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WOMEN AND THE LAW

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I INTRODUCTION

THE UNDERLYING notion of feminist jurisprudence is that the law has been instrumental in women's historical subordination. The feminist legal theory hence revisits law as an instrument for changing women's status through reworking of law and its approach to gender. Despite several legal safeguards adopted exclusively for women folk, violence against women continues unabated in our country and is manifested in forms of female infanticide, mental cruelty, molestation, stripping, kidnapping, rape, wife battering, male domination, dowry harassment, dowry death etc. The judiciary has always been vigilant to uphold the legal rights of women whenever contraventions reported. This survey analysis how judiciary responded in the survey year in cases involving women rights' violations, gender inequalities, discrimination etc.

II ATROCITIES AGAINST WOMEN

Kailas v. *State of Maharashtra*[1] demonstrates a typical instance of brutal atrocity against a tribal woman who had been beaten and paraded on the village road in broad day light. The sessions court had awarded the minimum punishment under sections 452, 354, 323, 506(2) read with section 34 IPC and section 3 of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989. On appeal to the High Court of Bombay, that part of the session court's order regarding fine imposed under various sections of IPC was set aside and each of the appellant was directed to pay a fine of Rs. 5000/- only to the victim. The conviction of the accused under section 3 of the SC/ST Act too was set aside on hyper technical grounds that the caste certificate was not produced and investigation by a police officer of the rank of deputy superintendent of police was not done. When the matter reached the apex court, the court took a very serious note of atrocities against women and considered the above mentioned defects as mere technicalities and hardly a ground for acquittal. The court observed that the sentence was too light considering the gravity of the offence. The court by describing the instance as shameful, shocking and outrageous said: "The dishonor of the victim called for harsher punishment, and we are surprised that the State Government did not file any appeal for enhancement of the punishment

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1 AIR 2011 SC 598.

awarded by the Additional Sessions Judge".[2] It is commendable that though all the eye-witnesses have turned hostile, the court rightly relied on the statement of the victim. The humiliation done to the tribal woman is shameful. Considering that the Constitution of India mandates equal respect to all communities, sects, lingual and ethnic groups in the country, it is high time to stop the atrocities against tribals in general and tribal women in particular.

The Supreme Court in *State of U.P* v. *Chhotey Lal*[3] has ruled that there should be no leniency in sentencing the accused in rape cases. The trial court had convicted the accused and imposed seven years' rigorous imprisonment. However, the high court in a sketchy manner reversed the judgment of the trial court without discussing the deposition of the witnesses as well as all the relevant points which were considered and touched upon by the trial court. The apex court found no justification for the high court in reversing the trial court's decision. It opined that the evidence of prosecutrix alone may sustain a conviction.[4] By restoring the trial court's conviction and setting aside the high court's acquittal, the Supreme Court observed thus:[5]

> The judgment of the High Court is vitiated by non-consideration of the material evidence and relevant factors eloquently emerging from the prosecution evidence….We are not oblivious of the fact that the incident is of 1989; the prosecutrix has married after the incident and A-1 has a family of his own and sending A-1 to jail now may disturb his family life. But none of these factors individually or collectively persuade us for a soft option. Rape is a heinous crime and once it is established against a person charged of the offence, justice must be done to the victim of crime by awarding suitable punishment to the crime doer. We are constrained to observe that criminal justice system is not working in our country as it should. The police reforms have not taken place despite directions of this Court in the case of *Prakash Singh and Ors.* v. *Union of India and Ors*.[6]

Rape of minor child

In *Gulab* v. *State of M.P*.[7] the High Court of Madhya Pradesh restated that the testimony of the prosecutrix alone can form the basis of conviction if it inspires confidence and is found to be reliable. While upholding the conviction of the accused the court also expressed its disappointment in not awarding the minimum statutory punishment in the following words: "The victim was a minor of 12 years of age.

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2 *Id*. at 599.

3 AIR 2011 SC 697: (2011) 2 SCC 550.

4 However, in *Alamelu* v. *State represented by Inspector of Police* (2011) 2 SCC 385, the Supreme Court had set aside a conviction on the sole testimony of prosecruitix on the fact that though the victim had several opportunity to protest and raise an alarm she did not do so. It has held that the conviction can be recorded on the sole, uncorroborated testimony of a victim provided it does not suffer from any basic infirmities or improbabilities which render it unworthy of credence.

5 *Supra* note 3 at 567 (of SCC).

6 (2006) 8 SCC 1.

7 2012 (1) Crimes 205.

She was alone and helpless at the place of incident. The accused took advantage of such situation and committed the rape. It is unfortunate that the session's judge had been lenient in passing the lesser sentence than the minimum sentence prescribed in the law".[8] The leniency of the courts in rape cases cannot be appreciated. The courts must award maximum punishment in rape cases especially where minor girls are involved.

Similarly, in *Sushil Kumar Biswas* v. *State of West Bengal*[9] the High Court of Calcutta took a similar view and sustained conviction of a 62 year old rapist by noting that: "Here the evidence of the victim inspires confidence and is found to be reliable, therefore, seeking corroboration of her statement before relying upon the same as a rule is not warranted in the eye of law. There is nothing on record to view the evidence of victim and doctor with doubt and suspicion. There is nothing on record to suggest as to why a child of six years will depose/complaint of rape/ attempt to rape against an elderly person aged about 62 years".[10]

Custodial rape

Mehboob Batcha v. *State Represented by Supdt. of Police*[11] discloses the inhuman and savage manner in which the accused police personnel, murdered one Nandagopal in police custody and gang raped his wife Padmini in his presence in most barbaric manner. Surprisingly, the courts below failed to frame charge against the accused under section 302 IPC and instead treated the death of Nandagopal as suicide. While lamenting that "ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge under Section 302 IPC was framed against the accused by the Courts below", the apex court upheld the conviction of the accused imposed by the Madras High Court. The Supreme Court expressed its opinion thus:[12]

> We are surprised that the accused were not charged under Section 302 IPC and instead the Courts below treated the death of Nandagopal as suicide. In fact they should have been charged under that provision and awarded death sentence, as murder by policemen in police custody is in our opinion in the category of rarest of rare cases deserving death sentence, but surprisingly no charge under Section 302 IPC was framed against any of the accused. We are constrained to say that both the trial Court and High Court have failed in their duty in this connection… In the normal course, we could have issued notice of enhancement of sentence, but as no charge under Section 302 IPC was framed, we cannot straightaway record conviction under that provision and enhance the punishment.

It can be noted that committing rape on a woman is not less than murdering her physically. When police officers themselves are engaged in such inhuman conduct like 'blood thirsty animals', gravest punishment should be awarded to the culprits.

8 *Id.* at para 31.
9 2011 (5) CHN 402.
10 *Id*. at para 28.
11 (2011) 7 SCC 45.
12 *Id.* at paras 15 and 18.

The issue of custodial murder of the prosecrutix's husband by the police personnel in no way should have digressed the seriousness of the issue of the custodial gang rape on the prosecutrix. Custodial rape must also be treated as a rarest of rare cases. There should be harsher punishment for such gruesome crime. It is high time to re-examine section 376 IPC as rape has become the fastest growing crime in the country. This also calls for the urgent need to bring immediate police reform in our country.

Honour killing

In a free and democratic country, once a person becomes a major he / she can marry whosoever he/she likes. As held in *Lata Singh* v. *State of U.P*[13] there is nothing honourable in honor killings and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. The Supreme court in *Arumugam Servai* v. *State of Tamil Nadu,*[14] severely criticized *'khap panchayats'*, '*katta panchayats'* in Tamil Nadu which often decree honour killings and other atrocities in an institutionalized way on girls and boys for inter-caste marriages. The court held such acts to be wholly illegal amounting to *kangaroo* courts. Right to marry a person of ones choice is a part of 'right to freedom of conscience and freedom of expression' guaranteed under articles 19(1), 21 and 25 of the Constitution of India. The court emphasized the need for ruthlessly stamping out honor killing and similar atrocities and directed the administrative and police officials to take strong measures to prevent such atrocious acts.

In *Bhagwan Dass* v. *State (NCT) of Delhi*,[15] yet another case of gruesome honour killing in which the father murdered his own daughter! By upholding the conviction of the accused wholly on circumstantial evidence, the Supreme Court observed thus:[16]

> In our opinion honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate 'honour' killings should know that the gallows await them.

III MARRIAGE AND FAMILY RELATIONS

Presumption of marital status

One of the major issues that cropped up in *Chanmuniya* v. *Chanmuniya Virendra Kumar*,[17] was whether or not presumption of a marriage arises when parties live together for a long time, thus giving rise to a claim of maintenance under section 125 of Cr PC. The Committee on Reforms of Criminal Justice System, headed by V S Malimath J in its report of 2003 had opined that the evidence regarding a man and woman living together for a reasonably long period should be sufficient to

13 (2006) 5 SCC 475: (2006) 2 SCC (Cri) 478.
14 (2011) 6 SCC 405: AIR 2011 SC 1859.
15 AIR 2011 SC 1863.
16 *Id*. at 1869.
17 (2011) 1 SCC 141.

draw the presumption that the marriage was performed according to the customary rites of the parties. Thus, it recommended that the word 'wife' in section 125 Cr PC should be amended to include a woman who was living with a man like his wife for a reasonably long period. The Supreme Court opined in the present case that where partners lived together for a long spell as husband and wife, a presumption would arise in favour of a valid wedlock. The court observed that the expansive interpretation should be given to the term 'wife' to include even those cases where a man and woman had been living together as husband and wife for a reasonably long period of time. It was also noted that a man should not be allowed to benefit from legal loopholes by enjoying advantages of a *de facto* marriage without undertaking duties and obligations. Any other interpretation would lead the woman to vagrancy and destitution, which the provision of maintenance in section 125 is meant to prevent. Having regard to the provisions of the Protection of Women from Domestic Violence Act, 2005 (DV Act, 2005), the court observed that when monetary relief and compensation can be awarded in cases of live-in relationships under the DV Act, 2005 then they should also be allowed in proceedings under section 125 of Cr PC.[18]

Divorce

In *M. Sundari* v. *A. Chandrasekaran*,[19] the High Court of Madras, while examining the correctness of decree of divorce passed by the Family Court, Coimbatore, reiterated that the family court is competent to pass a decree for judicial separation on the grounds mentioned in section 22 of the Divorce Act even when a prayer is made for a decree of divorce.[20] In the instant case, the family court had granted divorce on the ground of cruelty. While modifying the decree of divorce passed by the family court under section 10(1)(x) of the Divorce Act to judicial separation under section 22 of the said Act, the high court held thus:[21]

> The concept of cruelty encompasses mental cruelty also. Mental cruelty means mental pain, agony or suffering caused by either spouse. Where the wife makes accusations of illicit intimacy of the Respondent/husband by publicly abusing, it certainly amounts to cruelty. From the evidence, it is established or an inference can legitimately and reasonably be drawn that the conduct of the Appellant has caused mental cruelty in the mind of the

18 A reference has also been made to the hon'ble chief justice to refer the questions - (i) whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under s. 125 Cr PC? (ii) whether strict proof of marriage is essential for a claim of maintenance under s.125 Cr PC having regard to the provisions of DV Act, 2005? and (iii) whether a marriage performed according to customary rites and ceremonies, without strictly fulfilling the requisites of s. 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under s. 125 Cr PC?- to be decided by a larger bench.

19 1 (2011) DMC 190: (2011) 1 MLJ 447.

20 The court upheld the ruling in *Doris Padmavathy* v. *V. Christodass*, AIR 1970 Mad 188.

21 *Supra* note 19 at 453.

> Respondent. The question of cruelty must be considered in the light of the matrimonial relationship and regard must be had to the physical and mental conditions of the parties, social status, impact of the personality and conduct of the spouses and their mind set up. All incidents and quarrels of the spouses must be weighed from that point of view… The mere allegations of illicit intimacy coupled with other acts might have caused feeling of anguish, disappointment, frustration and public embarrassment. Such disappointment and incompatibility of temperament between the spouses cannot be held to be cruelty within the meaning of Section 10(1)(x) of the Divorce Act. We are of the considered view that the Family Court was not right in holding that the conduct of the appellant was such so as to cause reasonable apprehension in the mind of the respondent that it would be harmful or dangerous for him to live with the appellant. Though the conduct of the wife is proved to have caused mental cruelty to the husband, it was not a persistent unkindness or persisting cruelty so as to cause reasonable apprehension in the mind of the Respondent that it will be harmful or unsafe for him to live with the Appellant. In our considered view, the ingredients of Section 10(1)(x) of Divorce Act has not been established, whereas the case of cruelty is made out to grant decree of judicial separation under Section 22 of Divorce Act. When the Respondent has prayed for a decree of divorce, the Court is competent to pass a decree for judicial separation on the grounds mentioned in Section 22 of the Divorce Act.

To ascertain cruelty, the married life is to be assessed as a whole and few isolated instances over certain period may not amount to cruelty. As the Supreme Court observed, if the ill conduct is persistent for a fairly lengthy period where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, one party finds it extremely difficult to live with the other party no longer, it may amount to mental cruelty.[22]

The scandalous allegations leveled by the husband attacking the moral character of the wife or attributing her relationship with some one amounts to worse form of cruelty in the absence of any corroboration to such allegations, as held in *Hemwanti Tripathi* v. *Harish Narain Tripathi*.[23] In the instant case, the High Court of Delhi while entertaining an appeal against the order of trial court dismissing a divorce petition filed by the appellant wife under section 13(1)(ia) of the Hindu Marriage Act, held thus:[24]

> Cruelty can be intentional and unintentional; physical and mental…Cruelty is the very antithesis of love and affection and what may be a cruelty in one case may not be treated as an act of cruelty in another case. Much depends on the social, economic and educational background of both the parties and also on the level of their tolerance… [A]llegations against wife of unchastely, indecent familiarity with another person and extramarital

22 *Gurbux Singh* v. *Harminder Kaur*, AIR 2011 SC 114.
23 181 (2011) DLT 237.
24 *Id*. at 244.

relationship made in written statement filed by husband in proceedings under Section 13(1)(ia), Hindu Marriage Act initiated by wife seeking dissolution of marriage, all such allegations terming part of examination-in-chief or by way of cross-examination constitute cruelty.

A wife is thus entitled for decree of divorce on ground of cruelty and grave assault on character, honor, reputation and status. It is a settled proposition that a decree of divorce on the ground of cruelty can be passed on the strength of false, baseless, scandalous and malicious allegations in the written statement by one party on the other.[25] In *Hemwanti,* the high court failed to comprehend as to how the trial court could term the severe physical beating and scandalous allegations leveled by the husband attacking the moral character of the wife as "wear and tear of daily life which does not amount to cruelty". As per the high court, serious and malicious allegations made by the husband that the wife has extra marital relationship etc. cause deleterious affect on the mind of other party and the same is a worse form of cruelty.

To establish cruelty, it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonably be expected to put up with it. However, adjustment is the underlying principle of matrimony and the petty squabbles cannot be taken as amounting to cruelty in any event to seek a decree of divorce, even though the rising rate of divorce is a reality.[26] Further, a party would obtain decree for divorce on ground of cruelty only when the same is proved. Leveling of allegations, howsoever grave, cannot be taken on its face value unless they are proved as per law of evidence. In the instant case,[27] the appellant husband could not prove the allegation of cruelty leveled against his wife. The High Court of Delhi by upholding the judgment of trial court observed that "the court cannot adopt a hyper-sensitive approach in analyzing the incidents of cruelty and cannot give the status of cruelty to trifling and frivolous incidents".[28] If the alleged cruelty is not proved as required by section 13(1)(ia) of the Hindu Marriage Act, then divorce cannot be granted. The courts should not overlook when there is still hope to retrieve the union and should not accede to the baseless demand of dissolution of marriage until it is proved. On the other hand, the court should not be biased against any gender; the complainant be the husband or the wife. Cruelty - physical or mental, imotional or psychological, intentional or unintentional – should not be allowed in matrimonial relations.

Reasonable and fair provision

The High Court of Kerala in *Abdul Rahman* v. *Hairunnisa*[29] ruled that a divorced Muslim wife can claim reasonable and fair provision under section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 irrespective of her income and means. As the facts of the case explain, the petitioner and the respondent got married in 1980 and four children were born out of the wedlock. Thereafter, the

25 The court quoted with approval *Ashok Kumar* v. *Santosh Sharma*, AIR 1987 Delhi 63 and *Savitri Balchandani* v. *Mulchand Bakhandani,* AIR 1987 Delhi 52.

26 See *Ved Prakash Gulati* v. *Kusum*, 181 (2011) DLT 309.

27 *Ibid.*

28 *Id*. para 10.

29 AIR 2011 Ker 148: 2011 (2) KLT 387.

petitioner married again and started ill-treating the respondent, i.e., the first wife. The first wife obtained a decree of divorce from the family court. Her petition claiming maintenance during *Iddat* period and reasonable and fair provision filed under section 3 of 1986 Act had been partially allowed by the magistrate and the husband had been directed to pay maintenance during *Iddat* period. Towards reasonable and fair provision, the husband had been directed to pay Rs. 3,84,000/- with interest @ 6% from date of order till date of payment. The sessions court set aside the direction to pay maintenance during *Iddat* period as she had not observed *Iddat*, but concurred with trial court as regards fair and reasonable provision though it set aside the direction to pay interest. In revision, the husband moved the high court under section 482 of Cr PC contending that wife is not entitled to invoke the provision of section 3 of 1986 Act as it is she who had obtained divorce. It was also contended that the wife is not entitled to claim fair and reasonable provision as she is employed. Dismissing the petition, the High Court of Kerala held that a divorced Muslim woman is entitled to the benefit of section 3 irrespective of whether it was the wife or the husband who initiated the process of divorce. The wife need not prove that she is devoid of any means of livelihood and she can claim reasonable and fair provision irrespective of her income and means.

The court further observed that under section 125 of Cr PC, the wife or divorced wife can claim maintenance only on plea and proof that she is devoid of means for her maintenance.[30] Such condition is conspicuously omitted in section 3 of the 1986 Act. It is evident that the legislator intended to provide reasonable and fair provision to the divorced wife irrespective of her income and the means.

Irretrievable breakdown of marriage

In *Amar Lal Arora* v. *Shashi Bala*,[31] a husband sought divorce on the grounds of both cruelty as well as desertion and on both the said grounds the trial court had given the findings against the husband. On appeal to the High Court of Delhi, the court endorsed the view of the trial court that the appellant husband could not prove cruelty and desertion to the satisfaction of the court. As per the high court, it is essential for the one, who claims relief, to prove that a particular behaviour resulted in cruelty. The court, on the issue of desertion noted that decree of divorce could not be granted merely on account of separation of parties though the separation is for a quite long period as legislature had yet to introduce ground of irretrievable breakdown of marriage as a ground of divorce. As per the facts of the case, the husband sought divorce after staying separate for a period of 22 years. However, to the court, there was nothing proved on record to state that the wife did not want to join the company of the appellant husband. It is submitted that the very fact that the parties have been staying separate for a considerable long period cannot be overlooked. It would be unreasonable and inhumane, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife.[32]

30 The court quoted with approval *Ahammed* v. *Aysha,* 1990 (1) KLT 172.

31 181 (2011) DLT 378.

32 See the decision of full bench of the Delhi High Court in *Ram Kali* v. *Gopal Dass*, ILR (1971) 1 Delhi 6.

The apex court has in the past granted divorce based on irretrievable breakdown of marriage observing that where the marriage had been wrecked beyond any hope of salvation, public interest and the interests of all lay in the recognition, in law, of this fact, i. e., irretrievable breakdown as aground for divorce. However, the recent judicial trend is not to grant divorce on breakdown theory as evidenced in *Vishnu Dutt Sharma* v. *Manju Sharma*[33] wherein the Supreme Court speaking through Markandey Katju and V S Sirpurkar JJ observed that the cases which dissolved marriages on the ground of irretrievable breakdown have not taken into consideration the legal position. The court added that a mere direction of the court without considering the legal position is not a precedent and if the courts grant divorce on the ground of irretrievable breakdown, then the courts by judicial verdict be adding a clause to section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In *Vishnu Dutt* the apex court evidently noted that the inclusion of irretrievable breakdown of the marriage can only be done by the legislature and not by the court.

In India, as discussed above, irretrievably breakdown of marriage was sought to be made a ground for divorce by the judiciary and the law commission. As observed in *Ram Kali,*[34] it would be unreasonable and inhumane, to compel the parties to keep up the facade of marriage even though the rift between the couple is complete and there are no prospects of their ever living together as husband and wife. 71st Report of the Law Commission of India[35] proposed that the Hindu marriage should be allowed to be dissolved if the husband and wife have lived apart for a period of five to ten years and the marriage is irretrievably broken down due to incompatibility, clash of personality or similar other reasons, as is permissible under many systems of law of advanced countries. On this background, Union Cabinet on 23rd March, 2012 approved the Marriage Laws (Amendment) Bill, 2010, by which irretrievable breakdown of marriage has been made a statutory ground for dissolving a marriage under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954.

At this juncture, it may be noted that the inconsistency in the judicial pronouncements must be settled as it is highly undesirable to make law based on the personal inclinations and opinions of individual judges. The matter must be settled once for all bringing certainty and clarity in the legal provisions. It is hoped that the pending Bill, if becomes an Act, would settle the matter once for all.

Settlement deeds prior to the commencement of Hindu Succession Act, 1956

Applicability of section 14(1) of Hindu Succession Act, 1956 in respect of life interests created by settlement deeds prior to the commencement of Hindu Succession Act, 1956 was the issue in *Sri Ramakrishna Mutt* v. *M. Maheswaran*.[36] A life interest had been created in favour of a Hindu female before 1955. She remained in possession of the properties and enjoyed the same during her lifetime.

33 AIR 2009 SC 2254.

34 *Ram Kali* v. *Gopal Dass*, 4 (1968) DLT 503.

35 Law Commission of India, Govt. of India, *71st Report on Hindu Marriage Act, 1955: Irretrievable Breakdown of Marriage – Another Ground for Divorce* (March, 2009).

36 (2011)1 SCC 68.

As per the settlement deeds, it was provided that after her demise, the property would go in favour of the appellant - Sri Ramakrishna Mutt. However, it was contested by the defendants that the property could not have gone back as per the settlement deeds, as the Hindu female had become full owner of the property on account of section 14(1) of the Act. The lower courts concurrently held that the Hindu female had become absolute owner of the property under section 14(1) as she was in possession of those properties on the date when the Act came on the anvil. Upholding the concurrent findings of the courts below, the Supreme Court held that the Hindu wife was in constructive possession of property (though her husband by virtue of managing the properties was in actual possession) and the life interest created in the property has ripened into full ownership on the commencement of 1956 Act.

Abetment of suicide

The apex court in *Narwinder Singh* v. *State of Punjab*,[37] held that mere omission or defect in framing charge does not disable court from convicting accused for offence proved on record. The trial court convicted the accused husband and his parents for an offence punishable under section 304B IPC. Upon reconsideration of the entire evidence, the Punjab and Haryana High Court held that the deceased had not committed suicide on account of demands for dowry but due to harassment caused by the husband. The high court thus acquitted the parents of the appellant but, convicted the appellant. However, the conviction of the appellant was converted from section 304B (dowry death) IPC to section 306 (suicidal death and abetment thereof) IPC. It was argued before the Supreme Court that the high court could not have convicted the appellant under section 306 IPC as the charge had been framed under section 304B IPC. The Supreme Court held thus: [38]

> The High Court upon meticulous scrutiny of the entire evidence on record rightly concluded that there was no evidence to indicate the commission of offence under Section 304B IPC. It was also observed that the deceased had committed suicide due to harassment meted out to her by the Appellant but there was no evidence on record to suggest that such harassment or cruelty was made in connection to any dowry demands. Thus, cruelty or harassment sans any dowry demands which drives the wife to commit suicide attracts the offence of 'abetment of suicide' under Section 306 IPC and not Section 304B IPC which defines the offence and punishment for 'dowry death'. … In such circumstances, the High Court was, therefore, fully justified in convicting the Appellant under Section 306 IPC.

As the court pointed out, a conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice.

Dowry death

Dowry system is a big slur and curse on our society. Unfortunate and condemnable instances of dowry deaths are frequently occurring in our country. In

37 (2011) 2 SCC 47.
38 *Id*. at 51.

Nachhattar Singh v. *State of Punjab*,[39] the wife was found dead after five yeras of the marriage. There were allegations of demand of dowry. Hence the sessions court convicted the accused under section 304B IPC awarding a sentence of seven years' rigorous imprisonment. However, the high court has rejected the story about the demands for dowry but has drawn an inference that there must have been some cruelty which had forced the young woman to commit suicide despite the fact that she had a young child. Accordingly, the accused were aquitted of the offence under section 304B IPC but convicted under section 306 IPC. When the matter reached the apex court, the court ruled that while acquitting the accused of the charge under section 304 B IPC, no inferences or presumptions can be drawn. The apex court also made a perusal of section 498 A IPC and examined the meaning of the term cruelty. As per the court, it means any willful conduct which is of such a nature as is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health (mental or physical) to the woman. Such willful conduct should be of such a nature as would provoke a person of common prudence to commit suicide and a difference of opinion within a family on everyday mundane matters would not fall within the category of cruelty. For example, merely because the in-laws wanted the deceased as a good daughter-in-law to look after them in old age cannot be said to be infliction of such cruelty as amounted to an abetment of suicide.[40]

The deceased wanted to join service and hence she wanted to shift from the village. However, the in-laws prevented this genuine wish of their daughter-in-law to join service by demanding that their daughter-in-law "should be a good daughter-in-law and should look after them in their old age". For the apex court the behaviour/ demand of in-laws was not cruelty. It is difficult to support the notion that a woman gets married only to look after the in-laws in their old age. Can no married woman join service if her in-laws are old? Can't there be other alternative arrangements to take proper care of aged in-laws? The denial of permission to join service and the insistance that "the daughter-in-law should stay with the in-laws (without joining service) to look after them" should also be treated as a form of cruelty.

In each case the court has to analyze facts and circumstances leading to death of victim and decide if there is any proximate connection between demand of dowry and act of cruelty or harassment and death. In *Bansi Lal* v. *State of Haryana*[41] the court held that while considering a case under section 304B, cruelty has to be proved during the close proximity of time of death. Moreover, it should be continuous and such continuous harassment – physical or mental – by the accused which makes life of the deceased miserable which may force her to commit suicide. The question as to when can presumption as to dowry death be raised has been answered by the court in *Bansi Lal.* After examination of the wordings of section 113B of the Indian Evidence Act, 1872 which provides for presumption as to dowry death, the apex court observed that if essential ingredients of dowry death have been established by prosecution, it is the duty of court to raise a presumption that accused has caused dowry death. By holding so, the court candidly disbelieved the story of recovery of

39 (2011) 11 SCC 542.
40 *Id.* at 545.
41 (2011) 11 SCC 359.

suicide note disclosing premarital love affair of the deceased with some other person and forced marriage against her will with the accused, as reason for suicide. In the opinion of the court, such stories were not solid ground to rebut the presumption of dowry death.

In *Mahalakshmi* v. *State of Tamilnadu*[42] the marriage between the deceased wife and the accused husband took place on 11.07.2002 and within five months from the date of marriage, i. e., on 30.12.2002 the death occurred in the matrimonial home, on the very date the wife resumed her matrimonial home from her parents' house. There were ample evidences of dowry demand and the consequential ill-treatment/ harassment by her husband and other in-laws. As per the post mortem report, the death has been caused by 'asphyxia due to smothering with multiple injuries with postmortem drowning'. However, the trail court acquitted the accused finding discrepancies in the FIR. In the revision petition preferred by the mother of the deceased the High Court of Madras observed that FIR is not an encyclopedia; and the minor discrepancy between the evidence should not affect the case of prosecution.

This case assumes importance due to two reasons: It has upheld (i) the competency of doctor to give evidence and the duty of the court to act on such evidence; and (ii) onus of the accused to explain the cause of death. On the first issue the court reiterated the competency of doctor to give evidence in such situations by refereeing to *Sahebrao Mohan Berad* v. *State of Maharastra*[43] wherein, the apex court has held that the doctor who has examined the deceased and conducted the post-mortem is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective, the court cannot substitute its opinion for that of the doctor. In the present case, the doctor had been cross examined in length. He had specifically denied the suggestion that the death was due to drowning but he had emphasized on 'postmortem drowning'. The high court clearly stated that in such circumstances the doctor alone was a competent person to give the cause of death. The trial court had thus committed an error in disbelieving the medical expert's opinion.

On the second issue, the court found that since the deceased was living with the accused, the onus to explain the cause of death of the deceased was wholly upon the husband which he could not discharge to the satisfaction of the court. By setting aside the judgment of acquittal and ordering for retrial the court said thus:[44]

> In such circumstances, it is not fair on the part of this Court to consider the other matters that the value of the F.I.R. and the discrepancy in the evidence of P.Ws. 2 and 3 (sister and brother- in law of the deceased respectively) in respect of list of dowry demands and delay in dispatching the records to the court, lapse in investigation. If this Court has given any finding, it will affect the minds of the Trial Court at the time of retrial. Hence, I am of the opinion that the Trial Court has committed an error while discarding the doctor's evidence and the cause of death, as per the dictum of Apex Court,

42 MANU/ TN/2564/11:Criminal Revision Petition No. 771 of 2006, decided on 14.07.2011 by High Court of Madras.

43 CDJ 2011 SC 271.

44 *Supra* note 42 at para 29.

> the doctor, who did the postmortem, is the competent person to give opinion about the cause for death. Furthermore, considering the facts of the case … I am of the view (that), the trial Court has committed irregularity in appreciating the evidence. Hence, it is a fit case for setting aside the judgment of acquittal and ordering for retrial to prevent the gross miscarriage of justice.

What is surprising is that the state has preferred no appeal though the facts themselves proved a cold blooded murder that too within five months of marriage. The trail court has utterly failed to appreciate the post mortem report. The trail court must have considered all relevant aspects in proper perspective with great care and caution. The high court's observations on crimes against women are very pertinent.[45] Crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric. Hence, they call for harsh punishment. Unfortunately, what is happening in our society is that out of lust for money, people are often demanding dowry and after extracting as much money as they can they kill the wife and marry again and then again they commit the murder of their wife for the same purpose. This is because of total commercialization of our society and lust for money which induces people to commit murder of the wife. The time has come to stamp out this evil from the society with an iron hand.

Addition of section 302 IPC to the charge under section 304 B IPC

In *Rajbir @ Raju* v. *State of Haryana,*[46] where the accused murdered his pregnant wife barely 6 months after the marriage demanding dowry, the Supreme Court has directed trial courts in India to 'ordinarily add' section 302 IPC to charge of section 304B IPC so that the death sentence can be imposed in such heinous crime. Subsequently, District and Sessions Court, Sivagangai in view of a circular dated 18.05.2011, issued by the Registry of Madras High Court, in pursuance of the judgment of *Rajbir @ Raju* has altered the charges originally framed in a case under sections 306, 498(A) and 304(B) IPC, to include section 302 IPC. The said order of the trial court came to be challenged in *Chellapandi* v. *Deputy Superintendent of Police, C.B.C.I.D., Madurai.* [47] It was contented for the petitioner that (i) offence punishable under section 302 IPC has not been made out in the present case, (ii) while exercising power under section 216 Cr PC towards addition or alteration of the charges during trial, the court will have to be satisfied with the materials available on record and (iii) judgment of the apex court in *Rajbir @ Raju* cannot be applied like a statute and has to be applied on the facts of each case; and hence the order passed by the Sessions Judge, Sivagangai, to add section 302 IPC would have to be set aside. The High Court of Madras while accepting the arguments observed that the law governing the trial on criminal offence provides for alteration of charges at any stage of proceedings depending upon the evidence adduced in the

45 Referring apex court's decision in *Satya Narayan Tiwari* v. *State of Uttar Pradesh*, AIR 2010 SCW 7144.

46 AIR 2011 SC 568.

47 (2012) 1 MLJ 246.

case. The trial court can alter or add a charge only on the basis of evidence adduced before it and not on the basis of any other material which do not constitute evidence. If there is any material either in the complaint or in the evidence adduced during the course of trial, it is open to the trial court to frame a new charge. In the present case, the trial court has not exercised the power under section 216 of the Cr PC in the manner known to law as there is absolutely no material available on record to add the charge punishable under section 302 IPC. The word "ordinarily" used in *Rajbir @ Raju* has to be interpreted in consonance with the exercise of power under section 216 of the Cr PC. Thus the high court concluded that the pronouncement in *Rajbir @ Raju* cannot be read like a statute or an enactment to apply to all the cases in which charges have been framed for the alleged offence punishable under section 304(B) IPC.

Murder by husband

In *Thathamsetty Suresh* v. *State of Andhra Pradesh,*[48] the apex court took a serious view of crimes against women. The court condemned the barbaric and brutal manner in which the accused husband murdered his wife. The apex court sustained the conviction solely based on circumstantial evidence. The court reiterated its philosophy adopted in *Satya Narayan Tiwari* v. *State of U.P.*[49] and *Sukhdev Singh* v. *State of Punjab*[50] of giving harsh punishment in offenses committed against women by issuing notice to the petitioner as to why his life sentence should not be enhanced from life sentence to death sentence.

In *Babulal Sahu* v. *State of Chhattisgarh*,[51] the refusal of wife to have sexual relations with her husband had led to the quarrel between the spouses. Subsequently, the appellant husband committed murder of his wife by strangulating her. The appellant in the Supreme Court challenged the concurrent finding of conviction and sentence awarded to him under section 302 IPC and prayed that his case could be covered under exception 4 to section 300 IPC. However, the apex court found that the demand of the appellant for sex had apparently been satisfied as evidenced from the medical records. As per the court, the medical evidence was indicative that the murder had been committed after sex between the couple. Since the deceased had already obliged her husband the cause for the sudden quarrel no longer existed and hence the appellant's case would not be covered by exception 4 of section 300 IPC.

IV ROLE OF MEDIATION IN MATRIMONIAL DISPUTES

The blissful institution of marriage plays a vital role to the wellbeing of society nevertheless it is very much under attack in our country. Due to various socio-economic factors, outburst of matrimonial disputes is common in recent times and consequently the rate of divorces is on rise. In a *pro bono* litigation, i. e., *In the Matter of Matrimonial Disputes* v. *State of U.P.,*[52] the High Court of Allahabad

48 (2011) 1 SCC 318.
49 (2010) 13 SCC 689.
50 (2010) 13 SCC 656.
51 AIR 2011 SC 2530.
52 2011 (9) ADJ 122: II (2012) DMC 417.

exercised its judicial wisdom to elaborate upon the role of mediation in reconciling the estranged couples. As per the court, wherever allegations are not very grave, in order to save families and children and indeed the institution of marriage, an effort be first made for reconciling matrimonial disputes by mediation before steps can be taken for prosecuting offenders. By quoting *Preeti Gupta* v. *State of Jharkhand*,[53] the court further reminded the members of bar, social workers, police and other governmental agencies of their noble responsibility to ensure that the social fibre of family life is preserved by desisting from over-implicating all in-laws and their relations as accused persons in 498-A IPC and from filing exaggerated reports. The court observed that misuse of the well-intentioned provision in IPC by filing complaints with oblique motives would lead to new legal terrorism.[54] This decision assumes importance as the court has formulated and spelt out specific guidelines for the guidance of the state governments in matrimonial disputes. It would be desirable to discuss in detail the questions considered and the guidelines formulated by the court.

a. Whether registration of an FIR is mandatory?

Section 154 of the Cr PC mandates that when any information regarding a cognizable offence is given orally to the officer in charge of the police station, he is required to reduce it in writing and to enter it into the general diary. According to the court, this provision gives no option to the concerned police officer to refuse to lodge the FIR once information of a cognizable offence is given to the police officer. The officer in charge of the police station is statutorily obliged to register the case and then to proceed with the investigation, if he has reason to suspect the commission of an offence.

b. Whether arrest of husband and family members mandatory once FIR is lodged?

If it appears to the police officer that the matrimonial dispute between the spouses is either not of a grave nature or is the result of a conflict of egos or contains an exaggerated version, or where the complainant wife has not received any injury or has not been medically examined, he may even desist or defer the investigation in such a case. After the recent amendments,[55] now an offence under section 498A

53 AIR 2010 SC 3363.

54 Quoting *Sushil Kumar Sharma* v. *Union of India,* AIR 2005 SC 3100.

55 S. 41(1)(b) of Cr PC, which came into effect from 01.11.2010 provides that if some material or credible information exists of an accused being involved in a cognizable offence punishable with 7 years imprisonment or less with or without fine, the police officer has only to make an arrest, if he is satisfied that such arrest is necessary (i) to prevent such person from committing any further offence, (ii) for proper investigation of the offence; (iii) to prevent such person from causing the evidence of the offence to disappear or tampering with the evidence in any manner; (iv) for preventing such person from making any inducement, threat or promise to a witness to dissuade him from disclosing such facts to the court or the police officer (v) or unless such a person is arrested, he may not appear in the court when required. The arrest is only to be effected if any or all of the five conditions abovementioned are fulfilled. In contrast to this provision, under s. 41(1) (ba) such a limitation has not been provided for those cases, where credible information has been received that a person has committed an offence

IPC is punishable with imprisonment only up to three years and fine. If there are no injuries on a victim, in the opinion of the court, it constitutes a fit case for the police officer to exercise powers conferred by the newly introduced section 41(1)(b) read with section 41(A), where instead of straight away arresting the accused, it would be a better option at the initial stage for the police officer to require the said person to appear before him or before the mediation centre. Section 41A Cr PC permits calling the person concerned before the police officer himself or to any specified place. Hence a notice can be given to the accused to appear before the mediation centre. If the FIR is immediately registered that will appease the concerns of the aggrieved wife to some extent that action is being taken on her complaint, and it has not been put on the back burner.

c. Whether distinction possible between cases necessitating immediate arrest, and cases where attempt for mediation should first be made?

Arrest may be necessitated, if the husband or in-laws have given a grave beating to the wife endangering her life or where the wife has been subjected to repeated violence or there are any other circumstances of exceptional cruelty against the wife, where future recurrence of violence or cruelty seems likely, or for preventing the husband and his accused family members from trying to browbeat witnesses or to tamper with the course of justice, or for ensuring the presence of the husband or his accused family members at the trial, or for effective investigation. In all other cases, according to the court, an attempt should be first made for bringing about reconciliation between the parties by directing the complainant wife and her natal family members and the husband and other family members to appear before the mediation centre when the wife or other eligible relations under section 198-A Cr PC approaches the police station for lodging the report.

d. Appropriate place where mediation should be conducted?

By agreeing to the unanimous view of the officials as well as the lawyers the court observed that the police station should not serve as the mediation cell. As far as possible, the mediation proceedings should be carried out in the mediation or conciliation centres established in the district courts.

e. Time frame for concluding the mediation proceedings

If the matter is unduly prolonged in the mediation process, the delay could act as a shield to protect the accused from facing the penalty of law, causing frustration and bitterness for the aggrieved wife. Hence the court directed that notice should as far as possible be served personally on the accused and the parties should be directed to appear before the mediation centre within a week or 10 days of the lodging of the

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punishable with imprisonment of over 7 years. S. 41A of Cr PC gives powers to a police officer to issue a notice directing the person against whom a reasonable complainant has been made or credible information or reasonable suspicion exists to appear before him or at any place that he may specify in the notice where the police officer is of the opinion that the arrest is not required under the provisions of s. 41(1) but the accused is to comply with the notice and he would not be arrested, if he continues to comply with the terms of the notice.

report by the aggrieved wife or family members and thereafter, the mediation proceedings should be concluded within two months of the first appearance of both the parties before the mediation centre.

f. Who should be the members of the mediation cell in the district?

The Mediation Cell in the district should be headed by the secretary of the legal services authority in the district. It must have on its panel lawyers appointed by the district legal services authority, other lawyers, who volunteer for giving free services before the mediation centre, especially female lawyers. It is also desirable to have three or four social workers (especially female) in the cell. A female police officer may also be appointed as an ex-officio member of the mediation cell.

g. Procedure to be followed by the police when a report of a cognizable offence under section 498A IPC or allied provisions is reported?

The report regarding commission of cognizable offence under Section 498A IPC or other allied sections may be lodged at the concerned police station where the incident takes place or at the *'Mahila Thana'* especially created in the district for investigation of such cases. The police officer concerned will get the aggrieved woman medically examined for injuries if the same are present. If the report has been lodged at some police station other than the *Mahila Thana*, the injury report and relevant police papers shall be forwarded to the *Mahila Thana* for investigation of the case, and in appropriate cases the investigating police officer at the *Mahila Thana* may refer the matter to the mediation centre in the civil court, and direct the complainant to be present at the mediation centre on a fixed date 7 to 10 days thereafter. The accused should as far as possible also be personally given notice to appear before the mediation centre on the date fixed. The accused husband or other in-laws should be directed to report before the police officer on a date two months after the date of first appearance before the mediation centre and inform the police officer about the progress in the mediation. It would also be open to the complainant wife to inform the police officer about the progress (or lack of it) of the mediation process. In cases, where it has not been successfully concluded and the Police officer is of the view that arrest may not be necessary in a particular case, he may direct the accused persons to obtain bail from the competent court. In case, he is of the opinion that the arrest is necessitated at a subsequent stage, it will be open to the police officer to take such accused persons in custody.

After giving these guidelines the court considered the question 'whether offences under section 498A IPC be made compoundable'? On this issue, the court had received considerable feedback from subordinate judicial authorities that unless the offence under section 498A IPC is made compoundable, much benefit cannot be derived by trying to bring about mediation between the parties. The apex court in *Ramgopal* v. *State of M.P.*,[56] observed that an offence under section 498A IPC is essentially private in nature, and it should be made compoundable if the parties are willing to amicably settle their dispute. Directions were also given to the Law Commission of India to consider the matter and to make appropriate

56 2010 SCALE 711.

recommendations to the government to bring about suitable amendments in the statute.[57] After referring to a catena of judicial decisions the court noticed that where the dispute is purely personal in nature and the wife decides to compound the offence, as there would be little likelihood of conviction, quashing of the offence should not be refused on the hyper-technical view that the offence was non-compoundable as keeping the matter alive with no possibility of a result in favour of the prosecution would be of mere wastage of time.

The court further held that since cruelty or violence against women has neither ceased, nor has it been reduced, the special provision for meeting this problem must be retained in the statute book. The court quoted with approval the view expressed by Law Commission of India:[58]

> While the Commission is appreciative of the need to discourage unjustified and frivolous complaints and the scourge of over-implication, it is not inclined to take a view that dilutes the efficacy of Section 498-A to the extent of defeating its purpose especially having regard to the fact that atrocities against women are on the increase. A balanced and holistic view has to be taken on weighing the pros and cons. There is no doubt a need to address the misuse situations and arrive at a rational solution - legislative or otherwise.

Defrayal of a marriage dispute is an extremely intricate task. However, restitution of marriages and reunion should be the first endeavour and separation must be the last resort in a matrimonial dispute. It is the duty of the governmental agencies to prompt the estranged couples to go in for restoration of their matrimonial bliss through reconciliation. The state has to provide mediation and conciliation services to the quarrelling couples. Such services would discourage parties to the matrimonial discords from resorting to legal action without exhausting the avenues of reconciliation.

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57 In *Rajeev Verma* v. *State of U.P.*, 2004 Cri LJ 2956, a similar suggestion was made to the Law Commission of U.P. to recommend to the state government to make the offence under Section 498A IPC compoundable with the permission of the curt under s. 320 Cr PC. The reasons for the suggestion were that such FIRs are often lodged in the heat of the moment, without reflection after a sudden quarrel, and sometimes as a result of wrong advice or influences. But the complaining wife, who usually has no source of independent livelihood and is unable to provide for herself in the future, may have to suffer later if the relationship with her husband is irrevocably ruptured due to the hasty filing of the criminal case, particularly in view of the fact that the offence is non-compoundable. To meet this situation in various cases, the court has recommended quashing of the complaint in proceedings under s. 482 Cr PC or in the writ jurisdiction where the aggrieved wife compounded the offence. See, *B.S. Joshi* v. *State of Haryana*, AIR 2003 SC 1386; *Manoj Sharma* v. *State*, 2008 SC (Suppl) 1171 and *Madan Mohan Abbot* v. *State of Punjab*, AIR 2008 SC 1969.

58 Law Commission of India, "Consultation Paper-cum-Questionnaire Regarding Section 498-A of Indian Penal Code", para 11.

V REHABILITATION OF SEX WORKERS

The word 'life' in article 21 of the Constitution of India has been interpreted in several decisions of the apex court to mean a right to 'life with dignity' and not just an animal life.[59] The apex court has constituted a panel on sex workers to recommend steps to create "conditions conducive for sex workers to live with dignity as per provisions of the Article 21". In *Budhadev Karmaskar* v. *State of West Bengal*[60] the court emphasized the need to provide a life of dignity to the sex workers in our country by giving them some technical skills through which they can earn their livelihood instead of by selling their bodies.

The observations, remarks and directions made by the court in this case are noteworthy. The court endorsed the representation made by one of the panelists[61] that "many of the sex workers want to learn additional skills but they still want to continue with their old profession in the red light area because some of their clients are very persistent and keep on coming back and are unwilling to let the sex workers leave the profession. For many sex workers, the rehabilitation process is important but only if they are old and cannot get any income by selling their bodies. Many of them want vocational training only to add to their income while continuing with their sex work. Unless the attitude of the public in general towards the sex workers undergoes a change so as to remove the stigma attached to their profession, and there is more acceptability of the rehabilitated sex workers in the mainstream, it is difficult to persuade the sex workers to get rehabilitated leaving their old profession".

The court expressed the view that the societal mindset needs to be changed and there must be grater acceptance of the rehabilitated sex workers in the main stream of society. There is always a prevailing fear that by opting for rehabilitation they may be worse off by losing their old livelihood and also not being able to survive in the alternative vocation unless there is ready acceptance of the former sex workers in the mainstream.

The court further reiterated its earlier observations:

> We are fully conscious of the fact that simply by our orders the sex workers in our country will not be rehabilitated immediately. It will take a long time, but we have to work patiently in this direction. What we have done in this case is to present the situation of sex workers in the country in the correct light, so as to educate the public. It is ultimately the people of the country, particularly the young people, who by their idealism and patriotism can solve the massive problems of sex workers. We, therefore, particularly appeal to the youth of the country to contact the members of the panel and to offer their services in a manner which the panel may require so that the sex workers can be uplifted from their present degraded condition.

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59 *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746; *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802; *Chamali Singh* v. *State of UP.,* AIR 1996 SC 1051 etc.

60 2012 Cri LJ 316.

61 Ms. Indumati, South India AIDS Action Program, Chennai.

Other important directions given by the court include:

a) The Central Government should provide Rs. 10,00,000/- to each state government, Rs. 5,00,000/- to each union territory and Rs. 2,00,000/- to the panel on the sex workers.
b) If an incident of involvement of family of girl pushing her into sex racket came to notice of anyone concerned including NGOs, authorities, etc., such incident be reported to executive chairman/secretary of state legal services authority. It will be open for the said authority to take appropriate penal action against such illegality or person who may be found involved. Unless this nexus between the traffickers, pimps and the brothel owners, together with the family at times, is broken, successful rescue and rehabilitation becomes difficult.
c) The state legal services authorities should provide a helpline number to the NGOs and to the State machinery as well as to the sex workers and victims of sex trade who are in distress and who are compelled to continue with the sex trade, so that they can avail the benefit of the helpline number for providing legal assistance, to get them rescued or any other assistance which may be offered to them by way of free legal aid. The state legal services authorities thereafter may direct them to the concerned and appropriate authorities for taking remedial measures in that regard and also report the matter to the panel which has been constituted by the court.
d) Proper effective scheme should be prepared for sex workers who volunteers to leave sex trade.
e) Central and state governments should prepare schemes for rehabilitation all over the country for physically and sexually abused women.
f) There should be no condition that rescued sex workers must stay in a corrective home.
g) Central Government and state governments must submit additional reports stating in greater detail how they were complying with earlier court orders in this regard.
h) Providing short stay homes to sex workers is hardly a solution to their problem. They must be provided a marketable technical skill so that they can earn their livelihood through such technical skill instead of by selling their bodies. Merely sending them to homes is sending them to starvation. Much more needs to be done by the state governments.

It is high time to discourage prostitution. The sex workers have a right to live with dignity but the collective endeavour must be on the part of the sex workers to give up the trade in case they are given an alternate platform. At the same time, the state has to design scheme for making them economically self sufficient. They have to be rehabilitated with vocational training, decent employments and handsome emoluments. Measures must be envisaged to ensure that the rehabilitated women are not seen back in the flesh trade. They must be re-integrated in the mainstream and their past identity must be completely obliterated.

VI THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

Domestic violence, especially the violence against women, has existed throughout history. Domestic violence is a sad truism in Indian society as well. The phenomenon of domestic violence, though widely prevalent, remains invisible in public domain. To tackle this problem the Parliament enacted the DV Act, 2005. It was enacted pursuant to the Vienna Accord of 1994 and Beijing Declaration and the Platform for Action (1995) which recognized that the domestic violence as a grave human right issue and a serious deterrent to development. The United Nation's Convention on Elimination of all Forms of Discrimination against Women (CEDAW)[62] has recommended that the state parties should act to protect women against violence of any kind, especially those occurring within the family.

Can a female member of the husband's family be made a party to the proceedings under the DV Act, 2005

Sou. Sandhya Manoj Wankhade v. *Manoj Bhimrao Wankhade*[63] presented before the apex court a unique question as to whether a female member of the husband's family could be made a party to the proceedings under the DV Act, 2005? The Sessions Judge, Amravati in the proceedings before him, observed that the female members cannot be made parties in proceedings under the DV Act, 2005, as 'females' are not included in the definition of 'respondent' in section 2(q)[64] of the said Act. This view was confirmed by the Nagpur Bench of the Bombay High Court. However, the concurrent finding of the lower courts has not been approved by the apex court. By setting aside the judgments and orders, both of the Sessions Judge, Amravati, and the Nagpur Bench of the Bombay High Court, the Supreme Court held thus:[65]

> [A]lthough Section 2(q) defines a Respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint, which may be filed by an aggrieved wife or a female living in a relationship in the nature of a marriage. It is true that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative",

62 General Recommendation No. XII (1989).

63 2011 (1) KLT 609 (SC) : 2011 (2) SCALE 94.

64 S. 2(q). "Respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

65 *Supra* note 63 at paras 12-15.

> nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only. In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005. In our view, both the Sessions Judge and the High Court went wrong in holding otherwise, possibly being influenced by the definition of the expression "Respondent" in the main body of Section 2(q) of the aforesaid Act.

Setting aside of void order

Inderjit Singh Grewal v. *State of Punjab*,[66] reveals an exceptionally remorseful state of affair where the wife filed a criminal complaint before the court to initiate criminal proceedings against her husband alleging that he had obtained decree of divorce by playing fraud upon the court. As per the facts of the case, the appellant husband and the respondent no. 2 (wife) – both were highly qualified and were working as Asst. Professor and Lecturer respectively, – got married in 1998. However, in 2008 they obtained a decree of divorce by mutual consent from the District Court, Ludhiana as they could not pull on well together because of temperamental differences. Later on, on 04.05.2009, the wife filed a complaint before the Senior Superintendent of Police, Ludhiana against the husband under the provisions of the DV Act, 2005 alleging that the decree of divorce obtained by them was a sham transaction and even after getting divorce, both of them had been living together as husband and wife. The full-fledged inquiry conducted by the superintendent of police made out no case against the husband but revealed that the parties had been living separately after divorce. Subsequently, on 12.06.2009, she filed a complaint under the DV Act, 2005 before the magistrate who summoned the appellant as well as the minor child. The appellant, being aggrieved of the order of the magistrate filed application under section 482 Cr PC[67] for quashing the complaint dated 12.06.2009.

In the meanwhile, the wife also filed a civil suit on 17.07.2009 in the court of Civil Judge (Senior Division), Ludhiana, seeking declaration that the decree of divorce was null and void as it had been obtained by fraud. She also filed an application on 17.12.2009 under Guardians and Wards Act, 1890 for grant of custody and guardianship of the minor child before the Additional Civil Judge (Senior Division), Ludhiana. On 11.02.2010 she lodged an FIR under sections 406, 498-A, 376, 120-B of the IPC against the appellant, his mother and sister. The high court dismissed the application under section 482 Cr PC filed by the husband for quashing the wife's complaint dated 12.06.2009 and thus the matter reached the apex court.

Fraus et jus nunquam cohabitant – fraud and justice never dwell together. It is a settled legal proposition that where a person gets an order by making

66 2011 (9) SCALE 295.

67 S. 482 Cr PC reads: Saving of inherent power of High Court: Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

misrepresentation or playing fraud upon the authority, such order cannot be sustained in the eyes of the law as fraud unravels everything. As per the facts of the case at hand, the wife herself is an accomplice in the fraud and equally responsible for the offence. Hence, the question arises as to whether it is permissible for a party to treat the judgment and order as null and void without getting it set aside from the competent court. This question stands settled by a catena of decisions of the apex court clarifying that for setting aside even a void order, the party has to approach the appropriate forum.[68] By allowing the petition filed by the appellant under section 482 Cr PC the Supreme Court observed thus:[69]

> [W]e are of the considered opinion that permitting the Magistrate to proceed further with the complaint under the provisions of the Act 2005 is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the court. Undoubtedly, for quashing a complaint, the court has to take its contents on its face value and in case the same discloses an offence, the court generally does not interfere with the same. However, in the backdrop of the factual matrix of this case, permitting the court to proceed with the complaint would be travesty of justice. Thus, interest of justice warrants quashing of the same.

Retrospective applicability

The retrospective applicability of the DV Act, 2005 came to be questioned in *Karimkhan* v. *State of Maharashtra*.[70] As the facts of the case unveil, the family members of the petitioner husband used to ill-treat the respondent wife physically and mentally ever since the marriage solemnized in 1993. The respondent was driven out from the matrimonial home in 2001. On her subsequent complaint relief was granted under sections 12, 18, 19, 20 and 22 of the Act of 2005. The magistrate's order passed *ex-parte* in 2009 under section 23 of the 2005 Act also restrained the husband from alienating his property. The husband on appeal to the High Court of Bombay challenged the said verdict passed by the judicial magistrate questioning retrospective application of the 2005 Act. He raised objection by contending that Act of 2005 has no retrospective effect since it came into force on 26.10.2006 and the alleged domestic violence occurred prior to the coming into force of the DV Act, 2005 as such, the circumstances which allegedly occurred prior to the coming into force of the Act cannot be taken into consideration for granting any relief under the DV Act, 2005. On the other hand, the respondent argued that the acts of torture, cruelty, domestic violence etc. although committed prior to the coming into force of the Act, are continuous causes of action and, as such, the question of retrospective effect of the DV Act, 2005 does not arise at all.

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68 See, *State of Kerala* v. *M.K. Kunhikannan Nambiar,* AIR 1996 SC 906; *Sultan Sadik* v. *Sanjay Raj Subba*, AIR 2004 SC 1377; *M. Meenakshi* v. *Metadin Agarwal* (2006) 7 SCC 470 etc.

69 *Supra* note 65 at para 25.

70 2011 Cri LJ 4793.

The court noted that the question as to whether the Act has a retrospective effect or not is not material at all in view of the apex court's decision in *Vanka Radhamanohari* v. *Vanka Venkata Reddy.*[71] The court also took note *of Bharati Naik* v. *Ravi Ramnath Halnarkar*[72] which held with reference to the DV Act, 2005, that 'an interpretation which furthers the purpose of the Act must be preferred to the one which obstructs the object and paralyses the purpose of the Act". Thus, even if the woman was in the past in a relationship, she would be entitled to invoke the provisions of the Act on the basis of continuing cause of action. The court further observed:[73]

> Since there is a continuing cause of action… this Court is of the firm view that the provisions of the said Act of 2005 are attracted in the present case… The Petitioner can not be allowed to defeat the provisions of the Act continuously by depriving the Respondent/wife, who is legally entitled to a shared household in terms of the provisions of the Act of 2005. The denial of access to shared household to the Respondent/wife took place prior to coming into force of the Act of 2005, but such denial continued even thereafter. As the act complained of by the Petitioner is a continuing breach of legal right, as envisaged in the Act of 2005, there is no question of putting a stop to the relief sought for. Therefore, giving relief to the Respondent/wife for such continuous breach of the legal right, which has accrued to her, would not amount to giving retrospective effect to the Provisions of the Act of 2005. In view of this discussion, I have no hesitation to hold that continued deprivation of economic or Financial resources and continued prohibition or denial of access for the shared household to the aggrieved person is a domestic violence and the protection under the Act of 2005 will be available to the Respondent/wife who was driven out from her husband's shared household prior to coming into effect of the Act of 2005, but the deprivation continued even after the Act came into force.

VII MISCELLANEOUS

Casual labourers' entitlement for maternity leave

L. Kannaki v. *The Secretary to Government, Animal Husbandry and Fisheries Department, Chennai*[74] the Madras High Court upheld the right of a casual labourer to avail maternity leave. The petitioner who joined as casual labourer in the cattle breeding farm of government on 30.05.1988 and worked up to 04.05.1996 has been denied maternity leave and thrown out of the employment.

The court by referring to *Municipal Corporation of Delhi* v. *Female Workers (Muster Roll)*[75] held that the Maternity Benefit Act, 1961 is applicable not only to regular employees but also to those who are engaged on casual basis or on muster

71 1993 (3) SCC 4.
72 2011 ALL MR (Cri) 224.
73 *Supra* note 70 at para 8.
74 (2012) 3 LLJ 292 Mad.
75 2000 (3) SCC 224.

roll on daily-wage basis. As per the court, the denial of maternity leave and employment was unjust, illegal and violative of articles 14 and 21 of the Constitution. The court also ordered that since the services of other employees who joined the department as casual labourers along with the petitioner have been regularized, the petitioner should not only be reinstated in the services with all monetary benefits, but her service should also be regularized. Through this judgment the court has elucidated that basic human rights of woman are supreme and must be preserved at all costs. Granting maternity leave is a fundamental duty of an employer and availing of such benefit should not result in loss of employment, sonority and other allowances/benefits.

Mental and sexual harassment at workplace

S. Thippeswamy v. *Mangalore University, Mangalagangothry*,[76] the High Court of Karnataka upheld the punishment of compulsory retirement imposed on the petitioner by the university syndicate as the alleged behavior of the petitioner amounted to violation of code of conduct evolved by the National Commission for Women under section 10 of the National Commission for Women Act, 1990. The petitioner was an associate professor and the principle investigator of a project. Two of his junior research fellows complained of long and consistent misbehaviour coupled with sexual and mental harassment from the part of the petitioner. By quoting a series of judgments delivered by the apex court, the High Court of Karnataka reiterated that sexual harassment at the place of work results in violation of the fundamental right to gender equality and right to life and liberty. Sexual harassment of women at the workplace undoubtedly is a form of gender discrimination against women. Courts are under a constitutional obligation to preserve all facets of gender equality including prevention of sexual harassment and abuse.

Validity of marriage contracted with minor girl

The High Court of Madras in *T. Sivakumar* v. *The Inspector of Police*,[77] confronted *inter alia* with the questions whether in view of the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act), a minor girl, who claims to have solemnized her marriage with another person would be a juvenile in conflict with law and whether in violation of the procedure mandated by the JJ Act, the court dealing with a writ of *habeas corpus*, has the power to entrust the custody of the minor girl to a person, who contracted the marriage with the minor girl and thereby committed an offence punishable under section 18 of the HMA and section 9 of the Prohibition of Child Marriage Act, 2006 (PCMA).

Juvenile in conflict with law is the one who is alleged to have committed an offence and has not completed eighteen years of age as on the date of commission of such offence. When a minor girl enters into a marriage, she is not an offender under any of the provisions of the PMCA. According to the court, the minor girl is not an offender under section 18 of the HMA too.[78] In a child marriage, the minor

76 2011 (4) KCCRSN 403.

77 AIR 2012 Mad 62: III (2011) DMC 566.

78 S. 8 HMA reads: Every person who procures a marriage of himself or herself..... is punishable.

girl does not procure the marriage and instead her marriage is procured by the others. Thus, such a minor girl is not a juvenile in conflict with law. In other words, a minor girl whose marriage has been contracted in violation of section 3 of the PCMA is not an offender either under section 9 of the Act or under section 18 of the HMA and so she is not a juvenile in conflict with law.

As to the question, whether the principles of sections 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl admittedly in contravention of the provisions of the HMA, the court answered that sections 17 and 19 of the Guardians and Wards Act can also be taken for guidance while deciding the question of custody of a minor girl whose marriage has been celebrated.

Other observations made by the court in the instant case are also very significant. For instance, disapproving the verdict in *G. Saravanan* v. *The Commissioner of Police, Trichy City*,[79] the court ruled that the marriage of a minor girl shall certainly be affected by section 3 of the PCMA and thus voidable. The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent court under section 3 of the PCMA. Such a marriage is not a 'valid marriage' *stricto sensu* as per the classification but it is 'not invalid'. The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage *stricto sensu*, instead he will enjoin only limited rights. Further, the adult male contracting party to a child marriage with a female child shall not be the natural guardian of the female child in view of the implied repealing of section 6(c) of the Hindu Minority and Guardianship Act, 1956. Before the introduction of the PCMA the courts were almost uniform in their opinion that the husband of a minor child is entitled for the custody of the minor wife. In the post PCMA scenario, there is a considerable change in the approach of various high courts. Courts are declining to grant custody of the minor wife to the husband on the ground that the husband is an offender.[80] In view of the said position, the Madras High Court was of the view that it will be very safe to hold that after the advent of the PCMA since the male contracting party to a child marriage does not attain the full status of the husband until the child attains the eligible age, like a husband of a full-fledged valid marriage and consequentially since he is not the guardian of the female child of such child marriage, he is not entitled for the custody of the minor. If a different interpretation is adopted to say that such husband is entitled for the custody of minor wife will only defeat the very object of the Act.The male contracting party of a child marriage shall not be entitled for the custody of the female child whose marriage has been contracted by him even if the female child expresses her desire to go to his custody. In the present case, the minor girl had been kidnapped and been married by the respondent no. 2. According to him, he was a divorcee, the first wife having committed suicide. However, he described himself to be unmarried in the marriage registration form. The court could hardly find any welfare of the minor girl in his association.

79 2011 2 L.W. (Cri.) 114.

80 See *Avinash Singh* v. *State of Karnataka* (CDJ 2011 KAR. HC 373.

The court also examined the overriding effect of PCMA. As the court rightly observed, PMCA is a special enactment for the purpose of effectively preventing the evil practice of solemnization of child marriages and also to enhance the health of the children and the status of women, whereas, the HMA is a general law regulating the Hindu marriages. Therefore, PMCA, being a special law, will have overriding effect over the HMA to the extent of any inconsistency between these two enactments.

In the present case, the court interpreted PCMA in the light of the laws relating to Hindus since the parties to the case were Hindus. The court could not examine PMCA in the context of laws relating to other religions. However, the judgment is highly laudable since it interpreted PCMA in a way to make it effective.

It is widely accepted world over that child marriage is a human rights violation. Marriage at a very young age has grave health consequences for both the young women and their children. Even with the enactment of PCMA the evil menace of child marriages has not been eradicated in toto. Instead minor girls and boys induced by infatuation elope resulting in large number of *habeas corpus* petitions filed by the parents. There must be wide publicity of the penal provisions of the PCMA so as to sensitize the minor children and their parents.

VIII CONCLUSION

Although violence against women is a global problem and there are certain attempts in the various legal instruments to recognize it as an issue of human rights abuse concrete steps are yet to be taken by the poily makers to eliminate this gender-based violence. The judgments analyzed above elucidate the judicial endeavour in recognizing the violence against women as an abuse of human rights. The apex court has inclined to take a broad view of the definition of 'wife' having regard to the social object of section 125 Cr PC in *Chanmuniya* v. *Chanmuniya Virendra Kumar*.[81] In *Sandhya Manoj Wankhad,*[82] the apex court has further expanded the ambit of DV Act, 2005 by holding that female members of husband's family could be made party to the proceeding under the DV Act, 2005. The constitution of panel on sex workers and the judicial directions issued in *Budhadev Karmasker*[83] would hopefully be helpful in motivating the sex workers to give up sex industry and rehabilitate themselves in more dignified professions. *The Matter of Matrimonial Disputes* v. *State of U.P.*[84] assumes much significances as it lays down guidelines to adopt mediation in matrimonial disputes. The judgement of *T. Sivakumar*[85] would certainly make PCMA more effective by preventing the evil menace of child marriages. These decisions undoubtedly would enhance the social and legal status of women and help to achieve greater gender equality.

81 *Supra* note 17.
82 *Supra* note 63.
83 *Supra* note 60.
84 *Supra* note 52.
85 *Supra* note 77.