

Sec 377 ruling fails to get gay man reprieve in court

NOT OKAY Court rejects merchant navy officer's discharge plea, says section alive as case pending in SC



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MUMBAI: More than two years after the Delhi high court decriminalised consensual gay sex, a Girgaum magistrate's court has rejected a discharge application filed by a man booked for having 'unnatural sex' with another man.

In 2009, the Delhi high court had read down Section 377 of the Indian Penal Code (IPC) that defines "unnatural sex" ruling that consensual gay sex between adults was not an offence. An appeal against the order is pending in the Supreme Court, which has not stayed the Delhi high court order.

In Mumbai, the discharge application was filed by Rommel Fernandes (name changed), a merchant navy officer. Fernandes was allegedly the gay partner of Anand Gupta (name changed), a Peddar Road businessman. Gupta's wife of 17 years had filed a police case against her husband and Fernandes for having "unnatural sex" in February 2009. Gupta and his wife have a nine-year-old son.

The police booked Fernandes and Gupta under Section 377 of the IPC, Section 498A (domestic violence) and criminal intimidation. The maximum punishment under Section 377 is life imprisonment.

Fernandes cited the Delhi high court order to seek discharge in

WHAT THE LAW STATES

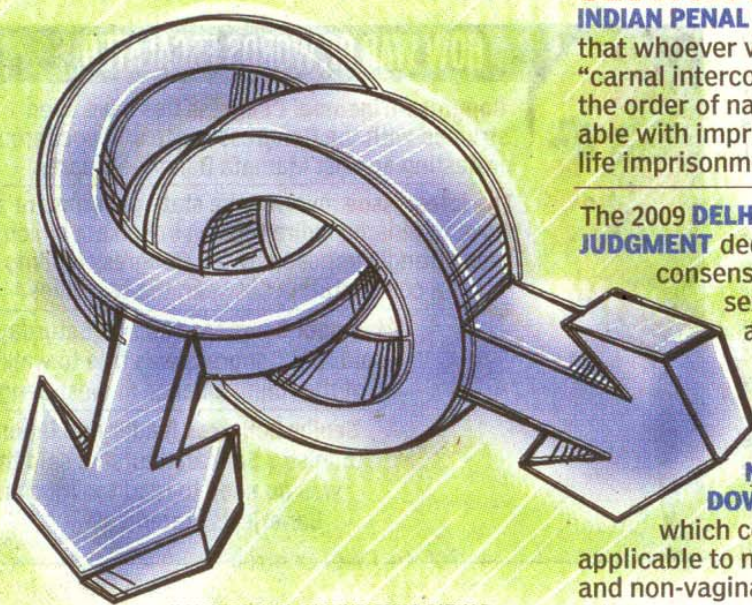


ILLUSTRATION: SHRIKRISHNA PATKAR

SECTION 377 of the **INDIAN PENAL CODE** states that whoever voluntarily has "carnal intercourse against the order of nature" is punishable with imprisonment up to life imprisonment.

The 2009 **DELHI HIGH COURT JUDGMENT** decriminalised consensual homosexual sex between adults by reading down Section 377.

The **HC DID NOT STRIKE DOWN** Section 377, which continues to be applicable to non-consensual and non-vaginal sex involving minors.

HOLDING THAT THE section violated right to life of homosexuals, the HC expanded the scope of Article 15 (social equality) by stating that a person cannot be discriminated against on grounds of sexual orientation.

About **19 PETITIONS** have challenged the HC judgment in the Supreme Court. The SC clubbed the petitions for hearing but refused to stay the HC judgment.

Thus the Delhi HC **JUDGMENT CONTINUES** to be in force. Although the order is technically applicable only in Delhi, it has persuasive value across the country. The ruling has set a legal precedent and can be cited in courts across the country to seek relief. Once the SC hears the appeals, its ruling will be the law of the country.

THE CASE

IN FEBRUARY 2009, Rohini, the wife of Anand Gupta (name changed) filed a police complaint stating that she became aware about her husband's homosexuality in 1998.

GUPTA HAD allegedly con-

fessed to her that he acquired this "strange habit" in his teenage years.

IN 2007, Gupta confessed to a counsellor that he had found a partner, Rommel Fernandes (name changed) on an Internet site in 2006

and had sexual relations with him.

THE GAMDEVI police on February 5, 2011, filed a 33-page charge sheet in the Girgaum court. It included statements of 13 witnesses including Rohini, the psy-

chotherapist, servants in the Gupta household and Rohini's parents.

MEDICAL EXAMINATION reports indicated homosexual sex between Gupta and Fernandes.

the case. The court, however, did not accept the argument.

"Section 377 of IPC is still alive in statute. There are sufficient allegations against both accused. In the premises (sic), prima facie case is against accused," additional chief metropolitan magistrate UK Aher stated in his order dated January 5.

"The Delhi high court judgment has held that gay sex

amounts to an offence only if it involves a minor victim. The Supreme Court has not granted a stay on the order. I will challenge the magistrate court's order in the higher courts," said advocate Vivek Kantawala, who appeared for Fernandes.

Lawyers said the 2009 judgment had persuasive value in city courts as well. "The 2009 Delhi high court judgment has

a bearing on the Bombay high court, and therefore all the courts in Maharashtra," said advocate Anand Grover, who argued for petitioners, Naaz Foundation, before the Delhi high court.

Other lawyers said territorial jurisdiction of the judgment was a grey area. "There is a judgment of the Supreme Court, which states that if one high court strikes down a law,

it is struck down throughout the country. Also, article 266(2) states that all high courts have territorial jurisdiction throughout the country. This order is worth challenging in the higher court," said Mihir Desai, a human rights lawyer.

The magistrate, however, discharged Fernandes under section 498A, which deals with domestic violence.