



## Supreme Court refers plea against Section 377 to five-judge bench

Issue of constitutional importance requires a hearing by a larger bench, says top court; activists cheer decision

Apurva Vishwanath



The apex court referred a batch of six curative petitions, which sought a review of a 2013 judgement upholding the 156-year-old law, to a five-judge constitution bench. Photo: Mint

**New Delhi:** The Supreme Court on Tuesday held out fresh hope to lesbian, gay, bisexual and transgender (LGBT) communities, as it ordered a review of a colonial-era law that criminalizes consensual same sex relations between adults.

The apex court referred a batch of six curative petitions, which sought a review of a 2013 judgement upholding the 156-year-old law, to a five-judge constitution bench.

A bench comprising chief justice T.S. Thakur, Anil R. Dave and J.S. Khehar heard a curative writ in open court to reconsider the apex court's 2013 judgement.

On 11 December 2013, a bench comprising G.S. Singhvi and S.J. Mukhopadhyaya overturned a Delhi high court verdict that had set aside the 1860 law that criminalizes consensual sex among homosexual adults.

Advocates Kapil Sibal and Anand Grover told the court that a determination on expression of sexuality needs constitutional interpretation and asked for the case to be referred to a larger bench. "There are constitutional aspects involved in the case. The utmost private right of a person, freedom to express sexuality, is in question. We will be holding the present and future generations to indignity and stigma if we allow this law," Sibal told the court.

Grover brought to the judge's notice a 2014 judgement of the same court that recognized the rights of transgenders. "The (2014) judgement recognizes them, but their sexuality is criminalized," he said.

Normally, in a curative petition, which is the last legal resort available to remedy a judgement, a court will not hear fresh aspects of a case. However, on Tuesday, the court said in its order that issues of constitutional importance require a hearing by a larger bench.

"This reference opens up the entire case. The whole issue will be heard afresh. This means the court has gone beyond the curative and will look into substantive constitutional issues," said Menaka Guruswamy, one of the lawyers representing the petitioners.

In 2009, the Delhi high court ruled that Section 377 of the Indian Penal Code (IPC), which prohibits "carnal intercourse against the order of nature with any man, woman or animal", was unconstitutional. Section 377 also criminalizes sexual intercourse that is penile and non-vaginal, deeming it "against the order of nature". The law affects the rights of the LGBT population, in particular, but its provisions can also be applied to heterosexual citizens.

On hearing the decision of the Supreme Court, Abeena Aher, a transgender rights activist who was present in court, said, "My rights have been given an opportunity to be heard. If the court had dismissed the petitions, it would have been a matter of shame. Instead, it has recognized the rights of the future of India. I am a transgender and the court has recognized my identity. If I don't have the right to exercise pleasure with a consensual partner, then my rights are being curbed."

The curative petitions filed before the top court, reviewed by *Mint*, argue that the court incorrectly held in its 2013 verdict that a "minuscule fraction of population cannot claim fundamental rights". The petitions also alleged bias by the top court against the LGBT community, citing statements such as "the so-called rights of LGBT persons" in the 2013 judgement.

That judgement said only a "minuscule fraction" of India's population constitutes lesbians, gays, bisexuals and transgenders. "In the last more than 150 years, less than 200 persons have been prosecuted for committing offence under Section 377," Singhvi and Mukhopadhyaya said in their ruling. They were ruling on a challenge to the Delhi high court verdict mounted on grounds of public morality by groups of religious bodies and individuals including the All India Muslim Personal Law Board, the Apostolic Churches Alliance and the Utkal Christian Council.

Interestingly, the government was unrepresented in court on Tuesday. This was because attorney general Mukul Rohatgi had certified that, in his view, the top court had erred in law in its 2013 verdict—before he had been appointed the government's top law officer. Such certification by a senior advocate who is unrelated to the case is a requirement for a curative petition.

"I have expressed my opinion and I will not defend the law even if the government chooses to do so," Rohatgi told *Mint* on the telephone. The government has not yet clarified if it will defend the controversial law.

The present bunch of curative petitions are part of a long legal battle, where the cause of LGBT rights has been led by the Naz Foundation, an HIV/AIDS prevention organization that appealed against Section 377 in 2001, after its outreach workers were arrested in Lucknow under this section. The plea was admitted for hearing in the Delhi high court in 2006, and Voices Against 377 a non-governmental organization also impleaded themselves in the case.

Also filing curative petitions were parents of LGBT persons led by Minna Saran, mental health professionals, filmmaker Shyam Benegal, academician Nivedita Menon and law professor Ratna Kapur.

Minna Saran, whose late son Nishit Saran was a gay rights activist and filmmaker, said, "This is a big victory, and this gives us hope. We all are thrilled. This is the way it should be. You cannot call anyone who is of a different sexual orientation criminal."

"All constitutional aspects such as right to liberty, equality and privacy were argued before the apex court earlier but the court (in 2013) still arrived at an unfortunate decision. But we are now confident it will be corrected," said Colin Gonsalves, a senior Supreme Court advocate and founder of the Human Rights Law Network, a non governmental organization.

*Dhamini Ratnam contributed to this story.*