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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CrI. M.P. NO. OF 2020

IN

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

IN THE MATTER OF:

JOSEPH SHINE ...Petitioner

Versus

UNION OF INDIA ...Respondent

And in the matter of:-

Union of India,

Represented Through,

Department of Military Affairs

Ministry of Defence,

South Block,

New Delhi - 110001.Applicant

APPLICATION FOR CLARIFICATION
OF THE JUDGMENT DATED
27.09.2018 PASSED BY THIS
HON'BLE COURT

TO

THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF THE
SUPREME COURT OF INDIA

HUMBLE PETITION OF THE
PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH;

1. That the present Application is being filed on behalf of Department of Military Affairs, Ministry of Defence, representing all the three wing of the Indian Defence Force, i.e. Indian Army, Indian Navy, and Indian Air Force.
2. That while deciding the constitutional validity of Section 497 IPC, the Constitution bench of this Hon'ble Court vide its Judgment dated 27.09.2018 in the case of Joseph Shine Vs Union Of India, held as follows:-
 - (i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.
 - (ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter

XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

(iii) The decisions in Sowmithri Vishnu (supra), V. Rewathi (supra) and W. Kalyani (supra) hereby stand overruled.

3. It is pertinent to mention that the judgment dated 27.09.2018 passed by this Hon'ble Court is a Law declared under Article 141 of the Constitution of India and is binding on all Courts. It is submitted that the aforesaid judgment passed by this Hon'ble Court may cause instability within the Applicants Services, as Defence Personnel are expected to function in peculiar conditions, during the course of which many a time they have to stay separated from their families for long durations, when they are posted on

borders or other far-flung areas or in areas having inhospitable weather and terrain. The support system to families is provided by creation of 'Field Area Family Accommodation', where families are cared for by local formations and units while their spouses are away serving in forward locations, very often in combat situations. To ensure that all personnel perform their duties without unnecessary-concern for their families, there is a system where frequent visits to families living away from their spouses by Officers/JCOs, is a regular feature, in view of the aforesaid judgment, there will always be a concern in the minds of the army personnel who are operating far away from their families under challenging conditions about the family indulging in untoward activity.

4. It is submitted that discipline is the bedrock of the work culture in Defence Services and an essential ingredient for

combat operations. Accordingly, the framers of the Constitution had authorised Parliament to restrict or abrogate certain fundamental rights in their application to armed forces so as to ensure proper discharge of duties and maintenance of discipline.

5. That KM Munshi's Draft on fundamental rights provided that 'the Union Legislature would by law be entitled to determine to what extent any of the fundamental rights should be restricted or abrogated for the members of the armed forces or forces charged with the maintenance of public order to ensure the fulfillment of their duties and the maintenance of discipline.
6. The Sub-Committee on Fundamental Rights accepted Munshi's, formulation and the Advisor}' Committee Report of April, 1947 included the following clause 23:

"23. The Union Legislature may by law determine to what extent: any

of the rights guaranteed by this part shall be restricted or abrogated for the members of the Armed Forces or Forces charged with the maintenance of public order so as to ensure fulfillment of their duties and the maintenance of discipline."

7. The Constituent Assembly adopted this Clause without any discussion on 2 May 1947. However, it later appeared without any material change as Article 26 in the Draft Constitution prepared by Drafting Committee in February 1948. The article was readily adopted by the assembly, on 9 December 1948 with minor verbal modification renumbered as Article 33 of the Constitution at revision stage it reads as follows:-

"33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the

members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

8. The Constitution (Fiftieth Amendment) Act, 1984 substituted the Article 33 in its present form as follows:

"Article 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) persons employed in or in connection with the telecommunication systems set up for the purposes of any Force bureau or organization 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."

9. That in pursuance of Article 33, Section 21 of the Army Act, 1950 was drafted, which authorised for making of rules restricting certain fundamental rights. Section 21 reads as under:

"Section 21 - Power to modify certain fundamental rights in their application to persons subject to this act - Subject to the provisions of any law for the time being in force relating to the regular Army

or to any branch thereof, the Central Government may, by notification, make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act -

(a) to be a member of, or to be associated in any way with, any trade union or labour union, or any class of trade or labour unions or any society, institution or association, or any class of societies, institutions or associations;

(b) to attend or address any meeting or to take part in any demonstration organised by any body of persons for any political or other purposes;

(c) to communicate with the press or to publish or cause to be published any book, letter or other document."

10. That based on Section 21 of Army Act. 1950, Rules 19, 20 and 21 were framed in the Army Rules, 1954. The said Rules read as under:

"19. Unauthorised organisation -
No person subject to the Act shall, without the express sanction or the Central Government -

(a) take official cognisance of, or assist or take any active part in, any society, institution or organisation, not recognised as part of the Armed Forces of the Union; unless it be of a recreational or religious nature in which case prior sanction of the superior officer shall be obtained;

(b) be a member of, or be associated in any way with, any trade union or labour union, or any class of trade or labour unions.

20. Political and non-military activities -

(1) No person subject to the Act shall attend, address, or take part in, any meeting or demonstration held for a party or any political purposes, or belong to or join or subscribe in the aid of, any political association or movement.

(2) No person subject to the Act shall issue an address to electors or in any other manner publicly announce himself or allow himself to be publicly announced as a candidate or as a prospective candidate for election to Parliament, the Legislature of a State or a local authority, or any public body or act as a member of a candidate's election committee, or in any way actively promote or prosecute a candidate's interests.

21. Communications to the Press, Lectures, etc.- No person subject to the Act shall -

(i) publish in any form whatever or communicate directly or indirectly to the Press any matter in relation to a political question or on a service subject or containing any service information, or publish or cause to be published any book or letter or article or other document on such question or matter or containing such information without the prior sanction of the Central Government, or any officer specified by the Central Government in this behalf; or

(ii) deliver a lecture or wireless address, on a matter relating to a political question or on a service subject or containing any information or views on any service subject without the prior sanction of the Central Government in this behalf.

Explanation - For the purpose of this rule, the expression "service

information" and 'service subject" include information or subject, as the case may be, concerning the forces, the defence or the external relation of the Union."

11. That though the Army Act and the Army Rules specify only few restrictions, however, this Hon'ble Court has, in a catena of cases held that every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33, as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the constitution and the Army Act.
12. That in constitution bench of this Hon'ble Court in the case of Ram Sarup Vs Uol & Anr (AIR 1965 SC 247) it was urged by the counsel for the Petitioner that in the exercise of the power

conferred on Parliament under Article 33 of the Constitution to modify the fundamental rights guaranteed by Part III, in their application to the armed forces, it enacted Section 21 of the Act which empowers the Central Government, by notification, to make rules restricting to such extent and in such manner as may be necessary, the right of any person with respect to certain matters, that these matters do not cover the fundamental rights under Article 14, 20 and 22 of the Constitution and that this indicated the intention of parliament not to modify any other fundamental right. It was further urged that the entire Act has been enacted by parliament and if any of the Provision of the Act is not consistent with the provision of any of the Articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those

articles in their application to the person subject to that Act. In view thereof the Constitutional bench held that, "We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental rights under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Art. 33 of the Constitution, made the requisite modification to affect the respective fundamental right".

13. The said position was reiterated by this Hon'ble Court in case of Lt. Col Prithi Pal Singh Bedi Vs. Uol & Ors. [1982 SCC (3) 140)], followed by R. Viswan & Ors Vs. Uol & Ors. (1983 SCC (3) 401). Further in Civil Appeal No.10383/1996 titled UOI & Ors Vs. Ex Fit Lt GS Bajwa, this Hon'ble Court held that, "the provisions of the Act cannot be challenged on the ground that they

infringe the fundamental right guaranteed to the respondent under Article 21 of the Constitution of India. Since the Air Force Act is a law duly enacted by Parliament in exercise of its plenary legislative jurisdiction read with Article 33 of the Constitution of India, the same cannot be held to be invalid merely because it has the effect of restricting or abrogating the right guaranteed under Article 21 of the Constitution of India or for that reason under any of the provisions of Part III of the Constitution.

14. Now here it appears that while deciding upon the constitutionality of Section 497 of IPC (Adultery), this Hon'ble Court apparently did not take into account or may not be apprised with the peculiar service conditions of the Defence Personnel as stated aforesaid and the fact that the framers of the Constitution had specifically authorized the Parliament for abrogation of their

fundamental rights in terms of Article 33 of the Constitution.

15. Now here it is important to extract the Sections 45 and 63 of the Army Act, Sections 45 & 65 of the Air Force Act and Sections 54 (2) and 74 of the Navy Act:-

"Army Act Sec 45. Unbecoming conduct - Any officer, junior commissioned officer or warrant officer who behaves in a manner unbecoming his position and 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".

"Army Act Sec 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".

"Air Force Act Section 45. Unbecoming conduct - Any 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 warrant officer, be liable to be dismissed or to suffer such less punishment as is in this Act mentioned".

"Air Force Act Section 65. Violation of good order and Air Force 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 air force 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".

"Navy Act Section 54 (2). Cruelty and conduct unbecoming the character of an officer - Every officer subject to naval law who is guilty of any scandalous or fraudulent conduct or of any conduct unbecoming the character of an officer shall be punished with imprisonment for a term which may extend to two years or such other punishment as is hereinafter mentioned".

"Navy Act Section 74. Offences against good order and naval discipline – Every person subject to naval law who is guilty of an act, disorder, or neglect to the prejudice of good order and naval discipline, not hereinbefore specified, shall be punished with imprisonment for a term which may extend to three years or such other punishment as is hereinafter mentioned".

16. In the light of the aforesaid provisions it can be seen that in cases of Adultery, even if there is a charge against the accused in either of the Sections for unbecoming conduct or violation of good order and military discipline, then in that case, an argument may be raised that we are circumventing the law and what could not be done directly in view of aforesaid judgment dated 27.09.2018, is being done indirectly. Hence in view of the aforesaid following two important question of law which

requires the consideration of this Hon'ble Court are as follows:-

- (a) Whether the persons subject to Army Act by virtue of Article 33 of Constitution of India being a distinct class should continue to be subject to the rigors of Section 497 of the Indian Penal Code by making an exception in regard to application of ibid Section 497 of the IPC vis a vis persons subject to Army Act
17. (b) Whether the promiscuous or adulterous acts by persons subject to Army Act should be allowed to be governed by the provisions of Army Act Section 45 or Army Act Section 63 and under corresponding provisions of Navy Act and Air Force Act being special legislation irrespective of the Hon'ble Supreme Court judgment in Joseph Shine's case by treating it as an abrogation of Fundamental Rights

provided by law in terms of Article 33 of Constitution of India.

18. Here it is pertinent to mention that in view of Article 33 of the Constitution, whether the judgment in Joseph Shine would prevent the Armed Forces from proceeding against a person subject to the Army Act, who is guilty of what would in effect be an adulterous act. For this purpose, it may be pointed out that unlike Section 497, the Armed Forces do not make a difference between a male or a female, who is subject to the Army Act, if they are guilty of an offence. In other words, de hors Section 497, the Army would equally proceed against a female subject to the Act, if she enters into an adulterous/illicit relationship.

19. Applying the ratio of judgment dated 27.09.2018, one would find that the first ground for invalidating Section 497, namely, that it was manifestly

arbitrary, would be traceable to Article 14 of the Constitution. The second aspect mentioned that Section 497 was discriminatory towards women and treated them as chattel and thus violated Article 14. and the third aspect of the violation of privacy under Article 21, are all matters which would be covered by Article 33 of the Constitution, where the provisions of the Army Act would prevail, notwithstanding their being inconsistent with fundamental rights.

20. Therefore, such being a case, the question which arises is whether an adulterous/illicit relationship by a male or a female subject to the Army Act can still be a matter for action under Section 63 or Section 45 of the Act and under corresponding provisions of Navy Act and Air Force Act.

21. That one has to remember that the Armed Forces exist in an environment wholly different and distinct from

civilians. Honour is a sine qua non of the service. Courage, and devotion to duty, even at the risk of one's lives, is part of the unwritten contract governing the members of the Armed Forces. As stated in the judgment of this Hon'ble Court in the case of Union of India vs. Harjeet Singh Sandhu, (2001) 5 SCC 593 as follows:-

"17. Army defends the country and its frontiers. It is entrusted with the task of protecting against foreign invasion and preserving national independence. The arduous nature of duties, the tasli they have to perform in emergent situations and the unknown lands and unknown situations wherein they have to function demand an exceptionally high standard of behavior and discipline compared to their counterparts in civil services. That is why the military people command the respect of the masses. Such factors taken

together demand the military services being treated as a class apart and a different system of justice — military justice — being devised for them...."

22. Hence two provisions covered by Army Act Section 63, namely 'good order and discipline', and Section 45, namely 'unbecoming conduct' and corresponding provisions of Navy Act and Air Force Act would cover a wide variety of conduct which a member of the forces will be subject to. It would not be possible to enumerate each and every one of these actions, and hence, the Army Act brings them under the two rubrics of 'good order and discipline' and 'unbecoming conduct'. Hence the result would be that Article 33 that protects both Section 45 and Section 63 and corresponding provisions of Navy Act and Air Force Act from challenge on the ground of violation of fundamental rights would also place beyond challenge every single act of

misconduct which would reasonably come under the broad generic heads laid out in Section 45 and Section 63 of the Act and under corresponding provisions of Navy Act and Air Force Act.

23. Therefore, 'promiscuous or adulterous act' by persons subject to the Army Act, Navy Act and Air Force Act would still be offences for which either criminal or disciplinary action could be initiated under Army Act Section 63 or Section 45 and under corresponding provisions of Navy Act and Air Force Act respectively, proceeding on the basis that these are acts of misconduct that would be covered by these two provisions.

24. It is further submitted that Section 497 has been struck down for the peculiar reasons mentioned in the judgment, namely violation of Article 14 because though the male perpetrator would be guilty, however, the wife is exempt

from criminal prosecution. Additionally, it has been held that privacy of the adulterous couple is being violated. But, after holding so, this Hon'ble Court has held that adultery is undoubtedly a moral wrong qua the family and the spouse, and has further recognized that a civil remedy exists as adultery remains a ground for divorce.

25. This application is made bona fide and in the interest of justice.
26. That the present application is bonafidely filed by the Applicants and if the same is not allowed the Petitioner will suffer irreparable Loss and injury.

PRAYER

It is therefore, respectfully prayed that this Hon'ble Court be pleased to clarify:-

- (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.

(b) pass such other further order(s) as this Hon'ble Court may deem fit and proper.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

DRAWN BY:-

FILED BY:

SACHIN SHARMA

PLACE : NEW DELHI

[A K SHARMA]

DATED:

Advocate for the
APPLICANT'S