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WOMEN AND THE LAW

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I INTRODUCTION

VIOLENCE FACED by women whether in public places, their homes or in the working environment, is an aspect of Indian society that finds reflection in the cases coming before the courts. The provisions of criminal laws that deal with specific gender-based violence such as rape, dowry death and cruelty together with special laws such as the Protection of Women from Domestic Violence Act, 2005 (PWDVA) or the provisions relating to sexual harassment at the workplace, provide the framework to deal with such forms of violence against women. The need for the administration and the courts to deal effectively and sensitively with such cases of violence is an important theme that we see reflected in the cases surveyed this year. The survey also points to the importance of constitutional provisions and statutes in creating equitable conditions for women, both within the home and in society in general, and the role of the courts in ensuring such substantive equality for women.

II VIOLENCE AGAINST WOMEN

Sexual harassment at the workplace and educational institutions

A growing number of cases has been filed in various high courts against disciplinary action taken by the authorities regarding complaints of sexual harassment. The increase in the number of such cases relating to sexual harassment is a clear indication, and a vindication, of the apex court formulating guidelines to deal with such harassment in the well-known *Vishaka* case.[1] Complaints have been filed by students, both boys and girls, alleging sexual harassment at the hands of their school teachers or principals, indicating the widespread malaise in educational institutions.

The modalities of holding an enquiry where charges of sexual harassment have been levelled against a teacher in a school have been elaborated in recent years. Dealing with allegations of sexual harassment made against teachers, the courts have approved the termination of such teachers after holding a

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1 1997 (6) SCC 241.

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summary enquiry where the rules permit such an action. The courts have noted that there is a need for (a) holding of a summary inquiry; (b) a finding in such summary inquiry that the charged employee was guilty of moral turpitude; (c) the satisfaction of the director of the concerned governmental organisation on the basis of such summary inquiry that the charged officer was *prima facie* guilty; (d) the satisfaction of the director that it was not expedient to hold an inquiry on account of serious embarrassment likely to be caused to the students or his/her guardians or such other practical difficulties; and finally (e) the recording of reasons in writing in support of the decision.[2] This power has been granted to the director of such school systems, like the Kendriya Vidyalaya, with two safeguards provided, namely, that the director should record reasons for the decision not to conduct an enquiry under the rules and also inform the Minster of Human Resources and Development accordingly.

In the year under review, the Delhi High Court has upheld a termination of an employee of a Kendriya Vidyalaya who had been guilty of acts that amounted to moral turpitude involving exhibition of immoral sexual behaviour towards a boy and girl student of the school following an enquiry ordered by the school authorities. The termination was upheld by the high court since the first enquiry *prima facie* established the guilt of the respondent and such termination was within the powers of the Director of the Kendriya Vidyalaya Sangathan under the Education Code as applicable to the organization.[3]

This decision follows the decision of the Supreme Court in *Avinash Nagra* v. *Navodaya Vidyalaya Samiti*[4] where the court had upheld the power of the director of the organization to dispense with a regular enquiry subject to the safeguards discussed above. The manner in which courts should deal with cases of sexual harassment by teachers and the powers of the court to deal with a teacher against whom a *prima facie* case has been made out has been followed in yet another case from the Madras High Court in the year under review.[5]

The Bombay High Court has upheld the termination of a teacher charged with such conduct amounting to 'moral turpitude' and misconduct under the Bombay University statutes.[6] The high court rejected the contention of the petitioner that the inquiry held by the university was not in conformity with the guidelines laid down in the *Vishaka* judgment.[7] The court pointed out that the guidelines relating to the definition of sexual harassment and the nature of the complaints committee laid down by the Supreme Court had to operate

2 *Director, Navodaya Vidyalaya Samiti* v. *Babban Prasad Yadav*, 2004 (2) SCALE 400.

3 *Kendriya Vidyalaya Sangathan* v. *Gauri Shankar*, 2008 (146) DLT 364.

4 (1997) 2 SCC 534.

5 *The Chairman* v. *Dr. T. Murugesan*, 2008 INDLAW Mad 1227.

6 *Prof. Shashikant B. Kulkarni* v. *The Principal, BPCS College of Physical Education*, decided on 5 May, 2008.

7 *Supra* note 1.

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in the absence of any substantive law covering that field. The court held that in the present case, the actions of the petitioner amounted to moral turpitude and misconduct involving exhibition of immoral sexual behaviour towards girl students. It was of the opinion that the findings of facts clearly demonstrated that the misbehaviour on the part of the petitioner was "derogatory to the status and dignity of a teacher" covered by the relevant university statutes and upheld the termination based on an enquiry as laid down in the university statutes, and, further, that the disciplinary action taken by the university authorities was not contrary to the guidelines in the *Vishaka* case.

Rape

There had been occasions in earlier surveys to note the tendency of some high courts to reduce the punishment of those guilty of rape to periods below the statutorily specified minimum period of seven years in section 376 (1) IPC. It has been noticed that in such cases, the accused file an appeal in the higher courts, which often reduce the sentence, permitted under the proviso to section 376 (1) IPC, which states: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

In a case under survey,[8] the Supreme Court has noted that the proviso to the said provision would indicate that recording of reasons was a *sine qua non* or condition precedent for imposition of a sentence lower than the minimum required by law. The court noted that such reasons ought to be both adequate and special, and further, that what reasons would be adequate and special would depend upon several factors and that no strait-jacket formula could be laid down as a rule of law of universal application. In the present case, the victim was raped in broad daylight when she was doing household chores at home. The high court in the said case had reduced the sentence to the period of imprisonment already undergone which was a paltry period of two months and three days on the ground that it was just and proper and justified the reduction of the sentence on the basis that the offender was an illiterate agriculturist from a rural area and that an amount of fine of Rs.2,500/- had also been imposed on him.

On appeal by the state, the Supreme Court held that the courts are "expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge is a better armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos". The court rejected the reasons put forward by the judge of the high court as neither special nor adequate.

What is perhaps, the most important part of the case, is that the appellant state averred that the judge in question was in the habit of passing such orders by reducing sentence to the period already undergone in serious offences

8 *State of Madhya Pradesh* v. *Babulal*, AIR 2008 SC 582.

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punishable under sections 304, 307 and 376 of the IPC. A list was also submitted of some of the matters decided by the said judge, and where such decisions had been reversed in appeal. Studies of judicial behaviour of judges are practically non-existent in India. While there are, no doubt, in-house mechanisms for monitoring the performance of judges of the subordinate courts in place, there is also a crying need to deepen the public and transparent assessments of the decisions of judges, to strengthen the sensitisation processes that C.K. Thakker J. referred to in his judgment in the present case. Constructive and insightful feedback, whether from the appeal court or outside the judicial system contribute greatly in achieving the goal of a gender-sensitive and equitable legal system, and the practice of assessment of judgments by the academia and legal profession must be encouraged and given due regard by the judicial system if the goal of a gender-sensitive judiciary is to be achieved.

One must also note that in the year under review the courts have, for entirely different reasons, allowed the sentence in rape cases to be reduced due to a compromise reached between the parties, where the complainant and principal accused had married each other.[9] These cases are entirely distinguishable from the case discussed above, and the reduction of the sentence was a result of the marriage between the parties. The court has also clarified in another case that the measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused.[10] Instead, it must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. In this case before the Supreme Court, the victim was around 10 years of age and the high court reduced the sentence of the accused to the period already undergone (six years) on the ground that he was himself of young age and the breadwinner for his family. The Supreme Court set aside this sentence and held that the legislative mandate for punishment for a rape of a girl below 12 years of age, shall not be less than 10 years, but which may also extend to life imprisonment and imposition of fine, reveals the intention of the legislature to deal with such heinous crimes stringently. The court, accordingly, restored the sentence of 10 years imposed by the trial court.

Domestic violence

The Delhi High Court has rejected a challenge to the constitutionality of the PWDVA.[11] Vikramjit Sen J observed that section 17 of the said Act was "path-breaking" since it introduces the right of every woman in a 'domestic relationship' to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. He observed that equity demanded that a woman, who had been living in the joint property of the man, be aided since it was likely that other members of family would resist such

9 *Hasi Mohan Barman* v. *State of Assam*, AIR 2008 SC 388.
10 *State of Rajasthan* v. *Madan Singh*, AIR 2008 SC 1292.
11 *Aruna Parmod Shah* v. *Union of India*, 2008 INDLAW Del 1012.

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a move. The court also rejected the contention of the petitioner that the provisions of the PWDVA threatened or diminished the rights of legally-wedded wives, if the rights of women in such domestic relationships were accommodated. The judge held that, "It seems to us that it is not unconstitutional for Parliament to provide for protection to a woman in a relationship akin to marriage, along with and juxtaposed to the protection given to wives and legitimate children." The court observed that there was no reason why equal treatment should not be accorded to wife as well as a woman who has been living with a man as his common-law wife or even as a mistress. The court went on to observe that like treatment to both does not, in any manner, derogate from the sanctity of marriage.

The court also noted the implications of section 18 of the PWDVA that allows protective orders to be issued by a civil court and maintained that this was one of the more significant provisions of the Act. As the judge put it: "A woman who is facing the brunt of harassment in a domestic relationship is more concerned with being rendered destitute rather than punishment being handed down to the perpetrator of the harassment."

The court also stated that challenge to the *vires* of the Act on the ground that it accords protection only to women and not to men was wholly devoid of any merit. It admitted that it could not rule out the possibility of a man becoming the victim of domestic violence, but observed that such cases would be few and far between, and therefore not requiring or justifying the protection of Parliament.

The extent of liability of the in-laws of a woman who alleges domestic violence at the hands of the husband came up for decision before the Supreme Court.[12] The court held that section 4, Hindu Adoptions and Maintenance Act, 1956 (HAMA) provides for a *non obstante* clause. Thus, any obligation on the part of in-laws in terms of any text, rule or interpretation of Hindu law or any custom or usage as part of law before the commencement of the Act were no longer valid. The court held that the provisions of the HAMA are alone applicable in view of the said *non obstante* clause. Sections 18 and 19 prescribe the statutory liabilities in regard to maintenance of a wife by her husband and, only on the death of the husband, upon the father-in-law. The mother-in-law, thus, cannot be fastened with any legal liability to maintain her daughter-in-law from her own property or otherwise. The court also pointed out, in the context of the PWDVA, that the right to residence provided under the said law, which is a right even higher than the right to be maintained, only extends to joint properties in which the husband also has a share. The court relied on the judgment in *S.R. Batra* v. *Taruna Batra* in this regard.[13]

A judgment of the Madras High Court has held that a 'domestic relationship' can be inferred where two persons had consensual sex and it does not require that they have lived together for any particular period of

12 *Vimlaben Ajitbhai Patel* v. *Vatslaben Ashokbhai Patel*, (2008) 4 SCC 649.
13 (2007) 3 SCC 169. See also Kamala Sankaran, "Women and the Law", XLIII *ASIL* 645-47 (2007).

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time under the PWDVA. As a result, the high court has upheld an order of maintenance passed by the family court in this case where the parties did not live together but had a close physical relationship over a period of time.[14]

Jurisdiction of Family Courts Act, 1984 vis-à-vis the PWDVA

In a case before the Madras High Court, the question whether a case could be filed under the PWDVA would lie while proceedings for judicial separation were pending before the family court was examined.[15] The court noted that section 26 of the PWDVA gave liberty to the affected person to seek reliefs under sections 18, 19, 20, 21 and 22 of the said Act in any legal proceedings before a civil court, family court or criminal court. It also observed that it was not necessary for the affected person to seek every remedy under the PWDVA and that there was no bar for the aggrieved person to seek the remaining parts of the reliefs before a civil court, family court or criminal court. The court noted that while the family court could also address the allegation of domestic violence raised by the wife, as the process under the PWDVA was a summary one; the proceeding under the PWDVA need not be quashed pending another proceeding under the family courts.

Residence under PWDVA

In an important decision the Madras High Court has discussed the scope of the powers of the judicial magistrate passing orders under the PWDVA. The affidavit filed by the respondent-wife stated that she was driven away from the matrimonial home in the middle of night and that she did not have a roof under which to reside. Therefore, she had sought an *ex-parte* residence order to be implemented by the local police station. The judicial magistrate, based on the affidavit together with the materials produced with the main petition, passed a residence order *in absentia* of the petitioners. Since the petitioners locked the premises despite the residence order, the judicial magistrate, after hearing both sides, passed another order directing the police to break open the lock and give protection to the respondent to reside in the house. In the revision petition before the high court, the petitioner-husband argued that the house was not his own and therefore did not fall within the scope of the term 'shared household' in section 2(s) of the Act and also challenged the power of the judicial magistrate to order breaking open of the locked house since there was no specific provision for this in the PWDVA. The respondent contended that the house belonged to the husband but with a view to thwart the wife, he had alienated the property to the second petitioner (his mother) while continuing to reside therein. The high court distinguished the facts of this case from the case decided by the Supreme Court in *S.R. Batra* v. *Taruna Batra*,[16] where the husband had shifted to his own premises where the parties never resided together, and

14 *M. Palani* v. *Meenakshi*, AIR 2008 Mad 162.
15 *Dennison Paulraj* v. *Mrs. Mayawinola*, 2008 INDLAW Mad 713.
16 *Supra* note 13.

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where the court held that the benefit of the expression 'shared household' could not be extended to the wife.

The high court distinguished the present case from *Batra* and perceptively noted that, if such a strategy of alienation by a husband were permitted "every husband will simply alienate his property in favour of somebody else after the dispute has arisen and would take a stand that the house where they last resided is not a shared household and therefore the wife is not entitled to seek for residence right in the shared household." The court also rejected the contention of the petitioner that residence orders could not be passed when a divorce petition was also pending before the forum concerned. The court also noted that the order passed by the magistrate clearly revealed that the averments in the application disclosed the commission of the act of domestic violence and this had been incorporated in the impugned order. The high court was of the view that the mere absence of the phrase "Magistrate is satisfied" in the order passed under section 23(2) of the PWDVA did not disclose any illegality or impropriety. The court also held that if the material analysed by the judicial magistrate disclosed the allegation of commission of an act of violence, the latter would be well within his/her powers to pass a protection order under the said section. The high court went on to note that the averment by the husband that he could provide alternate accommodation could be taken into account when the judicial magistrate passed final orders in the matter. Further, the high court held that the judicial magistrate had powers to pass protection orders under section 19 of the PWDVA. In order to make these orders effective, he could certainly pass orders to break open the lock in order that the wife could take up residence therein. If the magistrate were not empowered to so order, the result would be that "the husband will lock the house and walk off and thereby depriving the wife from enjoying the protection order passed under the Act." Such a limited reading of the powers of the judicial magistrate would be against the spirit of the object and scheme of the benevolent special Act. The court went further, and held that while the petitioner had challenged the magistrate's order to break open the lock on the ground that it was passed at 8.30 p.m. at night, this only indicated the praise-worthy attitude of the magistrate, who unmindful of the time, sought to provide immediate shelter to the aggrieved wife after hearing both the parties.

Sati

In an important judgment a full bench of the Madhya Pradesh High Court has held that a decision of a state government to withhold all financial aid to a village and not to implement any of the schemes of the central or state government for the development of the village on the ground that some people in the village had abetted or committed the offence of sati (which is punishable by law) is an arbitrary decision that can be struck down under article 14 of the Constitution.[17] This is a welcome decision, particularly

17 *Anandilal Chourasia* v. *State of M.P.*, AIR 2008 MP 257.

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keeping in mind that modern jurisprudence requires the culpable individual alone to be punished, and does not subscribe to a theory of community guilt and, therefore, community punishment. There are provisions for collective fines that can be imposed under various laws in India. These are provisions that surely require reconsideration. It is a welcome sign that the high court has held that the withholding of developmental schemes to a village, as a punitive measure, is unconstitutional. There must surely be better and more imaginative ways to bring about a change in the thinking of the villagers, even if it could be assumed that they all collectively supported the act of *sati*, than depriving them of whatever chances they would have to progress and be connected with the world outside.

Trafficking of women

The growing violence against women is visible in the increased reports of cases of women being trafficked for immoral purposes. In a case before the Supreme Court the court examined a petition for anticipatory bail granted to the accused under the Immoral Traffic (Prevention) Act, 1956 for forcing a minor girl into prostitution.[18] The accused, consisting of police officers, politicians and a business man, were charged with involving a minor girl in a prostitution racket. Several of the accused, including the police officers absconded and it was stated that their whereabouts were not known. Taking a stern view of policemen being charged with trafficking, the Supreme Court cancelled the anticipatory bail given by the high court to the accused.

III OTHER RIGHTS WITHIN MARRIAGE

Maintenance

In an important decision a division bench of the Madhya Pradesh High Court has held that maintenance could be claimed under both sections 125 Cr PC and *pendente lite* under section 24 of the Hindu Marriage Act, 1955 (HMA). The court has clarified that there is nothing in these laws which requires the court ordering maintenance to adjust or deduct the amount of maintenance granted under one law while considering the matter under another law. The high court distinguished *Sudeep Chowdhury* v. *Radha Chowdhury*[19], where the Supreme Court had held that maintenance orders may be adjusted, since the Supreme Court did not lay down that the maintenance amounts granted under one law should necessarily be adjusted when considering the question under the other law.

The quantum of maintenance has also been the subject-matter of cases under review. The Supreme Court has clarified that the mere fact that the deserted wife was earning some income would not disentitle her to claim maintenance under section 125 Cr PC. The court has clarified that the phrase

18 *State of Maharashtra* v. *Mohd. Sajid Husain*, AIR 2008 SC 155.
19 AIR 1999 SC 536.

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"unable to maintain herself" used in this provision would imply that she is unable to maintain herself in a manner that she was accustomed to while she had been living with her husband.[20] The court has graphically stated that where a wife survived by begging it would certainly not amount to a case where she had the ability to maintain herself, and that the phrase "unable to maintain herself" does not require that the wife should be absolutely destitute before she could apply for maintenance under this provision of the law.

Status of the second 'wife'

The rather nebulous position of being the 'other' woman in a relationship or that of the second 'wife' whose position is not legally recognised is one that has been subject to several legal provisions and decisions. The statutes themselves do not have a consistent position *vis-à-vis* such 'other' woman who may or may not enjoy legal protection as a 'wife'. Cases under review bring out the human tragedies that unfold in such instances. *Vidyadhari* v. *Sukhrana Bai* is a case filed following the death of Sheetaldeen by the two women in his life concerning the distribution of his property.[20a] The petitioner in this case was the second *de facto* wife of the deceased and the respondent his first legally-wedded wife. No customary divorce was pleaded or established between the deceased and the first wife rendering the status of the petitioner as a mere *de facto* wife. The case ultimately reached the apex court, where the court held that though the petitioner was not the legally-wedded wife, her children were legitimate for the purposes of a share in the father's employment dues. Regarding the question of which wife would be entitled to get the benefits, the court noted that the deceased had nominated his second 'wife' to receive the benefits. Balancing the equities, the court held that though the respondent was the only legitimate wife and thus entitled to a share equal to that of the children in the dues, yet since the deceased had nominated the petitioner, the succession certificate would be granted to the *de facto* wife with the rider that she would protect the share of the first wife (respondent) and hand over the same to her. The court also held that the petitioner could still prosecute her own remedies to establish her status independent of the proceedings in this case, which was limited to determining who would be entitled to obtain the succession certificate in this matter.

Dealing with other aspects of the second 'wife', courts have distinguished between such second *de facto* wives and 'concubines'. In a case before the Delhi High Court, the court noted that the legislature had carved out a distinction regarding the rights of such second 'wife' even if not legally married to the husband under section 18 of the HAMA.[21] In this case the second woman was married as per Sikh rites to the respondent and he

20 *Chaturbhuj* v. *Sita Bai*, AIR 2008 SC 530.

20a 2008 INDLAW SC 79.

21 *Smt. Narinder Pal Kaur Chawla* v. *Manjeet Singh Chawla*, AIR 2008 Del. 7. Also see *Narinder Pal Kaur Chawla* v. *Manjeet Singh Chawla*, AIR 2004 SC 3453.

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concealed the fact of his first marriage from her. The parties lived together for several years as husband and wife and also had children. When she came to know of the first marriage, the petitioner filed a case against the respondent for bigamy and also a petition for maintenance under sections 18 and 20 of the HAMA. The court analysed that section 18(2) (d) permits the granting of maintenance if the husband has any other wife living. On this basis, the court distinguished the position of the 'second wife' under this provision of HAMA from that of the liability to maintain a wife under section 125 Cr PC. The explanation to this provision of the Cr PC makes it clear that the expression 'wife' refers to only a legally married wife. The court, therefore, distinguished *Savitaben Sombhai Bhatiya* v. *State of Gujarat*[22] where the court had held that the right to maintenance was available only to the legally-wedded wife since that was a case pertaining only to section 125 Cr PC. This judgment of the Delhi High Court is to be welcomed since it considerably enlarges the applicability of the law of maintenance and gives some succour to those hapless women duped into a form of bigamous 'marriage' but who are subsequently left to fend for themselves when abandoned by their 'husbands'. The high court in this case drew support from another decision of the Supreme Court where the court had held that a husband who went through a fraudulent second marriage could not later on claim that there had been no marriage and hence could not be prosecuted under sections 498-A and 304-B of the IPC.[23] The court also drew support from the enlarged responsibility created by the PWDVA to adopt a purposive interpretation in interpreting section 18 of the HAMA and to hold such 'husbands' liable to pay maintenance to their *de facto* wives.

Separate identity of spouses within marriage?

Reiterating the now well-established position that marriage of a person not belonging to a scheduled caste to a person belonging to such reserved caste could not entitle the former to the benefits of reservations, the Jammu and Kashmir High Court has quashed the selection of such a candidate by the public service commission.[24] Basing itself on earlier judgments of the Supreme Court,[25] the high court held that the purpose of reservations was to remove the handicaps and disadvantages which the members of the scheduled castes and scheduled tribes had been subjected to and that this benefit could not be availed of by a person who did not suffer such disabilities from birth but merely married a person belonging to such a category.

Is the identity of the wife distinct from that of the husband? The above case appears to dispel the patriarchal notion that the wife, for all purposes, acquires the identity of the husband. Yet, this position is taken only in cases

22 AIR 2005 SC 1809.

23 *Reema Agarwal* v. *Anupam*, AIR 2004 SC 1418.

24 *Neelam Digra* v. State of J&K, 2008 INDLAW JK 1. Also see *Hemlata Milind Bacchav @Kum. Hemlata Nivrutti Kakad* v. *State of Maharashtra*, 2008 III LLJ 292 (Bom)(DB).

25 *Valsamma Paul* v. *Cochin University*, AIR 1996 SC 1011.

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dealing with marriage of a woman to a man belonging to the scheduled caste. In such instances, her identity in her natal caste is preserved and she is unable to get the advantages of reservation. However, in other matters, the identity of the woman seems to get merged with that of her husband. The Supreme Court in a recent judgment held that where a wife, economically dependant on her husband, had a telephone connection registered in her name, non-payment of her telephone bill could result in the disconnection of the phone of the husband. The logic of the court in this case appeared to be that the separate phone connection in the name of the wife was a mere proxy for the husband, who it appeared, was in a position to pay the bills. The court interpreted the relevant rules of the Indian Telegraph Rules to hold that the telephone line in the name of such other relative on whom the subscriber is dependant can be disconnected for non-payment of the telephone bills of the nominal subscriber.[26]

An earlier survey had discussed the inconsistency of the courts that merge the identities of the husband and wife and hold the husband liable for the bills of the wife.[26a] Yet, where the advantages of reservation benefits are sought by the wife, the court has held that the caste identities of the spouses remain distinct even after marriage. While one can, of course, justify the decision of the court in the reservation cases, since these amount to compensatory discrimination and reservation benefits should be available only to those who have suffered marginalisation and exclusion, it would have been more consistent to maintain the distinct identity of the wife in all matters, and to compel the telephone company to pursue the case against the wife for non-payment of bills to its logical conclusion rather than to allow it to take the short-cut of disconnecting the phone in the name of the husband on the ground that the wife was a mere name lender for the telephone connection. Mere convenience in collecting outstanding bills should have yielded to a more consistent judicial position on the identity of the wife *vis-à-vis* that of the husband, resulting in general principles that could have then been applied in other areas such as determination of the matrimonial home, matters of desertion, child custody and so on.

Right to privacy – *de hors* the HMA?

An issue of considerable importance has been discussed in a recent case before the Delhi High Court. In this case, the plaintiff-husband sought the relief of permanent injunction against his wife in a suit on the broad grounds of invasion of his privacy and of maligning and defaming him. In a well-reasoned judgment, Ravindra Bhat J has held that "where special rights, not existing previously, are created by a statute, that also provides a machinery for their enforcement, then, even in the absence of express exclusion, the civil court's jurisdiction over those matters is barred." The court went on to

26 *Surjit Singh* v. *Mahanagar Telephone Nigam Ltd*, AIR 2008 SC 2226.
26a See Kamala Sankaran, "Women and Law", XLII *ASIL* 607-10 (2006).

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hold that although the plaint was framed in a way that sought reliefs that appeared seemingly different from the remedies available under HMA, on closer scrutiny, it contained assertions of cruelty or unacceptable behaviour which constituted grounds for seeking judicial separation or divorce. The court was of the opinion that granting such permanent injunction would unduly prejudice the defendant-wife since she would be bound by principles of *res judicata* as well as issue-estoppel in any future proceeding for relief under the HMA. The court was emphatic that the entire bundle of mutual rights and obligations relating to marriage, and the available remedies, were to be dealt with under this Act. As a result, the court held that there was no basis for holding that the plaintiff had a special zone of privacy, outside of the HMA, which could form the basis of the reliefs sought in this case.[27]

Another aspect of the right to privacy created under the HMA came up before a single judge of the Andhra Pradesh High Court.[28] In this case the husband in an ongoing divorce petition against his wife, wished to bring on record a hard disk which contained her phone conversations that he had recorded, without her knowledge, as evidence in the matrimonial proceeding. The husband had moved the family court to prove the voice of the wife and for this reason wanted her voice to be recorded and compared by an expert. In revision the high court held that the wife had a right to privacy guaranteed by article 21 of the Constitution. It also stated that while the tapping of the telephones, as was done in this case, was a violation of the Indian Telegraph Act, 1885, the invasion of privacy by the husband by recording the conversation of his wife with other persons was illegal and therefore could not be admissible as evidence. As a result, it declined to order the wife to undergo a voice test or for an expert to examine the hard disk created by the husband in this case.

The Madras High Court has clarified that the courts deciding a matrimonial proceeding under the HMA including a family court under the Family Courts Act, 1984, is empowered under section 22 of the HMA to prohibit the printing and publishing of any matter in relation to proceedings under it.[29] The court has clarified that the family court applies the substantive law, in this case the HMA, and is bound to preserve the right to privacy created under section 22 of the HMA. The court has therefore upheld the injunction against some of the respondents, who are not parties to the original matrimonial proceeding before the family court.

Effect of the Hindu Succession (Amendment) Act, 2005

Following the amendment to the Hindu Succession Act, 1956 (HSA) in 2005 several decisions clarifying the nature of the amendment have been delivered. In one such case before a division bench of the Madras High Court, the court clarified that the amendment made daughters coparceners

27 *Vidyanidhi Dalmia* v. *Nilanjana Dalmia*, 2008 INDLAW Del 545.
28 *Smt. Rayala M. Bhuveaneswari* v. *Nagaphanender Rayala*, AIR 2008 AP 8.
29 *R. Sukan* v. *R. Sridhar*, AIR 2008 Mad 244.

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only prospectively from the date of the amendment. The court further held that a daughter could be considered a coparcener only if her father was a coparcener at the time of coming into force of the amended provision. In this case, the father had died in 1975 and the property had already vested in class I heirs, including the daughters, under the HSA in accordance with the existing provisions under section 6 of the Act. However, the partition could not be reopened since the amendment making daughters as coparceners was only prospective.[30] A related aspect of the amendment of 2005 and its prospective operation was considered by the Orissa High Court in a recent case.[31] The court rejected the contention of one of the parties in this case that the amendment Act of 2005 only applies to a daughter born after 2005. Instead it clarified that the amendment gives coparcenary right to daughters after 2005 provided the property had not been partitioned earlier.

A slightly different aspect of the consequences of the amendment to the HSA has been highlighted in a case from the Calcutta High Court. In a suit for partition of a dwelling house, the court held that the mere fact that a married sister generally resided in her matrimonial house would not allow the court to conclude that her title had been extinguished. Further, the court noticed that following the amendment in 2005, pending proceedings for partition have not been saved and, as a result, such a suit for partition of a dwelling house at the instance of a female would lie.[32]

In another case examining the effect of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, the court held that an unmarried daughter could be treated as a coparcener with the coming into effect of the amendment in the State of Tamil Nadu.[33] The question in this case was whether a share could have been allotted to the daughter in the property relinquished by the father. The court held that section 29-A(v) of the said Act provided that nothing in clause (ii) shall apply to a partition that has been effected before the date of commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989. The court pointed out that the expression "partition" in this context would mean a complete partition by metes and bounds and not mere severance of joint status. As a result, the court held that the daughters would be entitled to get a share in the property relinquished by the father to the other coparceners. However, the court refused to grant the daughter equal share in the entire property since the daughter would get a share only in the share of the joint property that the father had, which he then relinquished.

Divorce

An interesting case arose before the Kerala High Court concerning divorce on the grounds of religious conversion of one of the spouses.[34] The

30 *Smt. Bhagirathi* v. *S. Manivanan*, AIR 2008 Mad 250.
31 *Pravat Chandra Pattnaik* v. *Sarat Chandra Pattnaik*, AIR 2008 Ori 133.
32 *Kalipada Kirtan* v. *Bijoy Bag*, AIR 2008 Cal 3.
33 *Amudha Rani* v. *K. Veeraraghavan*, AIR 2008 Mad 64.
34 *Bini* v. *Sundaram K.V.*, AIR 2008 Ker 84.

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respondent-husband sought divorce under the HMA on the ground that his wife had ceased to be a Hindu and converted to another religion, which the family court granted. Aggrieved, the petitioner-wife in the present case challenged the granting of the decree of divorce on the ground that the family court had not attempted to reconcile the parties and had granted divorce solely on the ground that she had converted to another religion. The high court noted the provisions of section 23(2) HMA which provided that the possibility for reconciliation has to be explored by the courts where divorce is sought on the grounds of adultery and cruelty, but not otherwise. However, the court also noted that under the Family Courts Act, 1984, the family courts have been declared to be a civil court under the Code of Civil Procedure, 1908. Read together with order XXXII-A of the Code, this mandates the family court to attempt to assist the parties in arriving at a settlement in respect of the subject-matter of any suit. Further, the high court noted that the Supreme Court had held that this provision requires the court to make efforts for settlement of family disputes.[35] The high court also distinguished a judgment of the Delhi High Court that had relied on section 23(2) HMA to hold that efforts of reconciliation were not required in cases of conversion to another religion, renunciation of the world, mental disorder, venereal disease or leprosy, since in that case the provisions of the Family Courts Act, 1984 were not discussed. The Kerala High Court, therefore, set aside the decree of divorce and remitted the matter to the family court to endeavour to bring about reconciliation and a settlement. The high court held that a marriage need not necessarily be broken on the ground of conversion to another religion since in a "secular country like India and a literate State like Kerala where mixed marriage itself is an accepted course, on the mere ground of conversion to another religion…. The marital tie need not be broken. The parties can disagree on matters of faith and still lead a happy married life if they could be convinced that matters of faith should not stand in the way of union of hearts." This forward-looking judgment is a welcome one when increasingly young persons marry without considerations of differences in religion, region, caste or language.

Continuing with the discussion of divorce, two high courts in the year under review have held that the statutory waiting period of six months before divorce by mutual consent may be sought could be waived since it is only a directory and not a mandatory requirement.[36]

Annulment on a suit by a third party

The Allahabad High Court has taken the view that a suit for annulment of marriage can also be filed by a third party even after the death of one of the

35 *Jagraj Singh* v. *Birpal Kaur*, AIR 2007 SC 2083. Also see *Manju Singh* v. *Ajay Bir Singh*, AIR 1986 Del 420.

36 *Subhasree Datta* v. *Nil*, AIR 2008 Cal 144 and *K. Thiruvengadam* v. *Nil*, AIR 2008 Mad 76. Several other high courts have also waived the requirement of six months waiting period for a divorce by mutual consent.

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spouses to the marriage.[37] In this case, the father of the husband filed for annulment of his son's marriage after the death of his son, on the ground that his daughter-in-law was infected with HIV. The court rejected this as a basis for annulment under the HMA but went on to hold that a third party had *locus standi* to file a suit for annulment of another's marriage even after the death of the spouse, by interpreting the expression "either party" in section 11 of the HMA. While this broadening of the standing of the parties to file for annulment may be needed in some cases where a declaration by a competent court may prevent undue consequences of a void marriage, this is a power which must be used with circumspection in order to prevent meddlesome interlopers from subsequently challenging the validity of a marriage. It would have been more prudent and useful for the court to have also spelt out circumstances where such a broadening of the expression "either party" is warranted.

Status of mother of an illegitimate child

Is the mother of an illegitimate child to be viewed in the capacity of an 'accomplice' in a proceeding for maintenance under section 125 Cr PC, and that, as such, would it be necessary for her statement to be corroborated by other evidence to prove the case? This extraordinary position, based on earlier decisions by the same high court, had been stated by the Himachal Pradesh High Court in a matter for maintenance for a illegitimate daughter. The matter eventually reached the Supreme Court, where the court has noted, the statement of the high court in this case.[38] The court, without taking a view on the correctness or otherwise of this position *vis-à-vis* the mother as an accomplice in such maintenance claims filed by an illegitimate child, went on to reverse the decision of the high court, since it found, on merits, that the evidence of the mother was indeed corroborated by other pieces of evidence in the case to establish the paternity of the daughter and to hold that the illegitimate daughter was entitled to the maintenance. While the right to maintenance may have been granted in this case, the view that the mother of such illegitimate child is to be treated as an accomplice whose testimony requires to be corroborated in material particulars would need to be abandoned, along the lines of the changes made in the law of evidence with regard to the evidentiary value to be attached to a prosecutrix in a rape case. It is hoped that the court will directly examine the law laid down by the high court at the earliest and change the jurisprudence that tends to view a hapless mother as an accomplice to a crime.

Paternity and DNA tests

The power of the courts to order a DNA test in order to prove or disprove the paternity of a child has become the subject matter of several cases in recent years. In one such case under review, the husband challenged

37 *Smt. Triveni Singh* v. *State of U.P.*, AIR 2008 All 81.
38 *Dimple Gupta (minor)* v. *Rajiv Gupta*, AIR 2008 SC 239.

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the paternity of the child on the ground that the child was born through a normal delivery within six months of marriage and that he had non-access to his wife prior to marriage.[39] The wife on her part did not offer to undergo a DNA test though she stated that she would be willing to undergo such a test if the court should order her to do so. There has been considerable variation among the high courts regarding the power of a court to order a DNA test to be conducted in order to establish paternity. Some of these judgments have been reviewed in earlier issues of the survey.[40] In the present case, the high court took the view that it could not order such a DNA test except in certain exceptional cases. The court further held that given the fact that the husband had led sufficient evidence to establish non-access to the wife at the time of the conception of the child, the refusal of the wife to undergo a DNA test would permit it to draw an adverse inference in this matter, and thereupon annulled the marriage between the parties on the ground that the respondent-wife was pregnant at the time of marriage by a person other than the husband. It may be noted that the wife had expressed her willingness to undergo such a test had the court ordered her to do so. It appears that this could have been the 'exceptional circumstances' where the court could have ordered the conducting of such a test, based on the judgment of the Supreme Court in *Goutam Kundu* v. *State of West Bengal*.[41] It chose instead to annul the marriage on this ground after drawing an adverse inference against the wife, thereby causing, it is submitted, considerable harm to the child born to the wife.

The Gauhati High Court quashed the order of a family court ordering the conducting of a DNA test in the course of a proceeding filed by the wife for divorce. The court based its reasoning on *Sharda* v. *Dharmpal*[42] which had held that though the court has a discretion to pass an order directing a DNA test, it must have sufficient material before it for so doing. The high court held that in the present case, there was no dispute regarding the paternity of the children; the husband had admitted the paternity of the children in the written statement. The fact that the wife had agreed to undergo such a test would not be a ground for directing such a test. The high court, therefore, directed the family court to deal with the divorce proceedings under the HMA in accordance with law.[42a]

Right to have children

The judgment of the Supreme Court in *Javed* v. *State of Haryana*,[43] upholding a state law that prohibited members of *panchayat* from holding office if they had more than two children has led to more states enacting

39 *Maya Ram* v. *Kamla Devi*, AIR 2008 HP 43.
40 See for instance, Kamala Sankaran, *supra* note 26a at 611-12.
41 AIR 1993 SC 2295.
42 AIR 2003 SC 3450.
42*a* *Munmun Barkakati Das* v. *Girish Das,* AIR 2008 Gua 186.
43 AIR 2003 SC 3057.

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similar provision in their local government bodies. A division bench of the Gujarat High Court has upheld the constitutionality of the Gujarat Municipalities Act, 1963 which was amended in 2005 to prohibit a councillor from holding office if he/she had more than two living children after a period of one year following the commencement of the amendment Act. The Supreme Court had upheld the constitutionality of the Haryana local law on the ground that it did not violate either articles 14 or 25 of the Constitution. The petitioners challenged the state amendment before the Gujarat High Court on the ground that it violated their rights under articles 14 and 21 of the Constitution, and further, that the said provisions were inconsistent with provisions of the Medical Termination of Pregnancy Act, 1971 (that provides grounds for termination of pregnancy in certain cases) and the HMA where failure to carry out marital obligations have been held to constitute grounds for cruelty.[44] However, the high court in this case refused to consider these questions, on the basis that since the Supreme Court had upheld the *vires* of a similar law in Haryana, it was binding on all courts under article 141 of the Constitution. Further, the court held that considerations of judicial discipline do not permit it to consider the correctness of the decision of the Supreme Court even though the point raised before the high court was not considered by the Supreme Court.

Other issues

The courts have once again emphasised that where a man and woman live together for a long period as man and wife, the law can presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage.[45]

In a case dealing with dowry death the court has reiterated that it is irrelevant whether the accused had a great deal of property, a car or a scooter, in order to determine if they had made a demand for such items. The courts have declared that it is common knowledge that even if the in-laws had several items in their house they would make demands for dowry. If the demand for dowry was established, that the accused already owned some of the items demanded in dowry, could not be an argument put forward by the defence.[46]

IV OTHER RIGHTS AT THE WORKPLACE

Air hostesses and weight requirements

In 2007 airhostesses unsuccessfully moved a single judge of the Delhi High Court against their employer-airlines that required them to shed weight to the level stipulated in their employment contract.[47] The employer had

44 See *Vinita Saxena* v. *Pankaj Pandit*, AIR 2006 SC 1662.
45 *Tulsa* v. *Durghatiya*, AIR 2008 SC 1193.
46 *Kishan Singh* v. *State of Punjab*, AIR 2008 SC 233.
47 *Sheela Joshi* v. *Indian Airlines Ltd*, 2007 INDLAW Del 421.

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ordered them to be grounded and to be treated as on leave (due to them, in other cases, leave without pay) until such time they shed their excess weight. The single judge had held that maintaining their weight within the prescribed limits constituted a part of the service conditions and could not be challenged. The court also observed that the job profile demanded handling of emergency situations which are to be handled deftly, with alacrity and presence of mind, all of which require that the cabin crew possess the highest order of physical and mental fitness. The court also rejected the contention that such weight-related regulations are in any way unfair, unreasonable and insulting to their womanhood, since it observed that it was not air hostesses alone who were required to observe weight standards; other members of the flying crew were also required to do so. A bench of the Delhi High Court which heard the appeals from these petitions in 2008 once again rejected the objections filed by such grounded airhostesses and male stewards on the basis that these constituted conditions of employment needed for carrying out the tasks assigned to cabin crew.[48]

Maternity benefit

The question of whether students undergoing a course of study in a university should be granted maternity leave while calculating minimum attendance required for taking their examinations, came up recently before the Madras High Court. The high court noted that the rules of educational institutions allowed condoning of upto 5% of the attendance and that no other power was envisaged under the rules and regulations for condoning of any further period. The court noted various international conventions and the provisions of the Maternity Benefit Act, 1961 which were however not applicable to the educational institutions in this case. The court held that the question whether similar beneficial provisions should be made applicable to the educational institutions was essentially a policy question to be left to the wisdom of the legislature, and held that even if such maternity leave were granted to the student it would not be adequate to condone the shortfall of attendance to the concerned student in this case.[49]

The Supreme Court has declared that a bank, which is 'State' for the purposes of article 12 of the Constitution should not behave arbitrarily in denying a probationer another chance to appear for a test since she was unable to appear for the tests conducted for management trainees due to miscarriage and later delivery. The court held that the three chances given to probationers to appear for the tests must be effective chances, and not permitting the woman another chance would be arbitrary and whimsical under the Constitution.[50] Similarly, in another case denying maternity benefit to a person merely because she was working on a consolidated salary has been

48 "HC backs IA in grounding of overweight cabin crew", Indian Express, 5.6.2008.
49 *A. Arulin Ajitha Rani* v. *The Principal*, decided on 27.6.2008
50 *Punjab National Bank* v. *Astamija Dash*, 2008 III LLJ 84 (SC).

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held to be illegal and *mala fide*.[51] However, the courts have also upheld an order under the Punjab Civil Service Rules, which denied the right to maternity leave with wages to an employee who had more than two children and which stated that the employees would be entitled only to other kinds of leave due or extraordinary leave.[52]

Night work by women and employers' liability

The violence faced by women who work, particularly those who work in the night shift or in occupations where work extends for long hours has come up in a series of incidents in recent years. A recent case before the Supreme Court raised an important question of the liability of the employer for providing safe transport facilities to women employees working at night under the Karnataka Shops and Establishments Act, 1961.[53] The metropolitan magistrate took cognisance of offences under sections of this Act against the petitioner, following the death of an employee travelling for duty at night. The petitioner who was the managing director of the establishment which employed the woman filed a petition before the high court for quashing the complaint under section 482 of the Cr PC. While dismissing this petition, the high court in its order altered the cognisance taken by the magistrate under section 5 read with section 30(3) to that of section 25 read with section 30(1) of the said Act. On appeal, a two judge bench of the Supreme Court upheld the order of the high court refusing to quash the criminal proceedings.[54] However, since the bench differed on the cases in which such quashing of criminal proceedings could be ordered, the matter was referred to a three-judge bench. The petitioner contended once again that having regard to the exemption under section 3(h) of the Act in respect of persons in management of an establishment, the Act in its entirety was inapplicable to the appellant who was the managing director of the establishment. He also submitted that a government order had exempted his establishment from the relevant provisions of the Act and that he should therefore not be liable for commission of an offence punishable under this Act. On the other hand, the counsel for the state submitted that the object of section 3(h) of the Act was to exclude persons in management from being considered as employees entitled to seek benefits and reliefs under the Act. He submitted that the intention of section 3(h) was not to exempt 'persons in management' from incurring liability under the Act. However, since the two-judge bench had been unanimous in dismissing the appeal against the order of the high court refusing to quash the criminal proceedings against the petitioner, the three-judge bench did not go into this aspect of the case.[55] The trial in the case to

51 *Dr. (Ms.) Hemlata Saraswat* v. *State of Rajasthan*, (2008) III LLJ 423 (Raj).

52 *Parkaso Devi* v. *Uttar Haryana Bijli Vitran Nigam Ltd., Panchkula*, (2008) III LLJ 488 (P&H)(DB).

53 *Som Mittal* v. *Government of Karnataka*, (2008) 3 SCC 753.

54 *Ibid*.

55 *Som Mittal* v. *Government of Karnataka*, (2008) 3 SCC 574.

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be conducted by the magistrate will have important repercussions for establishing the liability of the top management of firms that employ women who travel at night to and from work.

V RIGHT TO REPRODUCTIVE HEALTH

Medical liability

The reproductive health of women and the liability of the medical profession in this regard has been the subject matter of litigation in a number of cases over the years. An important matter affecting the reproductive health of women was decided in the year under review by the Supreme Court. Questions of medical ethics and the nature of consent that the medical profession is required to take prior to treating patients in India came up for elaboration in *Samira Kohli* v. *Dr. Prabha Manchanda*.[56] In this case a 44 year-old woman had given her consent for performance of a laparoscopy under general anaesthesia for making a diagnosis with regard to prolonged menstrual bleeding. The patient gave her consent and the surgery commenced. During the surgery a doctor came out and took the consent of the patient's mother for performing hysterectomy (removal of uterus) and other procedures (salpingo-oopherectomy) and removed her uterus, ovaries and fallopian tubes. The patient took up the matter before the National Consumer Redressal Commission which dismissed her complaint whereupon she came in appeal to the Supreme Court. The appellant contended before the Supreme Court that she had given her consent only for a laparoscopic test, that her mother's consent for a hysterectomy was not valid consent, that the doctor respondent did not exhaust the conservative line of treatment before resorting to radical surgical procedures and therefore was guilty of violation of medical rules and ethics. The doctor, on the other hand, contended that the patient had been informed that if upon laparoscopic examination, the lesions were found to be extensive then hysterectomy would have to be performed, and that the consent given by the mother for the removal of the uterus would also be considered consent for the removal of the ovaries and fallopian tubes, that the consent given for laparotomy was the same as hysterectomy.

In an elaborate judgment, the court distinguished between the tests of 'real consent' as followed in the UK and 'informed consent' as followed in the USA. The court explained that, "In UK, the elements of consent are defined with reference to the patient and a consent is considered to be valid and 'real' when (i) the patient gives it voluntarily without any coercion; (ii) the patient has the capacity and competence to give consent; and (iii) the patient has the minimum of adequate level of information about the nature of the procedure to which he is consenting to. On the other hand, the concept of 'informed consent' developed by American courts, while retaining the basic requirements of consent, shifts the emphasis to the doctor's duty to

56 (2008) 2 SCC 1.

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disclose the necessary information to the patient to secure his consent." The court also stated that in some cases the doctors can perform further or additional procedures beyond the procedure for which consent is given, but this is restricted to cases where the patient is not in a position to give such consent (for instance being unconscious) or where delaying the procedure could cause imminent danger to the health or life of the patient.

The court also discussed the standards regarding disclosure that binds doctors and noted that the UK followed the *Bolam's* test first laid down in the *Bolam* case,[57] and also followed in India.[58] Based on a detailed examination of the standards followed in the UK, USA and India the court held that the principles of consent as applicable in India would be:

(i) A doctor has to seek and secure the consent of the patient before commencing a 'treatment' (the term 'treatment' includes surgery also). The consent so obtained should be real and valid, which means that: the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what he is consenting to.

(ii) The 'adequate information' to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(iii) Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save

57 *Bolam* v. *Friern Hospital Management Committee*, (1957) 1 WLR 582.

58 *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, 1996 (2) SCC 634 and *Vinitha Ashok* v. *Lakshmi Hospital*, 2001 (8) SCC 731.

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considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.

(iv) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in Canterbury but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment.[59]

Based on the above, the court held that the consent form showed that the appellant had given consent only for a diagnostic laparoscopy and laparotomy if needed. The court rejected the contention of the respondent that laparotomy included hysterectomy and cited medical texts that laparotomy is only the initial step necessary for a surgical procedure like hysterectomy and does not entail removal of reproductive organs. The court also held that the consent of the mother could not be held to be a case of real or valid consent. The court also rejected the contention for the respondent that what were removed were not vital organs. It held that for a woman who was not yet married and who had not yet reached the age of menopause, her reproductive organs were important and vital organs.

Yet the court refused to hold the doctor negligent in this case. The court held that laparoscopy had shown that the patient was suffering from endometriosis. While surgery is the last resort, however, keeping in view the age of the patient and the stage of endometriosis, the method of treatment chosen - that of radical surgery rather than conservative treatment - could not be considered to be a case of negligence. The court held that this finding of non-negligence on the part of the doctor had no bearing on the issue of lack of real consent obtained from the patient which it had already held against the doctor-respondent. In view of the court's finding that there was no consent by the appellant for performing hysterectomy and salpingo-

59 *Samira Kohli* v. *Dr. Prabha Manchanda*, *supra* note 56, para 49.

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oopherectomy, performance of such surgery was held to be an unauthorized invasion and interference with appellant's body which amounted to a tortious act of assault and battery and therefore a deficiency in service. Yet the court noticed mitigating circumstances since the patient was 44 years old and having menstrual problems. The court allowed the appeal in part, and directed the respondent to refund any bills already paid by the appellant with interest and directed the payment of Rs. 25,000 as compensation to the appellant.

What appeared crucial in this case for holding that the doctor was not guilty of negligence was the expert evidence of doctors that the line of radical surgery adopted by the respondent was one adopted by several doctors world-wide. Clearly, the court placed a great deal of emphasis on the expert evidence in this case, notwithstanding that there was an absence of real or valid consent as laid down in a series of tests in UK and India. The remedy in such a case, where negligence could not be established, was reduced to one of assault and battery for which monetary compensation was paid.

Sex-selection

Based on newspaper reports about large-scale violation of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PNDTA) a public interest litigation was filed before the Orissa High Court demanding proper implementation of the said Act in the state.[60] The petitioner stated that the PNDTA was not being implemented in the state notwithstanding that the said Act was brought into existence in 1996 and that it was further amended in 2003 in order to make its provisions more effective. The said amendment came into existence with effect from 14.2.2003.

After observing the mechanism created under the Act for its enforcement, the court directed that the appropriate authorities (if it had been set up as contemplated under section 17 of the PNDTA) to proceed strictly in terms of the provisions of the said Act since complaints under section 28 of the Act could only be filed once such appropriate authorities had been set up. Since the affidavits filed by the government did not reveal whether such appropriate authorities had been created, the court directed that if such bodies had not been constituted, they needed to be constituted within a period of six weeks from the date of service of the order upon the chief secretary of the state. The court observed that the Act has been enacted to serve a public purpose of preventing sex-selection and female foeticide and to maintain a healthy male-female demographic ratio. Thus, the state was under both a statutory and constitutional obligation to implement the provisions of the said Act.

The constitutional validity of sections 2, 3A, 4(5) and 6(c) of the PNDTA as amended by the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 was challenged before a

60 *Hemanta Rath* v. *Union of India*, AIR 2008 Ori 71.

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division bench of the Mumbai High Court.[61] The petitioner contended that the PNDTA as amended violated article 14 of the Constitution since it did not permit termination of pregnancy for sex-selection while the Medical Termination of Pregnancy Act, 1971 (MTP Act) permitted medical termination. The petitioners in this case were married with two female children and wished to have a male child and wished to avail selection of the sex of the foetus by pre-natal diagnostic techniques which are currently prohibited under the PNDTA. The court noted that the effect of the amendment to the PNDTA was to prohibit sex selection before and after conception. The court noted that as a result of the amendment, the law was re-named Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The court observed that the PNDTA was aimed at rectifying the gender imbalance in the demographic profile of the country. The Act, *inter alia*, prohibits sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gamets derived from either or both of them. It prohibits any person to cause or allowed to be caused selection of sex before or after conception. On the other hand, the MTP Act is an Act to provide for the termination of certain pregnancies by registered medical practitioners and seeks to liberalize certain existing provisions relating to termination of pregnancy as a health measure, when there is danger to the life or risk to physical or mental health of the woman, on humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a mentally ill woman, etc. and, on eugenic grounds where there is substantial risk that the child, if born, would suffer from deformities and diseases. The court noted that the MTP Act does not deal with sex-selective abortion after conception or sex-selection before or after conception. The two laws occupy entirely different spheres. Upholding the constitutionality of the PNDTA, the court held, "A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the foetus of the child but because of other circumstances laid down under the MTP Act. To treat her anguish as injury to mental health is to encourage sex selection which is not permissible. Therefore, by process of comparative study, the provisions of the said Act cannot be called discriminatory and, hence, violative of Article 14."

61 *Vijay Sharma* v. *Union of India*, AIR 2008 SC 29.

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