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WOMEN AND LAW

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I INTRODUCTION

SEVERAL ISSUES that are critical to the way a woman's identity is constructed and perceived, have been the subject matter of the cases decided by the courts in the year under review. Issues relating to her identity *vis-à-vis* her family in the determination of her caste status, her economic contribution to the family as a wife/mother/daughter, her role as a wife or mother – these are some of the cases which determine how the courts, and also society at large, view the position and status of women. Some of these cases are examined here to better understand the complex interplay between 'women' and the 'law', and to explore the manner in which one impinges upon the other.

II CASTE STATUS UPON MARRIAGE: DETERMINED BY PATRIARCHY?

One of the issues that stands out prominently in the cases reviewed this year is the manner in which the courts have constructed the identity of a married woman. Is her identity, as a member of a particular caste or religion immutable or does it change over her life cycle – initially determined at birth, by her natal family and changed upon marriage in keeping with patriarchal norms? Linked to this is another aspect of how we would determine the caste or religious status of child born to a woman marrying into another caste or religion.

Patriarchal familial relations normally dictate that the women acquire the status of the husband's family upon marriage. Marriages are typically patrilocal, and as a result upon marriage a woman moves from her natal family and the matrimonial home is where the husband resides. In traditional Hindu law the woman is assimilated into the *gotra* of the husband. With the advent of British in India, taking on the husband's surname became a practice – all instances of the merging of her identity with that of her husband upon marriage. (Other areas of law, such as the law of evidence treats communication between husband and wife as priveleged and not admissible in a court of law as evidence). A departure from such practices has been the

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instances where the court has ruled that women marrying in the *pratiloma* style (*i.e.* into castes 'below' their status, that was historically not considered a proper form of marriage) were held *not* to suffer from the same disabilities as their spouses and therefore not a part of the caste of their spouses after marriage. In *Valsamma Paul* v. *Cochin University*,[1] the Supreme Court had held that marriage with a person of scheduled caste status would not entitle the spouse to obtain the benefit of reservation under articles 15(4) and 16(4) of the Constitution. The court was of the opinion that reservations were compensatory in nature, to offset the social discrimination suffered by a person from birth. A person marrying into such a community would not face the same hardships and handicaps that a person born into the community did, and would thus not be entitled to the benefits of such reservation. In *NE Horo* v. *Smt Jahan Ara Jaipal Singh*,[2] a woman who married a person belonging to a scheduled tribe and who had also proved the custom by which she was admitted into the tribal community after marriage was allowed to contest on a reserved seat. It appears that in this case, the proof of the wife being accepted and treated as a member of the tribal community was one of the factors that influenced the court in deciding the way it did.

In *Sobha Hymavathi Devi* v. *Setti Gangadhara Swamy*[3] the court overruled *NE Horo* and held that "we have difficulty in accepting the position that a non-tribal who marries a tribal could claim to contest a seat reserved for tribals. Article 332 of the Constitution speaks of reservation of seats for Scheduled Tribes in Legislative Assemblies. The object is clearly to give representation in the legislature to scheduled tribe candidates, considered to be deserving of such special protection. To permit a non-tribal under cover of a marriage to contest such a seat would tend to defeat the very object of such a reservation." Thus, the courts have now brought about uniformity between articles 15(4) and 16(4) on the one hand and article 332 on the other. This was noticed in *Meera Kanwaria* v. *Sunita*.[4] The court in *Meera Kanwaria* held that a person who is a high caste Hindu and not subjected to any social or educational backwardness by reason of marriage alone cannot *ipso facto* become a member of a scheduled caste or scheduled tribe and claim the benefits accorded to disadvantaged persons. It is clear that according to the current view, mere acceptance by the community of such a spouse after marriage would not entitle him or her to claim the constitutional benefits of reservation. One can also note that in order to restrict the scheme of constitutional reservation to those who suffer from disabilities warranting such compensation, the courts have deviated from a patriarchal reading of family and kinship norms to hold that husband and wife do not constitute one unit nor do they have the same caste status after marriage. Yet, where such constitutional reservations were not at stake, the courts have been content to

1 AIR 1996 SC 1011.
2 AIR 1972 SC 1840.
3 (2005) 2 SCC 244.
4 AIR 2006 SC 597.

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let the patriarchal norms subsist, as in the cases where primacy of choice for determining the matrimonial home has been granted to the 'breadwinner' husband, notwithstanding that the wife was also an earning member.[5]

The status of a child born of such an inter-caste marriage has also been the subject of litigation. In *Anjan Kumar* v. *Union of India*[6] a scheduled tribe woman married a non-tribal through a court marriage, and their son was brought up in the forward community and visited his village only during holidays. The court held that such a son cannot claim status of a scheduled tribe. It was argued before the court that a circular issued by the Ministry of Home Affairs, Government of India on the subject 'Status of children belonging to the couple one of whom belongs to Scheduled Castes/Scheduled Tribes' has recognised that when a scheduled tribe woman married a man from a non-scheduled tribe, the children from such a marriage may be treated as members of the ST community, if the marriage is accepted by the community and the children are treated as members of their own community. However, the court held that such circulars issued from time to time are not 'law' within the meaning of article 13 of the Constitution. The court held that the condition precedent for granting a tribe certificate is that one must suffer disabilities where from one belongs. Thus, in this particular case, the facts belie that the petitioner suffered such disabilities.

Are husband and wife one for purposes of serving notice?

A question that is related to the one examined above (viz. can husband and wife be treated as belonging to the same caste) has been raised in other contexts as well. The analysis of the legal position in this regard and the attitude of the courts in this respect is quite illuminating and may help us in drawing firmer conclusions about the way normative principles treat the identity of spouses after marriage. Some of the cases illustrate the positions taken by the courts in such cases.

The telephone department had disconnected the phone of a subscriber on the ground that the wife of the petitioner defaulted in payment of her telephone bill. The court held that the petitioner and his wife were two distinct subscribers, and that he was a subscriber of a different telephone service from that of his wife. The court also pointed out that the petitioner was not legally bound to pay the bill of his wife and was, therefore, not a defaulting subscriber. In the circumstances, restoring telephone connection was ordered.[7] In another case dealing with a similar question, there was illegal construction of property under the management of the Defence Estate Officer, Cantonment Circle. Notice was, therefore, issued under section 256 of the Cantonments Act, 1924. The wife was the owner of the property. A show cause notice for carrying out new constructions without taking permission was served on the husband of the woman. The court took the view that as the husband and wife were living

5 *Kailashwati* v *Ayudhia Parkash,* 1977 CLJ 109 (P&H).
6 AIR 2006 1177.
7 *EV Sadasiva Reddy* v. *Chief General Manager,* AIR 2006 (NOC) 389 (AP).

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together and there was no allegation of strained relations between them, the purpose of serving a notice was acheived even if no notice is personally served provided the party has sufficient knowledge about the proceedings. In the facts of the case, the court held that the bogey of not being served personal notice could not be raised.[8] The two cases are distinguishable; in the former case the husband was unfairly made to bear the consequences for the non-payment on the part of the wife; in the latter he was merely the means through which notice was deemed to have been adequately served upon the wife. The individuality created by the law of contract and property makes clear that the merging of identities upon marriage is for limited purposes. In the case of the right to claim the benefits of reservation, it appears that the larger public interest of retaining a sharp focus to such constitutionally permitted provisions, have led the court to adopt an approach of retaining distinct identities upon marriage. In matter of economic liability too, their distinct identities have been maintained, while this is not the case in other matters, arising in particular, in family law.

III CONTRIBUTION OF WOMEN TO HOUSEWORK AND TO MATRIMONIAL PROPERTY

One of the areas in family law where the law assumes that women must not maintain a distinct identity and perform their conjugal duties, is the implied duty cast on the wife to perform household work unquestioningly for the other spouse; not doing so would constitute cruelty or desertion. A related, but much neglected area in family law is the area of matrimonial property.[9] Matrimonial property law seeks, among other matters, to quantify a spouse's contribution to the marriage in order to ascertain shares at the time of death or dissolution of marriage. Despite the lack of development of this branch of family law in India, other areas of law such as tort law, motor vehicle law and insurance law have made some advance in this direction. In *Lata Wadhwa* v. *State of Bihar*[10] the court was dealing with the monetary value of services rendered by housewives to the households in order to compute the compensation under the Motor Vehicles Act, 1988. The court was of the view that, "…taking into consideration, the multifarious services rendered by the housewives for managing the entire family even on a modest estimation should be Rs. 3,000 per month and Rs. 36,000 per annum. This would apply to all housewives between the age group of 34 to 59 and as such who were active in life…"As far as the elderly ladies were concerned, in the age groups 62 to 72, the value of the services rendered by them to the household was modified by the court to be Rs. 20,000 per annum with the appropriate age specific multiplier as provided in the Act in addition to the conventional sum of

8 *Smt. Kamlesh Devi* v. *Cantonement Board*, AIR 2006 All 69.
9 For an illuminating introduction to the subject see B. Sivaramayya, *Matrimonial Property Law in India* (1999).
10 AIR 2001 SC 321.

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Rs. 50,000 awarded in such cases. This quantification of the value of housework performed by women has been followed in tort cases where there was medical negligence. Compensation amounting to Rs. 6,12,000 was ordered to be recovered by the state from the negligent doctors in *Sobhag Mal Jain* v. *State of Rajasthan.*[11]

In an earlier case where high intensity electricity lines snapped leading to death of a person, the rule of strict liability was held to apply.[12] In *Surjya Das*[13] where such an accident happened and the petitioner's wife was electrocuted, the Gauhati High Court computed the quantum of compensation taking her earnings to be about Rs 1500 per month, she being a daily wage earner. This was done without any reference to the minimum wages fixed in the state in 1999 when the accident took place. It is disappointing that the court nowhere explains the basis on which it arrived at this figure. It must be pointed out that in cases where women are earning, their contribution to the household work, should also be taken into consideration as a separate factor apart from the loss of earning while computing compensation.

The growth of matrimonial property law in other countries in the world shows that there is a need to evolve a rational and transparent method of calculating compensation in such cases in our country as well.

IV FAMILY RELATIONS AND DNA TESTING

In *Sharda* v. *Dharmpal*[14] the court had held that a matrimonial court had the power to order a person to undergo a medical test which would not be in violation of article 21 of the Constitution. The court had held further, that if despite such an order a person still refused to undergo a test, the court would be entitled to draw adverse inferences against him. The court distinguished its earlier decision in *Goutam Kundu* v. *State of West Bengal*[15] where it was held that a person could not be compelled to give his blood sample for a DNA test. It must be borne in mind that refusal to undergo a DNA test has also resulted in adverse inferences being drawn against the wife.[16]

A related question of what presumption could be drawn from such DNA test arose in a case before the Andhra Pradesh High Court where the question was whether a DNA test could rebut the conclusive presumption drawn from section 112 of the Indian Evidence Act, 1987? Section 112 is based on the well-known maxim *pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The court held that the DNA test could rebut this conclusive presumption and added "The parties can avoid the rigor of such

11 AIR 2006 Raj 66.
12 *M.P. Electricity Board* v. *Shail Kumar,* AIR 2002 SC 551.
13 *Surjya Das* v. *Assam State Electricity Board,* AIR 2006 Gau 59.
14 AIR 2003 SC 3450.
15 AIR 1993 SC 2295.
16 *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit,* AIR 1999 SC 3348, *Amarjit Kaur* v. *Harbhajan Singh,* AIR 2005 SC 2132.

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conclusive presumption only by proving non-access which is a negative proof. It is always open to the Court to draw an adverse inference when the spouse refuses to undergo the test despite the direction given by the Court."[17] In support, the high court cited *Banarsi Dass* v. *Teeku Dutta*[18] where it had held that DNA test cannot be mandated in cases where the paternity can be decided effectively even otherwise without resorting to such a test.

In *Kamti Devi* v. *Poshi Ram* the court had held that "Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimizing a child. It is a sublime public policy that children should not suffer social disability on account of laches or lapse of parents." [19] However it must be noted that while under section 112 of the Indian Evidence Act, proof of non-access can be adduced to rebut the presumption that the child born during wedlock is legitimate, undergoing a DNA test cannot be ordered as a matter of routine. Where the husband pleads non-consummation of marriage and alleges that the wife was pregnant at the time of marriage by some other person, the court has held that this is a fit case for directing the parties and child to undergo a DNA test to establish whether the marriage could be declared null and void under section 12 of the Hindu Marriage Act, 1955.[20]

While the courts have generally been circumspect in ordering the parties to undergo a DNA test, the question whether the Women's Commission could order a DNA test was raised in *Joseph* v. *State of Kerala*.[21] The Women's Commission Act, 1990 defines an unfair practice in section 2(i) as: "unfair practice" means any distinction, exclusion or restriction made on the basis of sex for the purpose of or which has the effect of impairing or nullifying the recognition or exercise by women of fundamental constitutional rights, or of human rights, or of fundamental freedom in the political, economic, social, cultural, civil or any other field or the infringement of any right or benefit conferred on women by or under the provisions of any law for the time being in force or the mental or physical torture or sexual excess on women."

The Women's Commission in Kerala had ordered the test to establish if the woman (K.M. Janaki) was legally wedded to the person and the child (Reena alias Sindhu) was legitimate. Surprisingly, the court in this case upheld the order of the Women's Commission for the petitioner to undergo a DNA test to establish that the woman and her daughter are not the "illegitimate wife and child" of the petitioner. While the question of paternity could be established by such a test, the question of whether one is a legitimate wife of a husband or not can never be established by a DNA test, and is a matter that

17 *Shaik Fakruddin* v. *Shaik Mohammed Hasan,* AIR 2006 AP 48 at 52.
18 (2005) 4 SCC 449.
19 AIR 2001 SC 2226 at para 10.
20 *Smt. B. Vandana Kumari* v. *P. Praveen Kumar,* AIR 2007 AP 17.
21 AIR 2006 Ker 191.

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can only be established by leading evidence and raising presumptions on that point. However the division bench went on to say "We are quite convinced that whereas DNA test if positive, would redeem Janaki K.M. and Reena *alias* Sindhu of their trauma that they are undergoing for several years and also advance the purpose for which the Women's Commission Act, 1990 came to be enacted". The court in *Joseph* distinguished cases such as *Goutam Kundu* or *Haribhai Chanabhai Vora* v. *Keshubahi Haribahi Vora*[22] where the court had cautioned against the use of the DNA test which if conducted would have had the opposite effect viz, "where the DNA test if conducted could result in the plaintiff being called a bastard." This is an important matter which requires greater clarity and uniformity of principles to be established.

The Bombay High Court has very correctly refused to order a DNA test in a case where the wife alleged that her husband had fathered a child through another woman and sought to establish his paternity through such a test. The court pointed out that the DNA test, should not be ordered in a routine manner and should be ordered only if the court was of the view that it was in the best interests of the child, which it definitely was not in this case but in the interest of the wife to establish that the husband was living in adultery. Furthermore, no notice had been issued to the second wife and child, and ordering such a test without giving them a hearing would be a violation of the principles of natural justice. The court pointed out that the paternity could be proved by other means, such as in the instant case where the birth certificate and school records reflect that the petitioner and second wife are parents of the child.[23]

V FREEDOM TO MARRY AND REGISTRATION OF MARRIAGES

Notwithstanding the fact that persons who attain majority are entitled to marry the person of their choice, parental and societal pressure is exerted in tremendous ways to prevent the exercise of such freedom. This is especially true in the case of inter-caste marriages. When the laws of the land are misused to harass them by filing false cases or threatening the parties and their families, the lives of young persons who choose to marry the person of their choice can be ruined. In one such instance that came to the Supreme Court, the family members of the boy were arrested and harassed and innumerable false cases foisted upon them by the girl's family. The court pointed out that the right to marry by those who have attained the age of majority was recognised by law. To have an inter-caste and inter-religious marriage was a decision of the two persons. The court directed the police and district administration to protect the couple from harassment and violence. Directions were also issued that action needs to be taken against such persons who

22 AIR 2005 Guj 157.
23 *Sunil Eknath Trambake* v. *Leelavati Sunil Trambake*, AIR 2006 Bom 140.

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threatened or harassed such young couples who exercise their right to marry.[24]

In another case of inter-religious marriage where a Hindu boy married a Muslim girl, the court stated: "As usual….the police is trying to dislodge and undo even the marital-tie between the two of them. The police must be emphatically asked to refrain from doing so. They are free citizens of this country and they have a right to marry according to their own wishes of course, if they have attained the age of majority."[25]

Dealing with the freedom to marry, it may not be out of place to discuss the rather strange but interesting judgment, where damages were awarded by the trial judge for the breach of the promise to marry. The plaintiff (father of the girl) filed a suit for damages on the ground that the minor daughter was engaged to when she was 17 years and the marriage was fixed for a date after she attained majority. However, the marriage was called off. Aggrieved by the damages awarded by the trial judge, the matter went to the the district judge in appeal. The district judge was of the view that the contract was void *ab initio* because the plaintiff no. 2 was a minor on the date of the contract (engagement). Yet in appeal, the single judge of the Nagpur bench of the Bombay High Court[26] held that since the marriage was to take place only after the daughter attained majority, it could not be held to be a contract opposed to public policy. Further, that while plaintiff no. 2 – the daughter - lacked capacity to enter into a contract, the contract was actually between the two fathers, the plaintiff and the defendant. Citing an old case *Khimji Kuverji Shah* v. *Lalji Karsmi Raghavji*[27] where the court had held that a guardian can enter into a contract on behalf of minor children and can sue for breach, the single judge allowed the appeal. While damages for the costs incurred on account of preparations for the aborted marriage may appear justified, yet it needs to be questioned whether in this day and age the principle that a guardian can enter into a contract for the marriage of the minor child on a subsequent date should be endorsed. Besides, reliance on such antiquated precedents also needs to be seriously questioned.

Dealing with registration of marriages, the apex court in an important judgment has noted that while registration itself cannot be a proof of valid marriage *per se*, and nor could it be the determinative factor regarding validity of a marriage, yet it has great evidentiary value in the matters such as the age of parties to the marriage, the custody of children etc. The purpose of registration is summed up in section 8 of the Hindu Marriage Act, 1955 which states that it is "for the purpose of facilitating the proof of Hindu Marriages". The court has noted the social purpose served by registration and directed that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registerable in their respective states,

24 *Lata Singh* v. *State of U.P.*, AIR 2006 SC 2522.
25 *Smt. Pooja Arya* v *State of UP* AIR 2006 All 60 (DB) at 60-61.
26 *Tulshiram Maroti Kohad* v. *Roopchand Laxman Ninawe*, AIR 2006 Bom 183.
27 AIR 1941 Bom 129.

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where the marriage is solemnized. The court has also added that as "a natural consequence, the effect of non-registration would be that the presumption which is available from registration of marriages would be denied to a person whose marriage is not registered."[28] It must be noted that this judgment directs the government to take steps to make registration of marriages compulsory, when the government in its periodic reports to the CEDAW committee had declared that the principle of compulsory registration of marriages is not practical in a vast country like India, given its variety of customs, religions and levels of literacy.[29]

VI PERFORMANCE OF CONJUGAL DUTIES AND DISSOLUTION OF MARRIAGE

The occasion afforded by divorce petitions is one utilised by several courts to counsel couples on what it means to maintain conjugal harmony and expected marital behaviour. In matters arising under the Hindu Marriage Act, 1955, the idea of what is the expected role of a 'Hindu wife' has been a running theme in many judgments. In *Rup Jyoti Das* v. *Beron Saikia*[30] a manifestation of what the court considers to be the expected behaviour of an 'ideal Hindu wife' can be found. Thus, it has been stated that a Hindu marriage is a sacrament, an eternal and inviolable union and that divorce was unknown to general Hindu law. However, "basically the custom of divorce existed among the lower caste. Only in a very few high castes, divorce by custom has been available." The judgment goes on to trace the amendments in the Hindu marriage law and then "[I]n the backdrop of Hindu doctrine of marriage and divorce both past and present above discussed" the facts of the dispute are laid out. This is a case of alleged desertion, and as the court put it aspersions "questioning her character as regards faithfulness as an ideal Hindu wife".

The personal views of the judge who sees the Hindu marriage as indissoluble is clearly evident in the end of the judgment in the section termed "Comment" which reads, "Before parting with this case, we would like to put on record the following: We are pained to grant the dissolution of marriage of the parties by way of a decree of divorce as marriage is divine and is fixed in heaven and the concerned man and woman in this earth are only ordained to implement the same."[31]

Given the courts' emphasis on the role expectations of such a virtuous Hindu wife, it may be useful to recall the words of caution expressed by Chandrachud J. in the case of *NG Dastane* v. *S. Dastane*[32]

28 *Seema* v. *Ashwani Kumar*, AIR 2006 SC 1158.
29 United Nations Division for the Advancement of Women (UNDAW), Declarations, Reservations and Objections to CEDAW, http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm .
30 AIR 2006 Gau 125.
31 *Id.* at 132.
32 (1975) 2 SCC 326 at 332-33, 338.

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> The parties are Hindus but we do not propose, as is commonly done and has been done in this case, to describe the respondent as a "Hindu wife" in contrast to non-Hindu wives as if women professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the particular habits, ideas, susceptibilities and expectations of persons belonging to the strata of society to which to these belong. All circumstance which constitute the occasion or setting for the conduct complained of have relevance but we thing that no assumption can be made that respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a "secular" examination....
> The Court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be down their differences, their ideal attitudes may be help them overlook or gloss over mutual faults and failures.

Proceeding further with cases dealing with dissolution of marriage, a special bench of the Bombay High Court decided an important issue and held that the procedure contemplated by section 17 of the Indian Divorce Act, 1869 of decree nisi and confirmation by the high court (now amended in 2001) had to give way to the procedure under the Family Courts Act, 1984. The court further held that the decree of dissolution of marriage passed by the family court needs no confirmation. The judgments of the family courts are of course subject to the appellate jurisdiction of the high court under section 19 of the Family Courts Act. With this important pronouncement, the decrees passed by the family courts can be treated as final.[33]

It was held in *Hamim Ara* v. *State of UP*,[34] that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot itself be treated as effectuating *talaq* on the date of delivery of the written statement to the wife. This has been cited by the courts to reiterate that the pronouncement of the *talaq* has to be proved and not merely stated in the pleadings.[35]

VII RIGHTS OF WOMEN IN SUCCESSION AND INHERITANCE

In a cryptic decision where all the facts are not well spelt out, the Rajasthan High Court has held that because of section 2 (2) the provisions of

33 *Asis Ubaldo Rodrigues (D) by LRs* v. *Maria Asis Rodrigues*, AIR 2006 Bom 143.
34 AIR 2002 SC 3551.
35 *Abdul Rashid Khan* v. *Mustafian Bibi*, AIR 2006 Ori 186 (DB).

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the Hindu Succession Act, 1956 do not apply to the members of the scheduled tribes. Challenging an order of the Board of Revenue granting a share in the ancestral property to a widow who had remarried and to her married daughter, the high court quashed the order of the Board of Revenue. The court observed that remarriage of a mother (widow) would not defeat her claims of interest in property. The court surprisingly added that a married daughter would not have claims to the ancestral property of the father. However, the court chose to negate the claim of the married daughter and widow in this case on other grounds *viz*, that by virtue of section 2(2) the provisions of the Act are inapplicable to members of scheduled tribe. The court unfortunately did not go into the question of what the customary laws of inheritance and succession are for the members of the ST and whether, the widow and daughter could get a share in the property on the law as applicable to them.[36]

One of the issues that arises from time to time is the conflict between the rules of property devolution that are based on specific customary practices and the principle of reasonableness and non-arbitrariness which can be read into articles 14 and 15 of the Constitution. This aspect becomes important where a person converts to a religion which affords greater property rights to women in order to understand the implications of their legal rights to succession. An interesting case in point arose in 2006. A notification dated 23.7.1868 issued by the Governor-General of India in Council, exempted all native Christians in the State of Coorg from the operation of certain specified sections of the Indian Succession Act, 1865. The question arose whether such an exemption granted to persons of the Hindu faith who converted to Christianity residing in Hassan, Mysore (subsequently annexed) would be applicable to them in matters of property and succession after the enactment of the Indian Succession Act, 1925 and the commencement of the Constitution.[37] The courts held that in view of a savings clause contained in section 3 (3) of the 1925 Act, such exceptions would continue to be valid. Further, the court held that such continuation of exemption in favour of earlier rules of succession would not be hit by the doctrine of eclipse under article 13(1) of the Constitution nor could it be declared to be arbitrary and violative of articles 14 and 15 of the Constitution.[38] In an interesting judgment the Allahabad High Court has held that the rights of a female Hindu have undergone "a sea change" and her rights could not be restricted or denied to her on the ground of being a female Hindu. Thus a daughter, unless there is a custom to the contrary, could inherit

36 *Gulab* v. *Board of Revenue*, AIR 2006 Raj 162.

37 *Anthappa (deceased by LRs)* v. *Distinappa*, AIR 2006 Kant 60.

38 It could be argued that given the decision in *Mary Roy* v. *Union of India*, (1986) 2 SCC 209, where the court had held that after the extension of the Indian Succession Act, 1925 to all Part B states (following the enactment of the Part B States (Laws) Act, 1951), the provisions of the Travancore Christian Succession Act, 1092 stood repealed in its entirety, the court could have examined the matter in the light of this decision too.

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the right of *shebaitship*.[39] The court was interpreting the term property as occurs in explanation to section 14(1) of the Hindu Succession Act, 1956 and section 3(1) of the Hindu Women's Right to Property Act, 1937 (since repealed).

VIII CUSTODY OF CHILDREN AND INTER-PARENTAL KIDNAPPING

In 2003 the case of *Amit Beri* v. *Sheetal Beri*[40] where the Allahabad High Court had given custody of the child on the basis that the father was a rich man, and denied custody to the mother on the ground that she was a working woman and had sent the child occasionally to child care, and that she visited nightclubs (thereby implying her to be of loose morals) was discussed.[41] On appeal, the Supreme Court had remanded the matter to the high court. In 2006 the high court[42] deviating from the view it took in 2003, held that the mere fact that the mother works in Dubai and the child had to be kept for some time in child care, would not by itself indicate that she would not be able to take care of the child. Observing that it was unfortunate that the views of the 10 year old child had not been taken into account, the court gave the custody to the mother given the fact that the child until now had been with her based on the initial order of ADJ. Further, in a welcome development the court rejected the view of the earlier judge that the wealth, as asserted by the father, could not be a factor to determine that he would be in a better position to look after the child (judge in the earlier round of litigation had granted custody of the child to the father after directing him to deposit Rs. 5 lakhs in a nationalised bank). Further, the contention by the father that the mother goes to night clubs was dismissed by the court by stating that the mother had denied this and that she had stated that she sometimes went to parties of the company where she was an employee. The court also noted, that it is "word against word, and therefore, not proved". This is a welcome judgment. As noted in the 2003 *ASIL* the statements made by the judge in the earlier round of litigation only reinforced the existing stereotypes of professional working women and places a premium at money power over the real interests of the child.

The courts have recognised the growing menace of inter-parental kidnapping in India. In *Amit Pal Singh*,[43] the spouses resided together in Delhi and subsequently the father took away the children to another city. The question was which court would have jurisdiction. The court stated that the mere fact that the children of the family were taken out of the matrimonial home would not deprive the Delhi courts of the territorial jurisdiction to entertain the petition."

39 *Brashbhanji Maharaj VirajmanMmandir Oasba Barsena* v. *Smt Kampuri*, AIR 2006 All 34.
40 AIR 2003 All 78.
41 See, Kamala Sankaran, "Women and the Law" XXXIX *ASIL*, 698 (2003).
42 *Amit Beri* v. *Sheetal Beri*, AIR 2006 All 267.
43 *Amit Pal Singh* v. *Jasmeet Kaur*, AIR 2006 Del 213 at 215.

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IX BAR GIRLS AND BLANKET BAN ON DANCE PERFORMANCE

The Bombay Police Act, 1951 was amended in 2005 and sections 33A and 33B were inserted which prohibited the holding of dance performance of any kind or type in an eating house, permit room or beer bar. The division bench of the Bombay High Court held that section 33A which prohibits all forms of dancing in the beer bars, permit rooms, eating houses (prohibited establishments) is arbitrary and therefore void. The court took the position that the object of the legislation was to prohibit dances which are immoral. However, the Act prohibits all forms of dancing in the prohibited establishments. Further, the Act also classified establishments as dance bars and three-starred and above establishments (exempted establishments). The court maintained that it was difficult to understand why non-vulgar and non-obscene dances could not be permitted in the prohibited establishment, as even in such establishments they were required to obtain a performance licence for non-vulgar and non-obscene dances. Further, the court noted that if women could work in such 'prohibited establishments' performing work other than as dancers, one could ask why it would be termed exploitation when women dance to earn their livelihood. The court stated that it was the duty of the state to protect those lawfully earning their livelihood; and further that the inaction by the state in ensuring that its performance licences were not violated, was not a reason to deprive men and women of their right to earn their livelihood in a lawful manner by abiding with the law of the land. The court felt that there was no material placed on record to show that it was not possible to deal with issue of threat to public order within the existing laws.[44]

X MANNER OF DISPOSAL OF RAPE CASES

There have been several cases before the apex court in the year under review questioning the manner of disposal of rape cases. The observations in these cases by the court would serve as useful guidelines in the trial of rape cases in the future. A series of cases from the Madhya Pradesh High Court have come in appeal before the apex court on the question of reduction of sentence below the prescribed minimum in section 376 of the IPC for the offence of rape. Section 376(1) provides that "Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term that may extend to ten years and shall also be liable to fine. Under the category of cases covered by section 376 (2) the sentence cannot be less than 10 years…." The proviso to sub-section (1) states that the court may for adequate and special reasons to be mentioned

44 *Indian Hotel & Restaurants Association (AHAR)* v. *State of Maharashtra*, AIR 2006 (NOC) 901 (Bom).

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in the judgment, impose a sentence of imprisonment for a term less than seven years. Clearly the special reasons for reducing the sentence below the minimum should be adequate and well reasoned. In one of the cases before the Supreme Court a short and cryptic judgment was given by the high court to reduce the sentence to the period of imprisonment already undergone which was nearly three months. This manner of disposal was considered all the more shocking because this was also a case registered under section 3 (1)(xi) of the Scheduled Castes/ Scheduled Tribes (Prevention of Atrocities) Act, 1989 which does not seem to have been addressed. The Supreme Court remitted the matter to the high court for a fresh consideration of the appeal.[45] In another case from the same high court the sessions court had awarded a sentence of 10 years RI and a fine of Rs. 2000, and in default to undergo a further RI of six months. The high court upheld the conviction but reduced the sentence to the period already undergone which was nearly one year and four months. Here too, the same three-judge bench of the Supreme Court remitted the matter to the high court for fresh consideration since it felt the short and cryptic Judgment of the high court did not reveal any special reasons for reducing the sentence.[46]

In all these cases the Supreme Court was of the view that there were no satisfactory reasons given and there was non-application of mind. Yet, for its own part, in *State of Chhatisgarh* v. *Lekhram*,[47] where the question was whether the age of the prosecutrix was below 16 years, and two courts below had arrived at the conclusion that the girl was a willing party and had lived with the respondent for some months in a rented house, the Supreme Court was of the view that while the offence of rape was established, the above facts could be considered as mitigating circumstances. The court, accordingly, sentenced the respondent to the period already undergone by him.

The court has also held that what constitutes adequate and special reasons would depend on several factors and that no straitjacket formula could be indicated. Thus, in a given case where the high court indicated the young age of the accused and the fact that he was a member of a scheduled tribe, was rejected by the Supreme Court which stated that such reasons "by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative."[48] The fact that the victim and appellant in another case arising under section 498A of the IPC were considered to have "remarried and are happily living with their families" was considered to be special circumstances to warrant reduction of sentence to the period already undergone.[49]

45 *State of MP* v. *Dayanand Dohar,* AIR 2006 SC 754.

46 *State of MP* v. *Mahesh Bhoomia,* AIR 2006 SC 763; see also *State of MP* v. *Vilru @ Kamal,* AIR 2006 SC 765; *State of MP* v. *Gauri Shankar,* AIR 2006 SC 768; *State of MP* v. *Ram Kumar,* AIR 2006 SC 643; *State of MP* v. *Killu@Kailash Vishwakarma,* AIR 2006 SC 777.

47 AIR 2006 SC 1746.

48 *State of MP* v. *Santosh Kumar,* AIR 2006 SC 2648 at 2652.

49 *B.T. Jayaraman* v. *State of Karnatka,* AIR 2006 SC 1799.

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A welcome development of the law in this area has been the reiteration by the apex court about the need not to disclose the identity of the rape victim in court judgments. The court has pointed out that the reason section 228-A of the IPC has been enacted is to avoid social ostracism of the victim. This should serve as a reminder to courts in the country to maintain anonymity of the victim in the case of sexual offences.[50] Another aspect of this case also merits attention. The court has proceeded to state "The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy." This was a case where the victim was a member of the scheduled caste/scheduled tribe. Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 states: Punishments for offences of atrocities -

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, ...

(v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine; ....

Interpreting this section, the Supreme Court held that the *sine qua non* of section 3(2) is that an offence must have been committed against a person on the ground that such a person is a member of a scheduled caste or scheduled tribe. In the absence of this evidence no case under the Atrocities Act will be made out. It can, however, be argued that the object of the law is to punish those who commit atrocities against the scheduled castes/scheduled tribes and that, therefore, the text should be interpreted in a manner in consonance with the object of the Act. Thus, where there was knowledge regarding the caste of the victim at the time of the commission of the offence, that should be adequate to bring about culpability in keeping with the object and text of the statute.

XI WOMEN AND CHILDREN IN PRISONS

In an important judgment in *R. D. Upadhaya* v. *State of A.P.*,[51] the court has taken concrete steps to ameliorate the conditions of women in prisons, particularly those with children, who become "inmates" of such jails for no fault of their own. The court noted that there were 6496 under-trial women with 1053 children and 1873 convicted women with 206 children, based on the affidavits submitted by different state governments. It also noted that that a Jail Manual Bill ("The Prison Management Bill, 1998") had been prepared which, *inter alia*, deals with the plight of women prisoners, under chapters XIV and XVI. Further, that the "National Expert Committee on Women

50 *Om Prakash* v. *State of Uttar Pradesh*, AIR 2006 SC 2214.
51 *R. D. Upadhaya* v. *State of A.P.*, AIR 2006 SC 1946.

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Prisoners", headed by V.R. Krishna Iyer J, framed a draft Model Prison Manual. Chapter XXIII of this manual makes special provision for children of women prisoners. The court noted that this committee had made comprehensive suggestions regarding the rights of women prisoners, including those with children, those who are pregnant, as also regarding childbirth in prison.

After detailed submissions by state governments, union territories and the Union of India, the court issued very detailed guidelines concerning the child and mother in prison covering all aspects of their well-being. These guidelines spell out the duties and responsibilities of different authorities within the jail in these respects: Thus, a child shall not be treated as an under-trial/convict while in jail with his/her mother; he/she is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right; proper standards shall be maintained for child birth in prison; female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years; upon reaching such age, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department; when a female prisoner dies and leaves behind a child, the superintendent shall inform the district magistrate concerned and he shall arrange for the proper care of the child; proper provision shall be made for the education and recreation of children of female prisoners; crèche facilities shall be maintained; and the children shall be kept in separate environment from overcrowded or violent barracks; etc. The court directed that jail manuals and/or other relevant rules, regulations, instructions etc. should be suitably amended within three months so as to comply with these directions. The court also stated that the state legislatures could consider passing of necessary legislations, wherever necessary, on this important matter. Directions were issued to the state legal services authorities to monitor the guidelines given in the judgment. The courts dealing with cases of women prisoners whose children are in prison with their mothers were directed to give priority to such cases and decide their cases expeditiously.

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