

SC rips apart its 2014 ruling on Section 377

LEGAL CORRESPONDENT

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The nine-judge Bench of the Supreme Court on Thursday ripped apart its own judgment of 2014 upholding Section 377 of the Indian Penal Code, which criminalises consensual sexual acts of adults in private.

The Bench observed that the chilling effect of Section 377 “poses a grave danger to the unhindered fulfilment of one’s sexual orientation, as an element of privacy and dignity.” In separate judgments, the Constitution Bench, led by Chief Justice of India J.S. Khehar, concluded that the 2014 verdict by a

two-judge Bench of the court pandered to a “majoritarian” view to deny the LGBT community their inherent fundamental rights of life, personal liberty, equality and gender discrimination.

The 2014 judgment’s view that “a miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders” was not a sustainable basis to deny the right to privacy, Justice D.Y. Chandrachud observed in his judgment.

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Justice Chandrachud was writing for himself, Chief Justice Khehar, Justices R.K. Agrawal and S. Abdul Nazeer on the Bench.

“The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the ‘mainstream’. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties,” Justice Chandrachud observed.

Justice Sanjay Kishan Kaul, in his separate judgment, seconded Justice Chandrachud, while observing that the “majoritarian concept” does not apply to constitutional rights.

“Courts are often called upon to take what may be categorised as a non-major-

itarian view... One's sexual orientation is undoubtedly an attribute of privacy,” Justice Kaul added.

Justice Chandrachud observed that the SC, without any constitutional basis, had set aside the Delhi HC judgment of then Chief Justice A.P. Shah. The High Court had in 2010 found that Section 377 was a statutory provision targeting homosexuals as a class and amounted to a hostile discrimination on the grounds of sexual orientation violative of the fundamental rights.

Offensive to dignity

“Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual,” Justice Chandrachud wrote.

The apex court notes how the two-judges in 2014 had repelled the idea of Section 377 robbing the LGBT community of their “so-called” fundamental rights of privacy and dignity.