



## 28

# WOMEN AND THE LAW

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### I INTRODUCTION

THE CONSTITUTION of India is notable for the express provision in article 15(3) enabling the state to make special provisions in favour of women and children. These measures are to bring women into the social, economic and educational mainstream of public and private life and this has been an important theme of the cases reviewed in 2009. The manner in which such special provisions have been designed, and the examination of whether such measures are necessary or adequate is an important theme of the cases which came before the courts during the year.

### II RESERVATION FOR WOMEN

#### **Reservation for women in public employment**

The constitutionality of quota-based reservation for women in public employment, and if so, the quantum of such reservations has been repeatedly raised before the courts. The year under review is no exception. The question whether women could compete for open posts in services/posts when there are women-specific reservations, has been an important theme in the cases which came before the courts. These cases provided the courts an opportunity to clarify several important aspects of the nature of reservation for women under article 15(3), their inter-relationship with vertical reservations under articles 15(4) and 16(4) of the Constitution and the scope of the ‘50 per cent rule’ set out in *Balaji* and *Indra Sawhney*.<sup>1</sup>

The State of Tamil Nadu had passed an order in 1996 where it was stated that for standards I-V, vacancies for the post of secondary grade teachers would be filled up exclusively by women teachers and only when such teachers were not available men teachers could be appointed. On challenge before the Supreme Court in 1997, this exclusive reservation was stayed but

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1 *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649 and *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.



the earlier order of reserving one-third posts for women was permitted to continue. This order was challenged by the petitioners in the case under review before the Madras High Court.<sup>2</sup> Dismissing the petition, the High Court referred to the Supreme Court decisions in *Government of Andhra Pradesh v. P.B. Vijayakumar*<sup>3</sup> and *Toguru Sudhakar Reddy v. Govt. of Andhra Pradesh*<sup>4</sup> where the court upheld reservations for women and held that reservation even at levels beyond 50 per cent was permissible under article 15(3) of the Constitution.

Preference given to women candidates in the appointment as principals of girls' schools has often been challenged. The Madras High Court upheld government orders which provided that even if a male candidate was senior, a woman candidate should be preferred if appointment was sought to be made in a girl's high school.<sup>5</sup> Citing the recent decision of the Supreme Court in *Vijay Lakshmi v. Punjab University*,<sup>6</sup> where the court had held that sex was a sound basis for classification and that article 15(3) empowered the state to make special provision for women and children, the High Court upheld the appointment of a woman as headmistress of a girls' school.

Another case from the Madras High Court dealt with a similar issue.<sup>7</sup> Rule 21 of the Tamil Nadu State and Subordinate Services Rules provided that a minimum of 30 per cent of all vacancies that were to be filled through direct recruitment should be set apart for women candidates. The rule further stipulated that in respect of the posts to which the rule of reservation of appointments applied, 30 per cent of vacancies should be set apart for women candidates in the existing categories of reservation for scheduled castes and scheduled tribes, backward classes and in general posts. The rule clarified that women candidates should also be entitled to compete for the remaining 70 per cent of vacancies along with male candidates. Based largely on the decision of the Supreme Court in *P.B. Vijayakumar*,<sup>8</sup> the court upheld the reservation for women as a constitutionally permissible means to overcome backwardness. The court pointed out that reservation under article 15(3), and other provisions of articles 15 and 16 were designed to create an egalitarian society.

The Madras High Court also had an occasion to deal with a similar case challenging the constitutionality of a rule that held that women alone shall be eligible for appointment to the post of district social welfare officer, child development project officer, taluk project nutrition officer and superintendent sheltered workshop for the blind. Upholding the rule, the

2 *S.Pugazendi v. State of Tamil Nadu*, 2009 Indlaw Mad 835.

3 1995 (4) SCC 520.

4 Suppl (4) SCC 439.

5 *M. Muruganandam v. The Government of Tamil Nadu*, MANU/TN/0033/2009.

6 JT 2003(8) SC 259; see also Kamala Sankaran, "Women and the Law" XXXIX ASIL 701 (2003).

7 *G. Vijayaraghavan v. State of Tamil Nadu*, 2009 Indlaw Mad 1934.

8 *Supra* note 3.



High Court maintained that the government in exercise of its powers under article 309 of the Constitution was entitled to classify posts and lay down requirements for candidates filling up the posts. The court held that it was a policy decision of the government to reserve posts exclusively for women in view of special nature of those posts. Such a classification could be challenged if the said rules violated any constitutional mandate of equality. Dismissing the case, the court observed that the petitioners had been unable to prove that the ‘discrimination’ found in the impugned rule was based solely on sex.

A related challenge to a decision of the state government allocating the supply of cooked food only to women self help groups (SHGs) was rejected by the Calcutta High Court.<sup>9</sup> The state government had taken a decision that the supply of food exclusively to the indoor patients of rural hospitals, block primary health centres and primary health centres in the state would be undertaken by SHGs and, further, that while selecting SHGs, only women SHGs which also satisfied other eligibility criteria could be selected. The High Court was of the view that whereas under article 15(1) discrimination in favour of men, only on the ground of sex was not permissible, when the state did discriminate in favour of women under article 15(3), it did not violate article 15(1). The court held that, “as a result of the joint operation of article 15(1) and article 15(3), the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women.”

The Kerala government passed an order whereby certain posts in the category of child development project officer and assistant child development project officer were reserved to be filled up exclusively by women officers. This was challenged by the male petitioners who submitted that their chances for promotion were unfairly discriminated against.<sup>10</sup> The High Court directed the government to consider issuing special promotion rules under the special rules for Kerala social welfare service, 1992 in order that the seniority of male project officers was not unfairly interfered with as a result of this reservation policy. It must be pointed out that unlike in the case of article 16(4A), the effects on ‘consequential seniority’ are not available to women employees who obtain the benefit of reservation under article 15(3) of the Constitution. This is an instance where the reservations for employees based on sex alone stands on a footing different from that of reservations directed at groups considered to be backward classes of citizens.

#### **Reservation in educational institutions**

The Madhya Pradesh Medical and Dental Post Graduate Course Entrance Examination Rules, 2009 provide that the unreserved seat for

9 *Sudarsan Dhari Mondal v. State of West Bengal*, 2009 Indlaw Cal 697.

10 *K.P Shamsu v. State of Kerala*, decided on 13 March, 2009 (Ker).



orthodontics would be filled for two years by an open candidate, and in the third year by a woman candidate alone. This form of horizontal reservation for women was challenged before the Madhya Pradesh High Court. The High Court upheld the constitutionality of reserving 30 percent of the unreserved seats for women. It pointed out that in not doing so, "female candidates who are socially and economically handicapped in our country may not be able to compete in the open competition with the male candidates and get an opportunity to study."<sup>11</sup> It is submitted that the High Court appears to have missed the point that horizontal reservation for women is to benefit women as a class, including those who are socially and economically privileged. Reservation for women under article 15(3) does not always have as its goal social inclusion of bringing marginalised and backward sections into educational institutions. Rather, the idea is that women as a group should be present in institutions of higher learning, whatever be their social background. What the court envisages can only be achieved if reservations under article 15(4) were to incorporate a further reservation for women who comprise the socially and educationally backward groups targeted therein.

The reservation of 90 per cent seats in a nursing degree course exclusively for women was challenged as violating the right to equality before the Madras High Court.<sup>12</sup> The court observed that the "very concept of nursing implies the service of women nurses" to justify the government's decision to reserve bulk of the seats in the degree programme in favour of women. Upon challenge that such reservation exceeded the 50 per cent rule laid down in the *M.R. Balaji*,<sup>13</sup> the court reiterated that that ceiling only had relevance in the context of reservations made for backward classes of citizens under articles 15(4) and 16(4) of the Constitution. No doubt this is the correct legal position but the question that needs to be answered is whether such high levels of reservation in what are seen to be care-giving jobs, further reinforces popular perception that these are solely women's jobs. Stereotyping women's roles to such care work or domestic work has been an aspect of gender stereotyping that must be confronted if men and women are to enjoy equality both in the public and private sphere. In all these cases, the question whether resorting to reservation under article 15(3) can become a step that reinforces gender-stereotypes in society has unfortunately not been considered by the courts while upholding the constitutionality of such measures. Changing circumstances in society warrant that the lines of what constitute protection and special measures under article 15(3) should be carefully and periodically considered and re-assessed if required.

11 *Satish Menon v. State of Madhya Pradesh*, AIR 2009 MP 185 at 189.

12 *G Parimelazhagan v. State of Tamil Nadu*, AIR 2009 Mad 54.

13 *Supra* note 1.

**Reservations in elected bodies**

Some of the cases pertaining to reservation for women related to such quotas in elected bodies also. The Haryana Municipal Election Rules, 1978 had reserved the office of president of a municipal council (to be elected from amongst the municipal councillors) for a general category candidate. A petition was filed challenging the eligibility of a woman councillor to contest for the office of president of a municipal council since she had got elected from a women's constituency. The Punjab and Haryana High Court clarified that a woman councillor could not be prohibited from contesting elections for the office of president of a municipality. The court pointed out that one-third of the offices of president of municipalities across the state had been reserved for women, but this was only a minimum number. As a result, this would not preclude a woman candidate, elected from constituency reserved for women, from contesting for the office of president.<sup>14</sup>

A similar question also arose in the state of Punjab. In accordance with the 73<sup>rd</sup> constitutional amendment, the Punjab State Election Commission Act, 1994 had reserved the office of *panch* and *sarpanch* for different groups including scheduled castes. Some of these offices were also reserved for scheduled caste (women) in accordance with the constitutional amendment reserving one-third of such seats for women. The Punjab and Haryana High Court clarified that a woman elected to the office of a *panch* against a reserved category of scheduled caste (women) was eligible to contest for the post of *sarpanch* reserved for scheduled castes. The court pointed out that only a minimum one-third of the reserved offices had been reserved for women, and such women were free to contest for the office of *sarpanch* reserved for scheduled castes.<sup>15</sup>

### III RIGHT TO SEXUAL ORIENTATION

By far one of the most significant judgments affecting gender-based rights was the Delhi High Court decision in *Naz Foundation*.<sup>16</sup> The challenge in this case was to the constitutionality of section 377 of the Indian Penal Code, 1860. While the judgment covers many aspects of constitutional law, criminal law and the role of law in society, in this review only certain aspects of the judgment are highlighted. The court took the clear position that sexual orientation was a ground analogous to sex, and that, therefore, discrimination on the basis of sexual orientation was not permitted by article 15. As a result, any discrimination that targeted *lesbians, gays, bisexuals, trans-genders, hijra* and *kothi* persons (LGBT) based on their sexual orientation would be discriminatory. Developing on

14 *Manoj v. State of Haryana*, AIR 2009 (NOC) 427 (P&H).

15 *Parmjit Singh v. State of Punjab*, AIR 2009 P&H 7.

16 *Naz Foundation v. Government of NCT of Delhi*, 2009 Indlaw Del 677.



an earlier Supreme Court judgment in *Anuj Garg v. Hotel Association of India*,<sup>17</sup> the High Court pointed out that autonomy and self-determination were important parts of the right to equality and non-discrimination enshrined in article 15. The court also declared that the right of non-discrimination in article 15(2) “incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces.” This is an important aspect of the judgment impinging on gender-rights because it prohibits discrimination not only by the state but also private persons on the broad basis of sex, which is now deemed to include sexual orientation also. The right to sexuality and sexual preference is something that has long been denied or restricted in a patriarchal society. By declaring that every individual has the right to self-determination and the right to sexual orientation, the court has broken fresh ground in the development of constitutional rights in the country.

#### IV REPRODUCTIVE RIGHTS

One of the well-reported cases of the year under review was the question whether a mentally retarded woman was entitled to give her consent for the abortion of a child conceived through an act of rape upon her. Several interrelated issues arose in the case involving a 19-year old mentally retarded girl, living under state care in a *Nari Niketan*, who was raped and became pregnant while under such institutionalised care. When the matter came initially before the Punjab and Haryana High Court, the court observed that under the Medical Termination of Pregnancy Act, 1971 (MTP Act), as amended in 2002, a distinction was drawn between mentally ill and mentally retarded persons. The law requires a guardian of a mentally ill person to give consent for abortion whereas in most other cases consent of the person undergoing an abortion was required. The High Court had taken the position that notwithstanding this distinction made in the law, as a writ court exercising a *parens-patriae* jurisdiction, it “owes a bounden duty to act in the best interest of the guardee”<sup>18</sup> and took the position that even in the case of a mentally retarded person, a guardian could be appointed by the court. The High Court was guided by the fact that in both the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 both categories of mentally ill and mentally retarded persons had

17 (2008) 3 SCC 1.

18 The High Court relied on the earlier decision of the apex court in *Neel Rattan Kundu v. Abhijit Kundu*, 2008 (9) SCC 413.



been clubbed together for the purposes of affirmative action and social rehabilitation. As a result, the High Court had ordered a medical board to take the decision (after duly noting the wishes of the pregnant woman, whether the pregnancy could be continued or an abortion be performed).

In appeal, the Supreme Court took a position that gave far greater agency to the mentally retarded woman in this case.<sup>19</sup> The court was of the opinion that the reproductive rights of the mentally retarded woman as articulated by her must be given full effect to. Disagreeing with the position of the High Court, the Supreme Court stated: "We do not agree with this proposition. We must emphasize that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights." The court noted that the legislative intent of the amendment of 2002 to the MTP Act was to "narrow down the class of persons on behalf of whom their guardians could make decisions about the termination of pregnancy". As a result, the court held that the best interest of the woman alone must be kept in mind while determining the future course of action. As the court phrased it, "[I]t is the 'Best Interests' test alone which should govern the inquiry in the present case and not the 'Substituted Judgment' test."

The judgment of the court has been widely discussed since it marks a departure from the position of paternalism that normally governs decisions taken with respect to mentally retarded persons, purportedly keeping the interests of such person in mind (as in the case of forced sterilisation of institutionalised mentally retarded or mentally ill patients) but which are often decided keeping the convenience of other stakeholders in mind. It also gives greater effect to international conventions such as the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971. Most importantly, it places the onus on the state to ensure that the agency and choice of such persons are protected. What is perhaps most disturbing in the entire case is that the person who allegedly raped the young woman and caused the pregnancy was a guard of the institution in whose care the woman was committed. This attitude of callousness on the part of those charged with the responsibility of care and shelter of vulnerable persons goes unpunished too often in India. Introducing a rights-based perspective into the issue of reproductive rights of vulnerable and institutionalised persons is a welcome shift in the judicial discourse that might pave the way for greater accountability of state-run institutions in these matters.

19 *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1.



In 2007, the Punjab and Haryana High Court had taken *suo motu* notice of the alarming increase in female foeticide in north India. In the year 2009, the High Court continued with its close monitoring of the situation and observed that several steps had been taken to put an end to sex-determination kits advertised and sold in the states of Punjab and Haryana.<sup>20</sup> In view of the effective steps taken by the state governments in this regard, the High Court decided to dispose of the writ petition. The court clearly has taken the position that rather than issuing a continuous *mandamus* to the state government to take steps to curb the menace of female foeticide and the court monitoring these steps, it was better to wind up the writ petition in view of the satisfactory measures already undertaken by the executive. However, the real result of these measures would only be visible once the sex-wise data of the census 2011 is revealed and that the declining sex rates in some of the north Indian states has been arrested.

Other cases that related to reproductive rights included those pertaining to medical termination of pregnancy. The Orissa High Court, based on scientific studies, pointed out that despite a sterilization operation conducted on a woman, a sterilized woman could become pregnant due to natural causes. Where such an event occurs, the failure of the sterilization procedure would not give rise to a claim for compensation to the woman. The court pointed out that once the woman got to know of her pregnancy, she had the option of getting her pregnancy terminated (permitted under the MTP Act). Failure to do so would imply that the child that was born was not an unwanted child, and no claim for compensation could then arise.<sup>21</sup>

## V CONDUCT OF RAPE TRIALS

In *Virender v. State of NCT of Delhi*, the Delhi High Court has laid down the role of a trial court judge in the conduct of rape trials concerning children.<sup>22</sup> Pointing out that the trial judge in such cases was not to be a mute spectator or a mere tape recorder, the High Court stated that the trial judge must seek to elicit the truth in order that justice may prevail. This is particularly the case when the witness is bashful or young and overwhelmed by the court-room setting which can result in re-victimisation of the child victim/witness. Balance also has to be sought while protecting the feelings of the child so that no harm is wrought on the rights of the accused. The High Court drew on principles laid down in earlier decision of the courts in India.<sup>23</sup>

20 *Court On Its Own Motion v. State of Punjab*, decided on 31 July, 2009 (P&H).

21 *Kanaka Rana v. State of Orissa*, AIR 2009 Ori. 17.

22 2009 Indlaw Del. 2765.

23 For instance, *Court on its own Motion v. State* (2007) 4 JCC 2680 and *Sudesh Jhaku v. K.C.J.*, 1998 Cri LJ 2428, which was also heard by the Supreme Court in appeal in *Sakshi v. Union of India*, AIR 2004 SC 3566.



The Supreme Court in *State of Punjab v. Gurmit Singh*<sup>24</sup> had pointed out that cases of rape needed to be tried *in camera* in order that the trauma of the victim be reduced. That case had also suggested that it might be desirable that cases of sexual assaults of women be tried by women judges, wherever available, so that the prosecutrix can make her statement with greater ease and thus assist the courts in arriving at the truth. This suggestion was made not to doubt the impartiality of male judges or court-room staff, but keeping in mind the sensitivities of the victim and the social ethos. Pointing out the deficiencies in the trial in the case before it<sup>25</sup> the Delhi High Court observed that the recording of the child's testimony in court was lacking on several counts. The court stated: "The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence. There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court. There is no such material on the record. The order sheet does not indicate that the proceedings were in camera. The name of the prosecutrix is clearly mentioned on the record even, in the charge framed and the evidence recorded." Further, the High Court observed that the embarrassment of the trial court in putting relevant question to the child to elucidate the complete truth, resulted in the incoherent testimony of the child that did not reveal the essential ingredients of the offence. The child merely stated that some "wrong acts" (*gandi harkatein*) had been performed on her. As observed by the High Court, it is the duty of the judge to ensure the use of appropriate language (keeping in mind that several languages are spoken in the country) to enable decency to be maintained in the proceedings and the record.

The High Court observed that the shortcomings in the proceedings of the case before it had to result in the acquittal of the accused. In order that such child-rape/sexual assault trials are conducted in a manner as mandated by the judiciary, the High Court in a very useful summary, presented various directions of the courts in matters concerning a child victim or child witness in order that these be urgently implemented (reproduced below):

#### I POLICE

- (i) On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately
- (ii) Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating

24 AIR 1996 SC 1383.

25 *Supra* note 22.



- Officer shall conduct investigations on the points suggested by him also under his guidance and advice.
- (iii) The investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.
  - (iv) The statement of the victim shall be recorded verbatim
  - (v) The officer recording the statement of the child victim should not be in police uniform.
  - (vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear
  - (vii) The statement should be recorded promptly without any loss of time
  - (viii) The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.
  - (ix) The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.
  - (x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.
  - (xi) The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.
  - (xii) In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.
  - (xiii) The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A Cr PC) at the nearest government hospital or hospital recognized by the government.
  - (xiv) The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.
  - (xv) The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date
  - (xvi) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.
  - (xvii) The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.



- (xviii) To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O., for investigations on any particular aspect of the matter, the same shall be adverted to by the I.O. Proper entries shall be made by I.O. in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.
- (xix) Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration.
- (xx) The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof.
- (xxi) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any.
- (xxii) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.

## II RECORDING OF STATEMENT BEFORE MAGISTRATE

- (i) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.
- (ii) In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.
- (iii) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.
- (iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of “Ascertaining voluntary nature of statement” unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.
- (v) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.
- (vi) No Court shall detain a child in an institution meant for adults.



### III MEDICAL EXAMINATION

- (i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts.
- (ii) While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.
- (iii) In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.
- (iv) In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.
- (v) The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.
- (vi) In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.
- (vii) The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.
- (viii) Emergency medical treatment wherever necessary should be provided to the child victim.
- (ix) The child victim shall be afforded prophylactic medical treatment against STDs.
- (x) In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.

### IV COURT

- (i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.
- (ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.
- (iii) The trials into allegations of commission of rape must invariably be "in camera". No request in this behalf is necessary.
- (iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet.
- (v) The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.



- (vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross-examination is not impaired.
- (vii) Competency of the child witness should be evaluated and order be recorded thereon.
- (viii) The trial court is required to be also satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence. There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.
- (ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.
- (x) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.
- (xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her.
- (xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim.



- (xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure;
- (xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying. This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony.
- (xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing.
- (xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.
- (xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse .
- (xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing.
- (xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.
- (xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the Cr PC to elicit all necessary materials by playing an active role in the evidence collecting process.
- (xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-



examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for , to err is human and the chances of erring may accelerate under stress of nervousness during cross examination.

- (xxii) The court should ensure that the embarrassment and reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.
- (xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance “gandi harkatein” or “batamezein” have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.
- (xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatised the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.
- (xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.
- (xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required.
- (xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.
- (xxviii) The judge should be balanced, humane and ensure protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.



(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child.

#### V GENERAL

- (i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.
- (ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.
- (iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness. This would create and inspire a feeling of confidence and trust in the child.
- (iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.
- (v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a



- valuable tool in the proceedings to ensure that the complete truth is brought out.
- (vi) No court shall detain a child in an institution meant for adults. This would apply to investigating agencies as well.
  - (vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted.

Other cases of child sexual abuse have also been reported during the past year. Dealing with the case of child sexual abuse by child's father, the court acknowledged the good work done by the child welfare committee, Chennai, constituted under section 29(i) of chapter III of the Juvenile Justice (Care and Protection of Children) Act, 2000.<sup>26</sup> Cases such as these highlight the understanding of the court that matters of child abuse cannot be tackled merely by relying on the technicalities of the law – a holistic, interdisciplinary and multi-pronged approach alone provide some semblance of a solution

## VI SEXUAL HARASSMENT OF WOMEN

Despite the judgment of the Supreme Court in *Vishakha*,<sup>27</sup> a large number of state institutions that have not constituted a complaints committee are constantly coming to light. In the year under review, the Supreme Court dealt with a case of sexual harassment of the principal of a school run by the army by an army officer. Her complaint was not properly enquired into as required by the decision in *Vishakha*. Instead, based on a counter complaint, the victim's services were terminated. Commenting upon this, the court pointed out:

It is a matter of great regret that the army which is a disciplined organization failed to provide a complaint mechanism and ignored the decision of this Court which was bound to be given effect to in terms of Article 144 of the Constitution of India. A complaint committee as per 'Vishaka' was constituted for the other teachers and the staff but evidently no complaint committee was constituted for entertaining a complaint of this nature.

The apex court directed the High Court to constitute such a committee and enquire into the complaint filed by the principal in the present case.

Other cases of sexual harassment continue to confront the courts. What is striking in these cases is that these are government organisations that

26 *The State v. Unknown*, decided on 7 September, 2009 (Mad HC).

27 *Vishakha v. State of Rajasthan* (1997) 6 SCC 241.



have yet to constitute complaints committees to deal with such complaints of sexual harassment. Further, instead of dealing with the complaint, often, a counter complaint is made by the alleged harasser against the victim leading to her further harassment. This was the situation in a case of sexual harassment before the Madras High Court, this time involving the fire services. The court was constrained to draw attention to the need to observe the law laid down in *Vishakha*, and to quash action taken against the complainant without addressing her original complaint.<sup>28</sup>

## VII MATRIMONIAL HOME AND SHARED HOUSEHOLD

In an important case dealing with the matrimonial home, the Delhi High Court has reiterated that merely because the husband moves out of the place where the couple last resided, the matrimonial home did not necessarily shift to where the husband currently resides.<sup>29</sup> The High Court relied on a decision of the Supreme Court in a tenancy matter where it was held that if a tenant leaves the tenanted premises and settles elsewhere but leaves behind his wife, with whom his relations are strained, to stay in the tenanted premises, he would still be considered to be in possession of the tenanted premises through his wife.<sup>30</sup> The case arose from a suit by the parents of the husband for possession of their house occupied by the estranged daughter-in-law, though the son had vacated the premises. While the High Court set aside the decree of the lower court on the ground of non-joinder of the husband to the suit, the case has implications for determining the *locus* of the matrimonial home in the event that the husband alone moves out of the house where the parties last resided jointly.

The Delhi High Court has also clarified that this matrimonial home cannot be treated as the shared household for purpose of claiming residence under the Protection of Women from Domestic Violence Act, 2005 in all cases. Dealing with a case where the spouses lived together in a house where the husband did not have a right to live as the property belonged exclusively to the parents of the husband, the court held that the daughter-in-law could not claim a right to live in such a house and granted an injunction to the in-laws restraining the daughter-in-law from forcibly entering the house of her in-laws.<sup>31</sup>

## VIII CONCLUSION

The review of cases relating women and the law across different branches of law indicates the manner in which courts approach the question

28 S.Chitra v. The Director of Fire Services, 2009, Indlaw Mad 3231.

29 Kavita Gambhir v. Hari Chand Gambhir, 2009, Indlaw Del 1975.

30 B.P. Achala Anand v. S. Appi Reddy (2005) 3 SCC 313.

31 Neetu Mittal v. Kanta Mittal, AIR 2009 Del 72.



of gender equality. As observed in previous years of the survey, this year too, courts as an instrumentality of the state, have contributed variously in enhancing the juridical, social, economic and political position of women in Indian society.



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