SUPREME COURT AND THE DOMESTIC VIOLENCE ACT: A CRITICAL COMMENT ON *INDRA SARMA* v. *V.K.V. SARMA*

Abstract

The Supreme Court of India has played a key role in protecting women's rights and promoting gender equality. In *Indra Sarma* v. *V.K.V. Sarma*, a case which was decided on November 26, 2013 by the Supreme Court, a woman who was in a live-in relationship with a married man for 14 years was not accorded the fruits of the Protection of Women from Domestic Violence Act, 2005, since the court held that such a live-in relationship fell outside the purview of 'relationship in the nature of marriage'. While arriving at this conclusion, which has far-reaching implications on rights of aggrieved persons in non-matrimonial relationships, the Supreme Court laid down various criteria for the purpose of determining what kind of relationships would fall within the ambit of the expression 'relationship in the nature of marriage' in order to provide a remedy at civil law to women who are part of such a relationship. The present paper carefully critiques the approach followed by the Supreme Court in *Sarma* v. *Sarma*, particularly the reliance placed on foreign judgments and foreign statutory provisions for the purpose of interpreting a statutory provision which is peculiar to Indian conditions. The paper also attempts to analyse the extent to which the law laid down by the Supreme Court earlier in *D. Velusamy* v. *D. Patchaiammal*, survives. The paper also explores what possible remedies victims of such live-in relationships may have, especially in the face of the male partner holding out the promise of marriage.

I Introduction

THE SUPREME Court of India continues to grapple with the vexed question of how far it must permit live-in relationships to be covered by the Protection of Women from Domestic Violence Act, 2005.[1] One recent instance of this is *Indra Sarma* v. *V.K.V. Sarma*[2], where the court laid down guidelines on how to adjudicate whether a particular live-in relationship is covered in the expression 'relationship in the nature of marriage'[3]. The present paper attempts to comment on the viability and desirability of the tests laid down by the court in *Indra Sarma*. More particularly, the endeavour is to attempt a balance at the competing rights of a consort (not being a wife) and her partner in a relationship, which involves the two partners living in a shared household.

Domestic Violence Act, 2005 – A background

Prior to the enactment of the DV Act, the law with respect to payment of maintenance was primarily restricted to legitimate and familial relationships, such as

1 Hereinafter DV Act.

2 JT 2013 (15) SC 70. Hereinafter *Indra Sarma*

3 *S*. 2(f) of the DV Act, which defines 'domestic relationship' to mean "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family".

wives, children and parents. Section 125 of the Code of Criminal Procedure, 1973, provided a slight departure in the form of entitling even divorced women (who had not remarried) and illegitimate children to maintenance. Women in *de facto* marriages, or other marriage-resembling relationships, remained excluded from the purview of grant of maintenance.

The Supreme Court has repeatedly stressed that the fruits of maintenance under section 125, CrPC may in certain circumstances be available to second wives, even in the absence of the requisite religious rites having been performed. For instance, in *Sumitra Devi* v. *Bhikan Choudhary*,[4] the Supreme Court discounted the significance of religious rites for validity of marriage of a second wife who claimed maintenance for herself and her minor child. The observations in that judgment clearly indicate that the concept of a *de facto* marriage came to be recognised for the first time.

When the DV Act came into force, it brought within its purview relationships 'in the nature of marriage', and protected women who were in such relationships to seek redress against domestic violence, including economic abuse inflicted upon them by their partners. The DV Act was intended to be a giant leap forward to realize the goal of completely eliminating any sort of harassment, cruelty or abuse to a woman at her household at the hands of a male relation. A reading of the DV Act would show that the enactment is a woman-welfare legislation, which provides speedy and effective civil law remedy against mental or physical violence by their male relatives. The DV Act is wider in scope than any previous woman-centric provision, such as section 498-A, IPC (cruelty), maintenance provisions under various personal laws, and even section 125, CrPC. Indeed, the DV Act is a domestic counterpart of the Sexual Harassment Act[5] which deals with harassment of women at workplace. Indeed, together the DV Act and the Sexual Harassment Act are designed to provide statutory redressal mechanisms to women who are victims of abuse, violence or harassment. It is thus important that the Act be interpreted keeping in view the scope and object of the legislation.

II *Indra Sarma* case

In order to appreciate what transpired in *Indra Sarma*, a brief vista of facts is essential. The lady-appellant before the court began living with the respondent, who was her co-worker, in 1994. The appellant left her job and had a live-in relationship with the respondent, despite knowing that the respondent was married and had two children. The respondent eventually left the appellant's company in 2006. Consequently,

4 (1985) 1 SCC 637.

5 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came into force w.e.f. Dec. 9, 2013.

the appellant filed an application under section 12 of the DV Act, claiming maintenance and various other reliefs. On the preliminary question of maintainability, both the magistrate and sessions courts concurrently found such a petition to be maintainable, on account of the parties having lived together for almost 18 years, and ruled that a subsequent non-maintenance would constitute 'domestic violence'.

However, the high court, applying the test laid down in *D. Velusamy* v. *D. Patchaiammal*[6] held the live-in relationship to be not one 'in the nature of marriage' within the meaning of section 2(f) of the DV Act.[7] Assailing such a disposition, the aggrieved woman approached the Supreme Court. The precise question before the Supreme Court was therefore, the correctness of the view propounded by the high court.

It is appropriate at this juncture to pause and wade through the development of law with respect to rights of women in live-in relationships leading up to the judgment in *Indra Sarma*. Upon the enactment of the DV Act, actions thereunder were brought by women in non-matrimonial relationships against their partners. Courts thus had the occasion to consider the expanse of the term 'relationship in the nature of marriage' employed in section 2(f) of the Act. In one judgment, Madras High Court took the view that as long as the parties were close, and had lived together at some point of time, even without the promise of marriage, an application under the DV Act would be maintainable.[8]

This view is on the basis that the provision in section 2(f) is designed to incorporate within the fold of the DV Act, all kinds of abuses meted out to a woman by a man – including where the relationship between the parties is by way of consanguinity and adoption. However, such a view ignores two key features of section 2(f)—*firstly,* that the definition is exhaustive and not illustrative, and *secondly,* that the expression "relationship in the nature of marriage" necessitates that the relationship is akin to a marriage, although not a marriage, and not merely any sexual relationship between a man and a woman. In other words, the court has to evaluate whether such a relationship, *dehors* the solemnization of marriage, can be inferred to be a commitment-based relationship between two persons of the opposite sex. Thus, the only reasonable construction of this expression figuring in section 2(f) would be to evaluate what relationships would be *in the nature* of a marriage, and what would fall outside of it.

***Velusamy* case**

The Supreme Court was finally confronted with the true import of this expression in *Velusamy*, which was a case arising out of section 125, CrPC proceedings instituted

6 (2010) 10 SCC 469. Hereinafter *Velusamy.*

7 *V.K.V. Sarma* v. *Indra Sarma*, ILR 2012 KAR 218.

8 *M. Palani* v. *Meenakshi*, AIR 2008 Mad 162.

by a wife, claiming maintenance. The husband denied the claim on the ground that the marriage between them was void, since he was already married to someone else.

In the context of the DV Act, the court in *Velusamy* held, after surveying the protection accorded to women in such relationships in other jurisdictions, that 'relationship in the nature of marriage' is akin to common law marriage, which expression is, as per the court, synonymous to '*de facto* marriage' and 'informal marriage'. The court then proceeded to merely cite *Wikipedia* for laying down the essentials of a 'common law marriage', *viz.,* (a) holding out to society as being akin to spouses; (b) legal age to marry; (c) otherwise qualified to marry, including being unmarried; and (d) must have cohabited or held out to society for a significant period of time.[9] The court held that apart from these four criteria for a common law marriage, a 'shared household'[10] is necessary for a particular relationship to come within the purview of DV Act.

Although the facts did not require an interpretation of section 2(f), the Supreme Court ventured upon such an exercise of statutory construction in anticipation of "a large number of cases [which] will be coming up before the courts in our country on this point"[11]. It is respectfully submitted that such an exercise of statutory interpretation is unwarranted, since courts must interpret statutes on the basis of facts placed before them. Answering questions which are essentially academic in nature, clearly constitute *obiter dicta*, and must be avoided. Be that as it may, the judgment is important for the determining the sweep of the DV Act, and is thus, relevant on account of two reasons – *firstly*, since the *obiter dicta* of the Supreme Court is binding on the high courts in the absence of a direct pronouncement[12] and *secondly*, because there is an inextricable relationship between the maintenance under the DV Act and that under section 125, CrPC.[13]

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9 *Supra* note 6 at 477-478. The author respectfully submits that drawing from *Wikipedia* (which is an open-source encyclopedia and inherently prone to unreliability), for laying down the law by the highest court of the land is a dangerous trend, and is regrettable.

10 S. 2(s) of the DV Act.

11 *Supra* note 6 at 475

12 *Oriental Insurance Co. Ltd.* v. *Meena Variyal* (2007) 5 SCC 428, para 26 at 445. S. 26 further provides thus:- "26. Relief in other suits and legal proceedings.-

13 S. 20(1)(*d*) of the DV Act reads thus:-

"20. Monetary reliefs. (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,___

...

(*d*) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force."

***Chanmuniya* case**

Precisely this second reason prompted the court in *Chanmuniya* v. *Virendra Kushwaha*[14] to refer to a larger bench the issue of coverage of section 125 CrPC on account of the coming into force of the DV Act. The court noticed the development of law pertaining to right of maintenance of women whose marriage is shrouded either by an existing marriage of the husband, or non-compliance with personal laws. In *Vimala* v. *Veeraswamy*[15] a three-judge bench noticed that the term 'wife' is explained in an inclusive manner in section 125, CrPC—including former wives in certain situations.[16] The court relied on the object of the provision, *i.e.* to prevent vagrancy and destitution and placed a heavy burden of proof on the husband claiming a prior

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S.26 further provides that:-

"26. Relief in others civils and legal proceedings:-

(1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

14 (2011) 1 SCC 141. Hereinafter *Chanmuniya*.

15 (1991) 2 SCC 375

16 Relevant portion of S. 125, CrPC reads thus:

" **125**. **Order for maintenance of wives, children and parents.—** (1) If any person having sufficient means neglects or refuses to maintain—(a) his wife, unable to maintain herself, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

...

Explanation.—For the purposes of this Chapter,

...

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

...

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfiedthat there is just ground for so doing.

...

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him

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marriage to prove the existence of such a marriage. In this process, the court made an alleged second wife eligible for maintenance under section 125 CrPC.[17] However, discordant notes were simultaneously struck by the court when by a string of decisions, it insisted on the woman to prove a lawful and valid marriage for claiming maintenance under section 125, CrPC.[18]

Along with these developments at the court, the legislative policy underwent a radical change when, for the first time, almost-marital relationships were covered by the DV Act. Confronted with the cleavage in judicial opinion and the legislative change, the court in *Chanmuniya* rightly referred the matter to a larger bench for an authoritative pronouncement, *prima facie* opining that a broad and expansive interpretation be given to the term 'wife' so as to include cases where parties, though not formally married, have been living together for a reasonably long period of time.[19] Clearly, such an opinion had its roots in the possible test for adjudging a 'relationship in the nature of marriage' within the meaning of section 2(f) of the DV Act, since the court virtually equated the provisions of DV Act to section 125 CrPC, insofar as maintenance to wives and women in live-in relationship is concerned.[20]

Bigamous relationships

As seen above, capacity to marry constitutes an essential element for being brought within the purview of a 'relationship in the nature of marriage'. The apex court has repeatedly stressed that being monogamous is also a prerequisite for getting into a relationship in the nature of marriage. Although some personal laws do permit polygamy, the apex court has clearly held that conversion to another religion for the purpose of contracting a second marriage, would continue to be punishable by section 494 of the Indian Penal Code, and such a second marriage would be void.[21] Such an interpretation is based on the principles of justice, equity and good conscience.

This brief comment leads us to two possible situations – *first*, where the woman who is contracting marriage with a married man is unaware of his marital status; and *secondly*, where she is aware that the man she is marrying is already married. These two situations radically influence the answer to the question of whether the second wife is entitled to maintenance in such a case. While the answer in the first situation is simple and straightforward – that if the woman is unaware of the man's prior marriage, then she must be entitled to claim maintenance and other benefits flowing out of such a

17 See also, *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit* (1999) 7 SCC 675.

18 *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav* (1988) 1 SCC 530; *Savitaben Somabhai Bhatiya* v. *State of Gujarat* (2005) 3 SCC 636.

19 *Supra* note 14, para. 42 at 149.

20 *Id.*, para. 38-39 at 149.

21 *Sarla Mudgal* v. *Union of India* (1995) 3 SCC 635.

marriage, as a matter of right. However, the answer in the second situation is vexed – that if she is aware of the prior marriage of the man, in other words, she knowingly enters into a bigamous relationship, can she still be found entitled to maintenance and other rights? Looking at it from another angle, can a man deny his second wife maintenance on the ground that she was in the know of the bigamous nature of their marriage, and therefore, cannot reap fruits therefrom?

Bigamy is certainly opposed to public policy. The purpose of maintenance equally is to prevent vagrancy and destitution.[22] The husband therefore, cannot rely upon the bigamous nature of the relationship to decline to maintain his second wife/partner. A delicate equilibrium has therefore to be reached between these two competing norms. The approach of the Supreme Court, to some extent has been to rely upon justice, equity and good conscience, and to lean in favour of the woman seeking maintenance. For this purpose, at times, as in *Vimala* v. *Veerswamy,*[23] the Supreme Court imposed a heavy burden of proof upon the husband to show the existence of a prior marriage. In case the husband was unable to discharge this onus, the court promptly leaned in favour of the wife, and granted her maintenance. It is submitted that such an approach is correct, and must be applied at the outset.

Proceeding to the next step as to what is the effect of second partner/wife knowingly entering into a bigamous relationship, it is urged that the same may not make much difference as to her claim for maintenance. As stated above, maintenance is the obligation of the man towards his wife, and it will be against equity to permit the man to raise the excuse of the woman in the know of his marital status prior to entering into a relationship with him. This is where the court in *Indra Sarma* has seriously faltered. In order to deprive the appellant-lady of her rights under the DV Act, the court has emphasized on her having knowingly entered into an adulterous and bigamous relationship. The court, however, fails to balance the equities as the respondent is able to avoid his liability to maintain her solely on account of her being a participant in the illegal act. As far back as in 1954, a constitution bench of the Supreme Court[24] upheld the constitutionality of section 497 of the Indian Penal Code, which outlaws adultery, even though it prosecutes only a man in adultery and women are completely immune, as being saved by article 15(3).

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22 *Vimala* v. *Veeraswamy* (1991) 2 SCC 375

23 (1991) 2 SCC 375. See also, *Pyla Mutyalamma* v. *Pyla Suri Demudu* (2011) 12 SCC 189. See however, *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav* (1988) 1 SCC 530; *Savitaben Somabhai Bhatiya* v. *State of Gujarat* (2005) 3 SCC 636, where the Court does not follow this approach and denies maintenance to the second wife, without requiring the husband to satisfactorily discharge such onus.

24 *Yusuf Abdul Aziz* v. *State of Bombay*, AIR 1954 SC 321.

Given this legal position, women have been given special protection under our laws, and it is anomalous to permit the man to completely escape his liability to maintain his wife/partner, on account of her having participated in an adulterous and bigamous relationship.

Relevance of tort of alienation of affection

The Supreme Court, in supporting its conclusion in *Indra Sarma*, marshals the tort of alienation of affection and the same having been *prima facie* committed by the appellant-lady. The apex court had, in *Pinakin Mahipatray Rawal* v. *State of Gujarat,*[25] imported the tort of alienation of affection into Indian law, by placing reliance on some judgments of Mississippi State. With due respect, it is submitted that such an approach is not proper, as the tort of alienation of affection can hardly be imported into India. Besides, such actions have been barred in various other jurisdictions. Thus, there can hardly be said to be adequate justification to introduce a tort as ill-recognised as this into our legal system.

Moreover, it is extremely dubious to rely upon the woman being in the tort of alienation of affection to be denied maintenance from her male partner. This is because the plaintiff in an action of alienation of affection, if any, is the wife (first wife), and the husband is not even a party to such litigation. By being denied maintenance, the person who gained was the respondent, while the sufferer was the appellant-lady.

III Conclusion

The Supreme Court in *Velusamy* and *Indra Sarma* has attempted to lay down tests for determining the expanse of 'relationship in the nature of marriage' or what a quasi-marriage is. The apex court has attempted to balance between rights of a woman on the one hand, and public policy considerations on the other. The court has frowned upon women who, by being in such relationships, actively contribute to the adultery. These factors override the length of the relationship – *e.g.*, in *Indra Sarma*, the relationship lasted nearly 18 years.

The rights to claim maintenance under the DV Act have been both legislatively and judicially recognised to be akin to those under section 125 of the CrPC. In *Chanmuniya*, the apex court, while grappling with a similar issue, *viz.,* the definition of 'wife' in section 125, CrPC, indicated that the definition would draw some colour from the DV Act. The two-judge bench of the Supreme Court referred this question to a larger bench for an authoritative pronouncement.

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25 (2013) 10 SCC 48. This judgment is also delivered by the same bench which pronounced the judgment in *Indra Sarma case*.

The reference bench, of course, is not required to feel bound by the tests laid down in *Velusamy* and *Indra Sarma*. It is up to the reference bench to carve out a more just and reasonable test, so as to bring within the fold of the DV Act and other maintenance provisions women who are *quasi*-wives, even such as the appellant in *Indra Sarma*. The two-judge bench in *Indra Sarma*, it is respectfully submitted, has arrived at a wrong conclusion. In fact, the bench ought to have awaited the answers to the questions referred by *Chanmuniya*, as they would have definitely had an undeniable impact upon the *lis* in *Indra Sarma*.

The bottomline, however, remains that till such time the legislature does not define 'relationship in the nature of marriage', the problem of interpreting it is going to haunt the Supreme Court.

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