a complaint on his behalf.’

h 3. The learned counsel submits that the said provisions have been  
 treated to be constitutionally valid in three judgments, namely, *Yusuf Abdul*

5 Set out in paras 1 to 8, above.

*Aziz v. State of Bombay*<sup>1</sup>; *Sowmithri Vishnu v. Union of India*<sup>2</sup> and *V. Revathi v. Union of India*<sup>3</sup>. He has also drawn our attention to the decision in *W. Kalyani v. State*<sup>4</sup> wherein a two-Judge Bench of this Court, after referring to the provision, observed thus: (SCC p. 360, para 10)

‘10. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence.’

4. On a perusal of the judgment in *Yusuf Abdul Aziz case*<sup>1</sup>, it seems that the provision was upheld on the basis of Article 15(3) of the Constitution.

5. In *Sowmithri Vishnu case*<sup>2</sup>, the Court while relying on the principles laid down in *Yusuf Abdul Aziz case*<sup>1</sup> opined that the provision is *intra vires*. For the said purpose, the Court has expressed the view thus: (*Sowmithri case*<sup>2</sup>, SCC p. 142, para 9)

‘9. ... Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. An unfaithful husband risks or, perhaps, invites a civil action by the wife for separation. The legislature is entitled to deal with the evil where it is felt and seen most: A man seducing the wife of another. Mrs Chidambaram says that women, both married and unmarried, have changed their lifestyle over the years and there are cases where they have wrecked the peace and happiness of other matrimonial homes. We hope this is not too right but, an under-inclusive definition is not necessarily discriminatory. The alleged transformation in feminine attitudes, for good or for bad, may justly engage the attention of the lawmakers when the reform of penal law is undertaken. They may enlarge the definition of “adultery” to keep pace with the moving times. But, until then, the law must remain as it is. The law, as it is, does not offend either Article 14 or Article 15 of the Constitution. Incidentally, the demand of the petitioner that sexual relationship of a husband with an unmarried woman should also be comprehended within the definition of “adultery” is a crusade by a woman against a woman. If the paramour of a married woman can be guilty of adultery, why can

1 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri LJ 886

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an unmarried girl who has sexual relations with a married man not be guilty of adultery? That is the grievance of the petitioner.’

*a* 6. In *V. Revathi case*<sup>3</sup>, the learned Judges took the family as the platform and gave emphasis on the matrimonial unit and thereafter observed: (SCC pp. 76-77, para 5)

*b* ‘5. Section 497 of the Penal Code and Section 198(1) read with  
*c* Section 198(2) of the Criminal Procedure Code go hand in hand and  
constitute a legislative packet to deal with the offence committed by  
an outsider to the matrimonial unit who invades the peace and privacy  
of the matrimonial unit and poisons the relationship between the two  
partners constituting the matrimonial unit. The community punishes  
the “outsider” who breaks into the matrimonial home and occasions  
the violation of sanctity of the matrimonial tie by developing an illicit  
relationship with one of the spouses subject to the rider that the erring  
“man” alone can be punished and not the erring woman. It does not  
arm the two spouses to hit each other with the weapon of criminal  
law. That is why neither the husband can prosecute the wife and send  
her to jail nor can the wife prosecute the husband and send him to  
jail. There is no discrimination based on sex. While the outsider who  
violates the sanctity of the matrimonial home is punished a rider has  
been added that if the outsider is a woman she is not punished. There  
is thus reverse discrimination in “favour” of the woman rather than  
“against” her. The law does not envisage the punishment of any of the  
spouses at the instance of each other. Thus, there is no discrimination  
against the woman insofar as she is not permitted to prosecute her  
husband. A husband is not permitted because the wife is not treated  
as an offender in the eye of the law. The wife is not permitted as  
Section 198(1) read with Section 198(2) does not permit her to do so.  
In the ultimate analysis the law has meted out even-handed justice to  
both of them in the matter of prosecuting each other or securing the  
incarceration of each other. Thus, no discrimination has been practised  
in circumscribing the scope of Section 198(2) and fashioning it so that  
the right to prosecute the adulterer is restricted to the husband of the  
adulteress but has not been extended to the wife of the adulterer.’

*d* 7. Prima facie, on a perusal of Section 497 of the Penal Code, we find  
that it grants relief to the wife by treating her as a victim. It is also worthy  
to note that when an offence is committed by both of them, one is liable  
for the criminal offence but the other is absolved. It seems to be based on  
a societal presumption. Ordinarily, the criminal law proceeds on gender  
neutrality but in this provision, as we perceive, the said concept is absent.  
That apart, it is to be seen when there is conferment of any affirmative  
right on women, can it go to the extent of treating them as the victim, in  
all circumstances, to the peril of the husband. Quite apart from that, it is

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*f* 3 *V. Revathi v. Union of India*, (1988) 2 SCC 72 : 1988 SCC (Cri) 308

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perceivable from the language employed in the section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, prima facie, appears to be quite archaic. When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice.”

**11.** On a perusal of the aforesaid decisions, it is found that the constitutional validity of Section 497 of the Penal Code, 1860 has been upheld. One of them, namely, *Yusuf Abdul Aziz case*<sup>1</sup> has been delivered by a four-Judge Bench. As is noticeable, the four-Judge Bench has opined that the said offence does not offend Articles 14 and 15 of the Constitution.

**12.** In *Sowmithri Vishnu case*<sup>2</sup>, it has been held thus: (SCC p. 144, para 12)

“12. Though it is true that the erring spouses have no remedy against each other within the confines of Section 497 of the Penal Code, that is to say, they cannot prosecute each other for adultery, each one has a remedy against the other under the civil law for divorce on the ground of adultery. “Adultery” under the civil law has a wider connotation than under the Penal Code. If we were to accept the argument of the petitioner, Section 497 will be obliterated from the statute book and adulterous relations will have a more free play than now. For then, it will be impossible to convict anyone of adultery at all. It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationship is punishable by law. Stability of marriages is not an ideal to be scorned.”

**13.** In *Sowmithri Vishnu case*<sup>2</sup>, the Court has laid emphasis on the family platform and further opined that no discrimination has been practised.

**14.** As indicated in our earlier order, we had noted that the provision seems quite archaic and especially, when there is a societal progress. Thus analysed, we think it appropriate that the earlier judgments required to be reconsidered regard being had to the social progression, perceptual shift, gender equality and gender sensitivity. That apart, there has to be a different kind of focus on the affirmative right conferred on women under Article 15 of the Constitution.

**15.** In view of the aforesaid, we think it appropriate to refer the matter to a Constitution Bench. Let the papers be placed before the learned Chief Justice of India on the administrative side for constitution of the appropriate larger Bench.

Court Masters

<sup>1</sup> *Yusuf Abdul Aziz v. State of Bombay*, 1954 SCR 930 : AIR 1954 SC 321 : 1954 Cri LJ 886

<sup>2</sup> *Sowmithri Vishnu v. Union of India*, 1985 Supp SCC 137 : 1985 SCC (Cri) 325