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READING MATERIAL

Volume - 2

TRAINING OF EMPANELLED LAYERS IN JHARKHAND ON VIOLENCE AGAINST WOMEN & VIOLENCE AGAINST CHILD

19th & 20th September, 2015 (Saturday & Sunday)
at Jamshedpur

Organized by
Jharkhand State Legal Services Authority (JHALSA)
in association with
Lawyer's Collective Women's Rights Initiative, (LCWRI)
&
District Legal Services Authority, Jamshedpur

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TRAINING OF EMPANELLED LAYERS IN JHARKHAND ON VIOLENCE AGAINST WOMEN

&

VIOLENCE AGAINST CHILD

Date : 19th-20th September, 2015 (Saturday-Sunday)

Venue : Civil Court, Jamshedpur

Organised by :

JHARKHAND STATE LEGAL SERVICES AUTHORITY

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LAWYERS COLLECTIVE WOMEN'S RIGHTS INITIATIVE (LCWRI)

&

DISTRICT LEGAL SERVICES AUTHORITY, JAMSHEDPUR

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JUDGMENTS

IN THE SUPREME COURT OF INDIA

AIR India Vs. Nergesh Meerza and Ors.

Writ Petitions Nos. 3045, 1107, 2458 and 1624-1628/1981

Equivalent Citation: MANU/SC/0688/1981, AIR1981SC1829, 1981LabIC1313, (1981) IILLJ314SC, 1981(3)SCALE1275, (1981)4SCC335, [1982]1SCR438, 1981(2)SLJ349(SC)

Decided On: 28.08.1981

Appellants: AIR India Vs. Nergesh Meerza and Ors.

Hon'ble Judges/Coram: S. Murtaza Fazal Ali, A. Vardarajan and A.N. Sen, JJ.

Counsels: For Intervenor: Niranjan Alva, Narayan Netter, G.B. Pai, O.C. Mathur and Narain, Advs

Subject: Service

Subject: Constitution

Authorities Referred: Corpus Juris Secundum, Vol. 16 (PP. 236-237)

Acts/Rules/Orders: Constitution of India - Article 14, Constitution of India - Article 15(1), Constitution of India - Article 16, Constitution of India - Article 16(2), Constitution of India - Article 19; Equal Remuneration Act, 1976 - Section 4, Equal Remuneration Act, 1976 - Section 16; Industrial Disputes Act, 1947 - Section 18, Industrial Disputes Act, 1947 - Section 19; Air Corporations Act, 1953 - Section 45(2); Indian Airlines Corporation Regulations - Regulation Regulation 12

Cases Referred: General Manager, Southern Railway v. Rangachari,; State of Punjab v. Joginder Singh,; Sham Sunder v. Union of India,; Ramesh Prasad Singh v. State of Bihar,; United States v. James Griggs Raines, 4 L Ed 2d 524, 362 US 17 (1960) South Indian Bank Ltd. v. A.R. Chacko,; Md. Qasim Larry, Factory Manager, Sasamusa Sugar Works v. Muhammad Samsuddin,; Life Insurance Corporation of India v. D.J. Bahadur,; State of West Bengal v. Anwar Ali Sarkar,; Mary Ann Turner v. Department of Employment Security, 46 L Ed 2d 181, 423 US 44 (1975); Maneka Gandhi v. Union of India,; Guest, Keen, Williams Pvt. Ltd. v. P.J. Sterling,; State of Mysore v. S.R. Jayaram,; State of Mysore v. M.N. Krishna Murthy,; Kathi Raning Rawat v. State of Saurashtra,; All India Station Masters' & Assistant Station Masters' Association v. General Manager, Central Railways,; Western U.P. Electric Power & Supply Co. Ltd. v. State of U.P.,; State of Gujarat v. Shri Ambica Mills Ltd.,; State of Jammu & Kashmir v. Triloki Math Khosa,; Navy, Army and AIR Force Institutes v. Varley, (1977) 1 All ER 840, (1977) 1 WLR 149; Yusuf Abdul Aziz v. State of Bombay and Husseinbhoy Laljee,; Miss C.B. Muthamma v. Union of India,; General Electric Company v. Martha v. Gilbert, 50 L Ed 2d 343, 429 US 125 (1976); A.S. Krishna v. State of Madras,; Cleveland Board of Education v. Jo Carol La Fleur, 39 L Ed 2d 52 414 US 632 (1971); Sharron A. Frontiero v. Elliot L. Richardson, 36 L Ed 2d 533, 411 US 677 (1973); City of Los Angeles, Department of Water & Power v. Maris Manhart, 55 L Ed 2d 657, 435 US 702 (1978); Bombay Labour Union v. International Franchises Pot. Ltd.,; Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh,; E.P. Royappa v. State of Tamil Nadu,; State of Andhra Pradesh v. Nalla Raja Reddy,; Imperial Chemical Industries (India) Pot. Ltd. v. Workmen,; Lala Hari Chand Sarda v. Mizo District Council,;

Case Note: Service - validity - Article 14 of Constitution of India - validity of Service Regulations 46 and 47 was in question - Regulations 46 and 47 contended as discriminative and ultra vires by respondents - Regulation 46 related to termination of service of air hostesses (AH) upon attaining age of 35 years or on marriage if takes place within 4 years of service or on first pregnancy whichever occurs earlier - condition 'or on first pregnancy whichever

occurs earlier' is unconstitutional, void and violative of Article 14 so liable to be deleted - Regulation 47 provides for extension of service of AH at option of Managing Director (MD) - it conferred wide and uncontrolled power on MD and suffered from excessive delegation of power so violative of Article 14 - Regulation 47 liable to be struck down.

JUDGMENT

S. Murtaza Fazal Ali, J.

1. Transferred Case No. 3 of 1981 and the writ petitions filed by the petitioners raise common constitutional and legal questions and we propose to decide all these cases by one common judgment. So far as Transferred Case No. 3/81 is concerned, it arises out of writ petition No. 1186/1980 filed by Nergesh Meerza and Ors. Respondent No. 1 (Air India) moved this Court for transfer of the writ petition filed by the petitioners, Nergesh Meerza & Ors in the Bombay High Court to this Court because the constitutional validity of Regulation 46(1)(c) of Air India Employees Service Regulations (hereinafter referred to as 'A.I. Regulations') and other questions of law were involved. Another ground taken by the applicant-Air India in the transfer petition was that other writ petitions filed by the Air Hostesses employed by the Indian Airlines Corporation (hereinafter referred to as "I.A.C.") which were pending hearing in this Court involved almost identical reliefs. After hearing the transfer petition this Court by its Order dated 21.1.81 allowed the petition and directed that the transfer petition arising out of writ petition No. 1186/80 pending before the Bombay High Court be transferred to this Court. By a later Order dated 23.3.1981 this Court directed that the Transferred case may be heard alongwith other writ petitions. Hence, all these matters have been placed before us for hearing. For the purpose of brevity, the various petitions, orders, rules, etc. shall be referred to as follows:

   (1) Air India as "A.I."

   (2) Indian Airlines Corporation as "I.A.C."

   (3) Statutory regulations made under the Air India Corporation Act of 1953 or the Indian Airlines Corporation Act of 1953 would be referred to as 'A.I. Regulation' and 'I.A.C. Regulation' respectively.

   (4) Nergesh Meerza and Ors. as 'petitioners'.

   (5) Declaration by the Central Government under Equal Remuneration Act as "Declaration" and Equal Remuneration Act 1976 as '1976 Act'.

   (6) Air Corporation Act of 1953 as '1953 Act.'

   (7) Justice Khosla Award as 'Khosla Award' and Justice Mahesh Chandra Award as 'Mahesh Award'.

   (8) Assistant Flight Pursers as 'AFPs'

   (9) Air Hostess as 'A.H.' and Air Hostesses a 'AHs'.

   (10) Air India Cabin Crew as 'A.I. Crew' and Indian Airlines Corporation Cabin Crew as 'IAC Crew'

   (11) Flight Steward as "F.S.

2. Before dealing with the facts of the case and the central constitutional controversies and substantial points of law involved in these petitions, it may be necessary to give a brief survey of the history which laid to the formation of the two Corporations, viz., A.I. and I.A.C.

3. By virtue of Section 3 of the 1953 Act, the Central Government by a notification published in the official Gazette created two Corporations known as Indian Airlines and Air India

International. Section 3(2) provided that each of the two Corporations would be a body corporate having perpetual succession and a common seal subject to the provisions of the Act to acquire and hold property. Section 4 of the 1953 Act provides for the Constitution of the Corporations and Section 5 deals with the conditions of service of the Chairman and other Directors of the Corporations. Section 7 defines the various functions of the Corporations. Further details regarding the provisions of Section 7 would be dealt with later wherever necessary. Section 8 deals with the appointment of the officers and other employees of the Corporations. Sections 10 to 15 deal with finance, accounts and audit. Section 34 defines the control which the Central Government may exercise over the performance by the Corporation of its functions. The other provisions of the (953 Act are not germane for the purpose of this case.

4. It is manifest therefore from a perusal of the various provisions of the 1953 Act that A. I. and I. A. C. were established as a single entity which was divided into two units in view of the nature of the duties that each Corporation had to perform. We have mentioned this fact particularly because one of the contentions of Mr. Nariman, counsel for A.I., was that A.I. itself was a separate and distinct entity and could not be equated with I.A.C. The provisions of the Act completely nullify this argument and clearly show that the two Corporations formed one single unit to be controlled by the Central Government under the 1953 Act. It may be that the two Corporations may have different functions to perform-A.I. operating international flights and the other (IAC) operating domestic flights within the country. This fact alone, however, would not make the two Corporations absolutely separate entities. The two Corporations were part of the same organisation set up by the 1953 Act. This fact is fortified by subsequent events such as when disputes arose between the employees of the two Corporations, the dispute with respect to A.I. was referred to Justice Khosla and formed the basis of the Khosla Award. Similarly, dispute between the I.A.C. and its employees was referred to Justice Mahesh Chandra where A.I. filed an application on behalf of the Air Corporation Employees Union (ACEU). The aforesaid Union represented both the A.I. and I.A.C. A prayer of the ACEU was allowed by the Tribunal by its order dated 1.3.1971 (vide p. 1191 of the Gazette of India-Section 3(ii) dated 25.3.72) for being impleaded as a party to the Reference. As a result of the allowing of the application of the ACEU the scope of the Reference was widened to include the demands of I.A.C. & A.I. This, therefore, clearly shows that the two Corporations formed one single entity and whenever any dispute arose they tried to get the dispute settled by a common agency. Thus, the two Corporations before the Industrial Tribunals did not take any stand that they were different entities having two separate individualities. The initial argument of Mr. Nariman on this point is, therefore, overruled at the threshold. In fact, Mr. Nariman having indicated the point did not choose to pursue it further because the sheetanchor of his argument was that so far as AHs in the two Organisations are concerned they constitute a sex-based recruitment and, therefore, a completely separate and different category from the class of AFPs, in that, their service conditions, the mode of recruitment, the emoluments, the age of retirement of these two classes were quite different and, therefore, the question of the applicability of Article 14 did not arise. We may have to dilate on this part of the argument a little later when we examine the respective contentions advanced before us by the counsel for the parties. At the moment, we would like first to complete the history of the circumstances leading to the present controversy between the parties. It appears that there was a good deal of disparity between the pay-scales and the promotional avenues of the male cabin crew consisting of AFPs, FPs and In-flight pursers on the one hand and the AHs, Check AH, Deputy Chief AH, Addl. Chief AH and Chief AH on the other. The case of the AHs was sponsored by the ACEU which made a demand for alteration of the service regulations prejudicial to AHs. This was some time prior to 1964. The said dispute was ultimately referred to a National Industrial

Tribunal presided over by Mr. Justice G.D. Khosla who gave his award on 28.7.1965 making some recommendations in order to improve the service conditions of AHs.

5. In fact, the main issue canvassed before the Khosla Tribunal centered round the question of the age of retirement of the AHs and matters connected therewith. A perusal of the Khosla Award shows that the parties entered into a settlement with respect to all other disputes excepting the retirement benefits on which the Tribunal had to give its award. In para 252 of the Award the dispute regarding the retirement age is mentioned thus:

252. At present, the retirement age of the Air India employees is governed by Service, Regulations Nos. 46 and 47. Service Regulation No. 46 is as follows:

46. Retirement Age:

. . .

(C) An Air Hostess, upon attaining the age of 30 years or on marriage, whichever occurs earlier.

. . .

253. Regulation No. 47 provides for a further extension of the employee beyond the age of retirement for an aggregate period not exceeding two years except in the case of Air Hostesses where the services can be extended upto a period of 5 years. The extension is granted on the employee being found medically fit.

6. Thus, according to the Regulations prevalent in A.I. an AH had to retire at the age of 30 or on marriage whichever was earlier subject to an extension being granted for a period of 5 years if the employee was found to be medically fit. While considering this demand, the Tribunal seems to have upheld the view of the Corporation and found no reason to interfere with Regulation Nos. 46 and 47. In this connection, the Tribunal observed as follows:

In my view, no case has been made out for raising the age of retirement and in cases where the efficiency of the employee is not impaired, there is suitable provision under Regulation 47 for extending his service upto the age of 60. As observed above, there have been no complaints of any employee being made to retire under the provision of Clause (ii) of Regulation 46.

7. Giving the reasons for its conclusion the Award in Para 256 runs thus:

With regard to air hostesses, the contention of the Management is that they are in a special class. They have to deal with passengers of various temperaments, and a young and attractive air hostess is able to cope with difficult or awkward situations more competently and more easily than an older person with less personal prepossessions. On this point there can be no two opinions. It was also pointed out that air hostesses do not stay very long in the service of Air India, and young and attractive women are more inclined to look upon service in Air India as a temporary occupation than as a career. Most of them get married and leave the service. Counsel for the Corporation placed before me a table (Exhibit M 14) which shows that the average service of an air hostess for the 5 years between 1960 and 1965 was only two years. Only 2 air hostesses reached the age of 30. None was retired at the age of 30 and in all, 70 air hostesses resigned before reaching the age of retirement. The total number of air hostesses at present is 87 and, therefore, it will at once be seen that most of them chose to leave service of their own free will.

8. It would thus be seen that one of the dominant factors which weighed with the Tribunal was that there were only 87 AHs out of whom quite a large number retired even before reaching the age of 30 years. The Tribunal was also impressed by the argument of the Corporation that AH had to deal with passengers of various temperaments and a young attractive AH

was more suitable for doing the job. With due respect to Justice Khosla wa may not agree with some of the reasons he had given, but the position has now completely changed as more than 15 years have passed and at present AI employs as many as 737 AHs. However, the matter rested there and the AHs seem to have lost their first battle before the Khosla Tribunal.

9. Thereafter, it appears the same dispute arose between the employees of I.A.C. which, as indicated above, had to be referred to another Tribunal, viz. Mahesh Tribunal, before whom a part of the dispute between several workmen was settled but the dispute which was not settled including the question of the age of retirement of AHs was referred to this Tribunal some time in November 1970 and the Award was given on 25th February 1972. Before this Tribunal also, the stand taken by the ACEU was that the age of retirement of AH should be fixed at 45 instead of 30 or 35 and the bar of marriage should be removed. The A.I., however, stuck to its original stand that having regard to the strenuous work to be put in by an AH, the age of retirement should be kept at 30. In this connection, the Mahesh Tribunal indicated the stand of the parties thus:

The ACEU contends that age of retirement of air hostesses should be fixed at 45 instead of 30 or 35 as at present; that this demand for increase in the age of retirement is in accordance with Geneva Convention and that the bar of marriage on air hostesses should be removed.

The Air India's contention is that the nature and underlying object of the job of an air hostess requires that their age of retirement should be kept at 30 as at present. It has also been pointed out that after 30, the General Manager of the Corporation has the discretion to extend the age of retirement of an air hostess by one year at a time till she reaches the age of 40 years. As for the retirement on Marriage, the Air India's contention is that it is necessary and a desirable provision as otherwise after marriage they will not be able to fulfil adequately the main purpose of their employment.

. . .

The rule regarding extension of service in the Settlement between the ACEU and the Indian Airlines of January 10, 1972 is better worded and it should be adopted by the Air India also in its entirety.

10. This appears to be the position upto the year 1972. Subsequent events, however, show that both A.I. and I.A.C. later realised that the Rules regarding the age of retirement and termination of Ahs work serious injustice and made several amendments. We would first take up the various amendments made by the I.A.C.

11. The previous regulation regarding the retirement age of I.A.C. AH was regulation No. 12 which may be extracted thus:

Flying Crew shall be retained in the service of the Corporation only for so long as they remain medically fit for flying duties...Further, an Air hostess shall retire from the service of Corporation on her attaining the age of 30 years or when she gets married whichever is earlier. An unmarried Air Hostess may, however, in the interest of the Corporation be retained in the service of the Corporation upto the age of 35 years with the approval of the General Manager. (Vide counter-affidavit of Wing Commander N.C. Bharma)

12. This regulation was further amended on 13.7.68 which ran thus:

An Air hostess shall retire from the service of the Corporation on her attaining the age of 30 years or when she gets married, whichever is earlier. The General Manager, may, however, retain in service an unmarried Air Hostess upto the age of 35 years.

13. Then followed the Settlement dated 10.1.1972 between the I.A.C. and ACEU under which AH was to retire at the age of 30 or on marriage. The General Manager, however, could retain an unmarried AH in service upto the age of 40 years. Thus, the only difference that the Settlement made was that the discretion to extend the age of retirement of AH was increased by 5 years, i.e. from 35 years to 40 years. Ultimately, however, the old Regulation underwent a further change and by virtue of a Notification published in the Gazette of India on 12.4.1980 in Part III, Section 4, para 3 of the amended Regulation 12 was further amended thus:

An Air Hostess shall retire from services of the Corporation upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier.

14. This amendment seems to have made a slight improvement in the condition of service of AHs inasmuch as the age of retirement was fixed at 35 years and the bar of marriage was restricted only to a period of four years, that is to say, if an AH did not marry within a period of 4 years of her entry into service, she could retire at the age of 35. This amendment was not in supersession of but but supplemental to the ACEU Settlement dated 10.1.1972. In other words, the position was that an AH if she did not marry within 4 years, could go upto 35 years extendable to 40 years, if found medically fit. This was the historical position so far as the retirement age of AHs working with IAC is concerned. As regards AHs employed by AI the latest position is to be found in Regulations 46 and 47, the relevant portions of which may be extracted thus:

46. Retiring Age:

Subject to the provisions of Sub-regulation (ii) hereof an employee shall retire from the service of the Corporation upon attaining the age of 58 years, except in the following cases when he/she shall retire earlier:

(c) An Air Hostess, upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier.

. . .

47. Extension of Service.

Notwithstanding anything contained in Regulation 46, the services of any employee, may, at the option of the Managing Director but on the employee being found medically fit, be extended by one year at a time beyond the age of retirement for an aggregate period not exceeding two years, except in the case of Air Hostesses and Receptionists where the period will be ten years and five years respectively.

15. Thus, an AH under A.I. was retired from service in the following contingencies:

(1) on attaining the age of 35 years ;

(2) on marriage if it took place within 4 years of the service, and

(3) on first pregnancy.

16. The age of retirement of AH could be extended upto ten years by granting yearly extensions at the option of the Managing Director. Thus, if the Managing Director chose to exercise his discretion under Regulation 47 an AH could retire at the age of 45 years.

17. Thus, the only difference regarding the service conditions pertaining to the age of retirement or termination is that whereas the services of an I.A.C. AH could be extended upto 40 years, those of the A.l. AH could be extended upto 45 years, subject to the conditions indicated above. This appears to be the position regarding the service conditions of the AHs belonging to both the Corporations which form the cornerstone of their grievances before us.

18. Having given a brief history of the dispute between the parties we would now indicate the contentions advanced before us by the petitioners (AHs) and the counsel for the Corporations and other respondents. As the service conditions of AHs employed by the two Corporations are almost identical the arguments put forward by them also are almost the same with slight variations which will be indicated by us when we deal with the arguments.

19. Mr. Atul Setalvad appearing for the AHs in Transfer case No. 3 of 1981 has submitted some important and interesting points of law which may to summarised as follows:

    (1) The AHs employed by one Corporation or the other form the same class of service as the AFPs and other members of the cabin crew. Both the male pursers and the AHs are members of the same cabin crew, performing identical or similar duties and hence any discrimination made between these two members who are similarly circumstanced is clearly violative of Article 14 of the Constitution of India.

    (2) Even if the AHs are a separate category or class, there is an inter se discrimination between the AHs posted in the United Kingdom and those serving in the other Air India flights.

    (3) That the AHs have been particularly selected for hostile discrimination by the Corporation mainly on the ground of sex or disabilities arising from sex and therefore, the regulations amount to a clear infraction of the provisions of Article 15(1) and Article 16 of the Constitution of India.

    (4) The termination of the services of AHs on the ground pregnancy or marriage within four years is manifestly unreasonable and wholly arbitrary and violative of Article 14 of the Constitution and should, therefore, be struck down.

    (5) The contention that a woman in view of strenuous work that she is called upon to perform, becomes tired or incapable of doing the work of catering to the passengers is based on pure speculation and being against the well established facts and norms set up by the Geneva Convention is clearly inconsistent with the concept of emancipation of women. No material has been placed before the Court to prove that the efficiency of the AHs is in any way impaired at the age of 40 or 45 years so as to make a gross discrimination between the male pursers and AHs.

    (6) Apart from the discrimination regarding the age of retirement, the AHs have been completely deprived of promotional opportunities available to the male members of the cabin crew.

20. For the aforesaid reasons, it was contended that Regulations 46 and 47 of Air-India Employee's Service Regulations and Regulation No. 12 of the Indian Airlines (Flying Crew) Service Regulations must be struck down as being discriminatory and ultra vires.

21. The counsel appearing for the petitioners in the writ petitions more or less adopted the arguments of Mr. Atul Setalvad in one form or the other.

22. In answer to the contentions raised by Mr. Setalvad and the counsel who followed him, Mr. Nariman appearing for A.I. and Mr. G.B. Pai for the I.A.C., adumbrated the following propositions:

    (1) That having regard to the nature of job functions, the mode of recruitment of AHs, their qualifications, their promotional avenues and the circumstances in which they retire AHs fall within a category separate from the class to which the pursers belong and if AHs from a separate class or category by themselves, then there can be no question of discrimination or contravention of Article 14 which would apply if there is discrimination between the members of the same class inter se.

(2) The recruitment of the AHs is actually sex based recruitment made not merely on the ground of sex alone but swayed by a lot of other considerations: hence Article 15(2) of the Constitution was not attracted. To buttress this argument reliance was placed by Mr. Nariman on the Declaration made by the Government under the 1976 Act.

(3) As the conditions mentioned in Regulation 46 of A.I. Regulations and 12 of the IAC Regulations have been upheld by the Khosla and Mahesh Awards, they have statutory force and unless they are per se arbitrary or discriminatory, the court ought not to interfere with them particularly when those two Awards are binding on the parties even though their period may have expired.

(4) Having regard to the circumstances prevailing in India and the effects of marriage, the bar of pregnancy and marriage is undoubtedly a reasonable restriction placed in public interest.

(5) If the bar of marriage or pregnancy is removed, it will lead to huge practical difficulties as a result of which very heavy expenditure would have to be incurred by the Corporations to make arrangements for substitutes of the working AHs during their absence for a long period necessitated by pregnancy or domestic needs resulting from marriage.

(6) The court should take into consideration the practical aspects of the matter which demonstrate the fact that a large number of AHs do not stick to the service but leave the same well before the age of retirement fixed under the Regulation.

23. Finally, as a very fair and conscientious counsel Mr. Nariman placed a few proposals which might mitigate the inconvenience caused to the AHs and remove a large bulk of their grievances. It was submitted by Mr. Nariman that he would in all probability persuade the management to accept the proposals submitted by him which will be referred to when we deal with the contentions of the parties at length.

24. We shall now proceed to deal with the respective contentions advanced before us indicating the reply of the respondents to the arguments raised by the petitioners.

25. It was vehemently argued by Mr. Setalvad that having regard to the nature of the duties and functions performed during the flight by AFPs and AHs both the groups constitute the same class or category of service under the Corporation and hence any difference or discrimination between the members in the same class is clearly violative of Article 14 of the Constitution. A second limb of the argument which flows from the first contention was that the AHs were selected for hostile discrimination by the Corporation in the matter of retirement, termination and promotional avenues which was manifestly unreasonable so as to attract Article 14 of the Constitution.

26. The counsel for the Corporation, however, countered the arguments of the petitioners on two grounds:

(1) That in view of the mode of recruitment, qualifications, retiral benefits and various other factors the AHs constitute a special category or class of employees different from the AFPs and, therefore, they could not be in any way equated with them.

(2) That in fact the recruitment of AHs was sex-based and swayed by a number of other considerations and not based on sex only.

27. In order to appreciate the arguments of the parties on this point it may be necessary to refer to the law on the subject which is now well settled by a long course of decisions of this Court. It is undisputed that what Article 14 prohibits is hostile discrimination and not reasonable classification. In other words, if equals and un-equals are differently treated, no

discrimination at all occurs so as to amount to an infraction of Article 14 of the Constitution. A fortiori if equals or persons similarly circumstanced are differently treated, discrimination results so as to attract the provisions of Article 14.

28. In our opinion, therefore, the inescapable conclusion that follows is that if there are two separate and different classes having different conditions of service and different incidents, the question of discrimination does not arise. On the other hand, if among the members of the same class, discriminatory treatment is meted out to one against the other, Article 14 is doubtless attracted.

29. In *Kathi Ratting Rawat v. The State of Saurashtra:* 1952CriLJ805 Sastri, C.J. observed thus:

Though the differing procedures might involve disparity in the treatment of the persons tried under them, such disparity is not by itself sufficient, in my opinion, to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands as, for instance, when it amounts to a denial of a fair and impartial trial.

30. Fazal Ali J. as he then was, pithily observed as follows:

I think that a distinction should be drawn between 'discrimination without reason' and 'discrimination with reason'. The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances.

31. Similar observations were made by Mukherjee, J. who remarked thus:

The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the legislation, that necessity of judicial interference arises.

32. The most apposite decision on the subject is the case of *All India Station Master's & Assistant Station Master's Association and Ors. v. General Manager, Central Railways and Ors.* : [1960]2SCR311 where the law on the subject was succinctly stated by Das Gupta, J. who speaking for the Court as follows:

So multifarious are the activities of the State that employment of men for the purpose of these activities has by the very nature of things to be in different departments of the State and inside each department, in many different classes. For each such class there are separate rules fixing the number of personnel of each class, posts to which the men in that class will be appointed, questions of seniority, pay of different posts, the manner in which promotion will be effected from the lower grades of pay to the higher grades, e.g., whether on the result of periodical examination or by seniority, or by selection or on some other basis and other cognate matters. Each such class can be reasonably considered to be a separate and in many matters independent entity with its own rules of recruitment, pay and prospects and other conditions of service which may vary considerably between one class and Anr.

. . .

It is clear that as between the members of the same class the question whether conditions of service are the same or not may well arise. If they are not, the question of denial of equal opportunity will require serious consideration in such cases. Does the concept of equal opportunity in matters of employment apply, however, to variations in provisions as between members of different classes of employees under the State ? In our opinion, the answer must be in the negative.

33. The same view was reiterated by another decision of this Court in *The General Manager, Southern Railway v. Rangachari* : (1970)IILLJ289SC where Gajendragadkar, J. pointed out thus:

> Would it, for instance, be open to the State to prescribe different scales of salary for the same or similar posts, different terms of leave or superannuation for the same or similar post? On the narrow construction of Article 16(1) even if such a discriminatory courses are adopted by the State in respect of its employees that would not be violative of the equality of opportunity guaranteed by Article 16(1). Such a result could not obviously have been intended by the Constitution....The three provisions form part of the same constitutional code of guarantees and supplement each other.
>
> If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.
>
> . . .
>
> It is common ground that Article 16(4) does not cover the entire field covered by Article 16(1) and (2). Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by Article 16(1) and (2) do not fall within the mischief of non-obstante clause in Article 16(4).
>
> (Emphasis ours)

34. In *State of Punjab v. Joginder Singh*, Ayyangar, J while delivering the majority judgment clearly elucidated the various spheres where Article 14 could operate and observed thus:

> As we have stated already, the two Services started as independent services. The qualifications prescribed for entry into each were different, the method of recruitment and the machinery for the same were also different and the general qualifications possessed by and large by the members of each class being different, they started as two distinct classes. If the government order of September 27, 1957, did not integrate them into a single service, it would follow that the two remained as they started as two distinct services. If they were distinct services, there was no question of inter se seniority between members of the two services, nor of any comparison between the two in the matter of promotion for founding an argument based upon Article 14 or Article 16(1). They started dissimilarly and they continued dissimilarly and any dissimilarity in their treatment would not be a denial of equal opportunity, for it is common ground that within each group there is no denial of that freedom guaranteed by the two Articles. The foundation therefore, of the judgment of the learned Judges of the High Court that the impugned rules created two classes out of what was formerly a single class and introduced elements of discrimination between the two, has no factual basis if, as we hold, the order of September 27, 1957, did not effectuate a complete integration of the two Services, On this view it would follow that the impugned rules cannot be struck down as violative of the constitution. (Emphasis supplied)

35. The same dictum was followed by this Court in a later case- *Sham Sunder v. Union of India and Ors.* : (1970)ILLJ6SC -where it was pointed out that Article 16(1) would be attracted only if there is a breach of equality between members of the same class of employees and Article 14 did not contemplate equality between members of separate or independent classes. In this connection Bachawat, J. held thus:

> For purposes of promotion, all the enquiry-cum-reservation clerks on the Northern Railway form one separate unit. Between members of this class there is no discrimination and no denial of equal opportunity in the matter of promotion....Equality of opportunity in matters

of employment under Article 16(1) means equality as between members of the same class of employees and not equality between members of separate, independent classes.

36. The same principle was reiterated by this Court in *Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P. and Anr.* : [1969]3SCR865 where Shah. J. observed thus:

Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law.

37. In a recent decision of this Court in *Ramesh Prasad Singh v. State of Bihar and Ors.* : (1978) ILLJ197SC to which one of us (Fazal Ali, J.) was a party, the same principle was reiterated thus:

Equality is for equals, that is to say, those who are similarly circumstanced are entitled to an equal treatment but the guarantee enshrined in Articles 14 and 16 of the Constitution cannot be carried beyond the point which is well settled by a catena of decisions of the Court.

38. Similarly, in The State of Gujarat and *Anr. v. Shri Ambica Mills Ltd. etc.* : (1974)ILLJ121SC Mathew, J. speaking for the Court pointed out that classification is inherent in legislation and expounding the concept of equality contained in Article 14 observed thus:

It may be remembered that Article 14 does not require that every regulatory statute apply to all in the same business ; where size is an index to the evil at which the law is directed, discriminations between the large and small are permissible, and it is also permissible for reform to take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

. . .

Classification is inherent in legislation. To recognize marked differences that exist in fact is living law: to disregard practical differences and concentrate on some abstract identities is lifeless logic. (Morey v. Doud U.S. 457, 472)

39. In State of *Jammu and Kashmir v. Triloki Nath Khosa and Ors.* : [1974]3SCR760 it was clearly pointed out that equality is only for equals and even in cases of promotion Article 14 would apply only if promotional facility is denied to equals within the same class. In this connection, Chandrachud, J. (as he then was) pithily observed thus:

But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.

Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class.

In *United States v. James Griggs Raines* 4L Ed 2d 524 it was held that one to whom application of statute is constitutional cannot be heard to attack the statute on the ground that impliedly if it applied to other persons it might be unconstitutional. These observations, in our opinion, furnish a complete answer to the argument of the petitioners that Article 14 is violated in the instant case.

40. Similar observations were made in Vol. 16 (PP. 236-237) of Corpus Juris Secundum which are extracted below:

A person ordinarily is precluded from challenging the constitutionality of governmental action by invoking the rights of others and it is not sufficient that the statute or administrative regulation is unconstitutional as to other persons or classes of persons; it must affirmatively appear that the person attacking the statute comes within the class of persons affected by it.

41. Thus, from a detailed analysis and close examination of the cases of this Court starting from 1952 till today, the following propositions emerge:

(1) In considering the fundamental right of equality of opportunity a technical, pedantic or doctrinaire approach should not be made and the doctrine should not be invoked even if different scales of pay, service terms, leave, etc., are introduced in different or dissimilar posts.

Thus, where the class or categories of service are essentially different in purport and spirit, Article 14 cannot be attracted.

(2) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases Article 14 will be completely out of the way.

(3) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(4) Where equals and unequals are treated differently, Article 14 would have no application.

(5) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(6) In order to judge whether a separate category has been carved out of a class of service, the following circumstances have generally to be examined:

(a) the nature, the mode and the manner of recruitment of a particular category from the very start,

(b) the classifications of the particular category.

(c) the terms and conditions of service of the members of the category,

(d) the nature and character of the posts and promotional avenues,

(e) the special attributes that the particular category possess which are not to be found in other classes, and the like.

42. It is difficult to lay down a rule of universal application but the circumstances mentioned above may be taken to be illustrative guidelines for determining the question.

43. Applying these tests we now proceed to examine the correctness of the first contention advanced by Mr. Atul Setalvad and counsel for other petitioners and countered by the Corporations.

44. A very large number of affidavits and documents have been filed by the parties in support of their respective cases but in view of the arguments of the parties, the matter falls, in our opinion, within a very narrow compass and we shall refer only to those affidavits and documents which are germane for deciding the case on the basis of contentions advanced before us.

45. In order to test whether the category of AHs constitutes the same class as AFPS or is a separate category by itself, we shall detail the materials placed before us by the parties on this aspect of the matter. We shall first deal with the case of AHs employed by A.I.

46. To begin with, it is not disputed that at the initial recruitment a classification for appointment of AH and AFP is essentially different. For instance, while in the case of AFP the necessary qualifications are as follows:

(1) SCC or its equivalent

(2) Minimum three years' training experience in any Airline or three years Diploma in Catering from a recognised Institute or a Graduate.

(3) There is no requirement that AFP should be unmarried.

(4) The AFP has to appear for a written I.C. test.

47. As against these basic requirements for entry into service for the class known as 'AFP', the requirements for AHs are as follows:

(1) SCC or its equivalent

(2) AH must be unmarried

(3) No other requirement is needed for entry into service so far as AH is concerned.

48. Mr. Setalvad however, argued that both AHs and AFPs being members of the same cabin crew must be taken to belong to the same class. This argument fails to take into consideration the fact that if at the threshold the basic requirements of the two classes, viz., AFP and AH, for entry into service are absolutely different and poles apart even though both the classes may during the flight work as cabin crew, they would not become one class of service.

49. Secondly, while AFP starts with a grade of Rs. 385-535, the AH starts her career with the grade of Rs. 485-25-560-40-770. This is also a very material difference which points to the AHs being a separate category both in respect qualifications at the entry into service and also in respect of starting salaries.

50. Another important distinction between AFPs and AHs is that whereas the total number of posts in AJ. of AFPs are 494, in the case of AHs is 737. Thus, to begin with, the two classes differ in qualifications, in grades and also in the number of posts.

51. The matter does not rest there. Even the promotional avenues or channels of the two categories of service are quite different and so is their seniority. So far as the AFPs are concerned, the hierarchy is as follows:

(1) A.F.P.

(2) F.P. (Grade: Rs. 485-25-560-40-720-50-1020)

52. The total number of posts of FPs are 372. Thus, by and large AH starts almost in the same grade as F.P. which is a higher post than AFP. The third higher category is Check F.P. which has the same emoluments as FPs with the difference that the Check FPs get an additional allowance of Rs. 200/- p.m. and the number of posts are 61. The next promotional avenue is

the post of Inflight Supervisor. The total posts are 69 and the Grade is Rs. 1100-50-1600-60-1780-100-1880

	No. of Post	Grade
(5) Dy. Manager	8	1400-50-1600-60-1780-100-1880
(6) Manager	7	1720-60-1780-100-2180
(7) Manager, Cabin Crew.	1	1880-100-2480

53. It is asserted by the A.I. that it takes about 15 to 20 years for a F.P. to reach the promotional posts of Inflight Supervisor and 25 years to reach the post of Dy. Manager. As against this, the hierarchy of AH is as follows:

	No. of Posts	Grade
1. AH	737	-
2. Check AH	72	
3. Dy. Chief AH	3	1100-50-1600-60-1780-100-1880
4. Addl. Chief AH	3	1400-50-1600-60-1780-100-1980
5. Chief AH	1	1720-60-1780-100-2180

54. It may be mentioned here that so far as the post of Dy. Chief AH is concerned, by virtue of an agreement dated 30th May 1977 between the male members of the cabin crew it was decided to phase them out. A serious exception has been taken against the Corporation for having acceded to the demand for phasing out a post belonging to the category of AHs and that too without taking the consent of AHs. A serious protest on this account was lodged by the AHs which is to be found at page 166 of Vol. II of the Paperbook, the relevant portion of which of may be extracted thus:

We do not see how any Flight Purser or Assistant Flight Purser could suggest a viable proposal regarding our promotion considering this matter is in direct relation to Air Hostesses and their future.

In the past the Flight Pursers and the Assistant Flight Pursers took away our promotional avenue to Deputy Chief Air Hostess without even consulting us.

55. At page 148 of Vol. II of the Paper Book, the affidavit details the circumstances under which the post of Dy. Chief AH was agreed to be phased out. In this connection, the following extracts are relevant:

The Association also went into the grades of different categories of cabin crew and found that while the Deputy Chief Air Hostesses functioned on board the flight only as Check Air Hostesses and/or Air Hostess her grade was much higher than that of a Flight Purser who was in a higher status or cadre and had supervisory responsibilities. The management therefore was approached by the Association resulting in the said agreement of 30.5.1977 which is already annexed hereto and marked Exhibit V above by which the category of Deputy Chief Air Hostesses was made redundant.

56. We are also unable to understand how the Management could phase out a post available to the AHs exclusively at the instant of Pursers when they had absolutely no concern with this particular post nor had the Pursers any right to persuade the Management to abolish a post which was not meant for them. The AHs have rightly protested that the Agreement to phase out the post was unilaterally taken by the Management without even consulting the AHs although they were the only ones who were most adversely affected by this decision. In para 25 of the Affidavit at P. 58 of the same volume a statement is made regarding the

circumstances under which the post of Dy. Chief AH was phased out, which is extracted below:

On May 30, 1977, as a result of discussions with the Air-India Cabin Crew Association representing the flight pursers, assistant flight pursers and air hostesses, it was decided that the category of Deputy Chief Air Hostess would be phased out, i.e., as and when the then existing Deputy Chief Air Hostesses retired or resigned the consequent vacancies would not be filled. At present the promotional avenues for Air Hostesses are the post of Additional Chief Air Hostess, Chief Air Hostess and Deputy Manager Air Hostesses.

57. Unfortunately, however, as the decision was taken as far back as 1977 and no grievance was made by the AHs before the High Court and as this is not a matter which is covered by Article 32 of the Constitution, we are unable to give any relief to the AHs on this score. We would, however, like to observe that in view of the limited promotional channels available to the AHs, the A.I. should seriously consider the desirability of restoring the post of Dy. Chief AH and thereby remove the serious injustice which has been done to the AHs in violation of the principles of natural justice.

58. We have touched this aspect of the matter only incidentally as it was mentioned in the Affidavit filed before us and appeared to us to be of some consequence.

59. Thus, from a comparison of the mode of recruitment the classification, the promotional avenues and other matters which we have discussed above, we are satisfied that the AHs from an absolutely separate category from that of AFPs in many respects having different grades, different promotional avenues and different service conditions. Finally, it may also be noted that even though the AHs retire at the age of 35 (extendable) to 45 they get retiral benefits quite different from those available to the AFPs. For instance, at pages 68-69 of Vol. II of the Paperbook the following averments may be specially noticed:

The benefits particularly the retirement benefits for male cabin crew and female cabin crew in service have been and are materially different and the expectations raised on the basis of these benefits are also viewed differently. Thus, for instance, an Air Hostess, who is recruited between the age of 19 and 25 on a higher pay scale than that of an Assistant Flight Purser and who retires after service of 10 years, is entitled to the same quantum of free air passages, which she was entitled to in the 10th year of her service, for a continuous period of five years thereafter. Similarly, an Air Hostess who has completed 15 years of service and retires thereafter is entitled to free air passages for a continuous period of 10 years thereafter on the basis of the total number of free air passages she was entitled to in the 15 years of her service. On the other hand, Assistant Flight Pursers who are recruited between the ages of 21 and 26 are entitled to retirement benefit of free air passage only if they voluntarily retire after 25 years of continuous service or on attaining the age of superannuation, i.e., 58 years. If the retirement age of air hostess were extended to 58 years, they would be subjected to the same discipline and reaction of many of the existing air hostesses in Air India is that the differentiation in retirement ages between men and women is fair and reasonable and to their advantage. In fact most of the air hostesses are anxious to complete 10 years of service and retire to become eligible for these benefits.

60. These benefits are further explained in a chart given in Ext. D which extracts the relevant portions of Air India Employees Passage Regulations, 1960. The relevant portion of the provisions may be extracted thus:

Category

Scale of Concession

Period for which concession would be admissible

(a) Employees retiring on reaching the age of 58 years or 55 years, as the case may be, provided they have rendered continuous service for a minimum period of 20 years.

One free passage every year or two free passages every alternate year and not more than two 90% free passages every alternate year and not more than two 90% rebated passages every year.

Till the death of the retired employee.

(b) Employees retiring on reaching the age of 58 years or 55 years, as the case may be, provided they have rendered continuous service for a minimum of 25 years.

Two free passages every year and not more than two 90% rebated passages every year.

Till the death of the retired employee.

(c) Employees permitted by competent authority to retire voluntarily after completion of a continuous service of not less than 25 year.

One free passage every year or two passages every alternate year and not more than two 90% rebated passages every year.

Till the death of the retired employee.

(d) Air Hostesses retiring after rendering continuous service for a minimum period of 10 years, but less than 15 years.

One free passage every year or two free passages every alternate year and one 75% rebated passage every year or two 75% rebated passages every alternate year.

For a period not exceeding five years from the date of retirement or from April 1, 1974, whichever is later.

(e) Instructress, Air Hostess/Lady Receptionists retiring after rendering continuous service for a minimum period of 15 years.

One free passage every year or two free passages every alternate year one 75% rebated passage every rebated passages every alternate year.

For a period not exceeding ten years from the date of retirement or from April 1, 1974, whichever is later.

(f) Employees retiring permanently due to medical unfitness provided that they have retired after rendering continuous service for a minimum period of 15 years.

--do--

--do--

61. Thus, although the AFPs also get retiral benefits which continue upto their death yet they get these benefits only after having put in 20 years of service or reaching the age of superannuation which in their case is 55 or 58 years; whereas; the AHs get almost the same concessions, though for a lesser period, even after serving the Corporation for a much shorter period. This is yet another distinctive feature of the separate category of AHs.

62. Having regard, therefore, to the various circumstances, incidents, service conditions, promotional avenues, etc. of the AFPs and AHs, the inference is irresistible that AHs though members of the cabin crew are an entirely separate class governed by different set of rules, regulations and conditions of service. Mr. Nariman submitted that job functions performed by the AFPs and AHs being entirely different, is also an important circumstance to prove that AHs is a class completely separate from the class of AFPs. We are, however, not impressed

with this argument because a perusal of the job functions which have been detailed in the affidavit, clearly shows that the functions of the two, though obviously different overlap on some points but the difference, if any, is one of degree rather than of kind. Moreover, being members of the crew in the same flight, the two separate classes have to work as a team, helping and assisting each other particularly in case of emergency. This aspect of the matter was highlighted by the Mahesh Award which observed thus:

> The management claims that there cannot be and should not be, any inflexibility or rigidity regarding the functions and duties of the different categories of cabin crew and the Management should have full authority and discretion as regards the interchangeability of job allocations and functions and duties of the different categories of cabin crew and for effecting from time to time such interchanges of job allocations and of functions and duties as it might think fit.
>
> . . .
>
> There is not the slightest doubt that the Cabin Crew have to work as a team as pointed out by Shri S.S. Hemmadi (AMW-5). Although there are different duties fixed for different categories, it is necessary for each category to give help and do the work of other categories for the smooth flight.
>
> (vide pp. 1259-60 of the Mahesh Award)

63. We entirely agree with the observations made in the Mahesh Award and, therefore, do not attach much importance to this circumstance relied upon by the Corporation.

64. In the same token, an additional argument advanced by Mr. Setalvad was that certain terms and conditions of AHs were palpably discriminatory and violative of Article 14. For instance, under the Regulations concerned, AHs suffered from three important disabilites-(1) their services were terminated on first pregnancy, (2) they were not allowed to marry within four years from the date of their entry into service, and (3) the age of retirement of AHs was 35 years, extendable to 45 years at the option of the Managing Director, as against the retirement age of AFPs who retired at the age of 55 or 58 years. There can be no doubt that these peculiar conditions do form part of the Regulations governing AHs but once we have held that AHs from a separate category with different and separate incidents the circumstances pointed out by the petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground. There is no complaint by the petitioners that between the separate class of AHs inter se there has been any discrimination regarding any matter. In fact, the only point raised on this aspect was that AHs employed by A.I. in U.K. have different conditions of service from AHs serving A.I. in countries other than U.K. Doubtless this distinction is there but this is really a fortuitous circumstance because A.I. was forced to comply with the local laws of U.K. in order to increase the age of retirement of AHs posted in England. Surely we cannot expect A.I. to commit an offence by violating the laws of U.K. In Navy, Army and Air Force Institutes v. Varely [1977] 1 All. ER 840 the variation between the hours of work by female employees in Nottingham and the hours of work by male employees in London was held to be valid and did not violate the principle of Equality. Phillips, J. made the following observations:

> An example which we gave the other day was of a case where all the conditions are satisfied for the operation of an equality clause-because, for instance, there is a variation in that a woman is paid less-but it is found on investigation that the employers can establish (and the burden of proof, which is a heavy burden, is always on them) that the reason the man is paid more than the woman has nothing whatever to do with sex but is due to the fact that the employers have in force a system under which a long-service employee is paid more so the variation there is due, not to a difference of sex, but to that material difference. It is

important to note there that the women, if she remains sufficiently long in the company's employ, will of course one day herself qualify to receive a long-service increment.

It is common ground in this case that the variation-that is to say, the difference in the hours worked in London and those worked in Nottingham-is not due to a difference of sex.

65. On a parity of reasoning in the instant case, therefore, the violation of Article 14 is not due to any fault of the Corporation which only seeks to abide by the local laws of United Kingdom nor could it be said that the higher retirement age was fixed for AHs posted in U.K. only on the ground of sex.

66. Coming now to the next limb of the argument of Mr. Setalvad that even if there is no discrimination inter se between AHs, the conditions referred to above are so unreasonable and arbitrary that they violate Article 14 Hand must, therefore, be struck down, we feel that the argument merits serious consideration. Before, however, we deal with the various aspects of this argument, we might mention an important argument put forward by the Corporation that the class of AHs is a sex-based recruitment and, therefore, any, discrimination made in their service conditions has not been made on the ground of sex only but due to a lot of other considerations also. Mr. Setalvad tried to rebut this argument by contending that the real discrimination is based on the basis of sex which is sought to be smoke-screened by giving a halo of circumstances other than sex. Both parties placed reliance on the 1976 Act. It may be necessary to examine the relevant section of the 1976 Act. Sub-sections (1) and (3) Section 4 of the 1976 Act may be extracted thus:

4. (1) No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the works of the opposite sex in such establishment or of a similar nature.

. . .

(3) Where, in an establishment or employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the same work or work of a similar nature are different only on the ground of sex, then the higher (in cases where there are only two rates), or, as the case may be, the highest (in cases where there are more than two rates), of such rates shall be the rate at which remuneration shall be payable, on and from such commencement, to such men and women workers:

67. There is no doubt that the statutory mandate prohibits any employer from making a distinction in wages between male and female. Had the matter rested here, there could have been no option but to accept the argument of Mr. Setalvad. It would, however, appear that the benefit conferred on the females under the 1976 Act is not absolute and unconditional. Section 16 clearly authorises restrictions regarding remuneration to be paid by the employer if a declaration under it is made by the appropriate Government, which may be extracted thus:

16. Where the appropriate Government is, on a consideration of all the circumstances of the case, satisfied that the differences in regard to the remuneration, or a particular species of remuneration, of men and women workers in any establishments or employment is based on a factor other than sex, it may, by notification, make a declaration to that effect, and any act of the employer attributable to such a difference shall not be deemed to be a contravention of any provision of this Act.

68. In the instant case, the Central Government has made a declaration by virtue of a Notification dt. 15.6.79 published in the Gazette of India, Part II-Section 3, Sub-section (ii) dated 30. 6.79, which runs thus:

New Delhi, the 15th June 1979.

S.C. 2258-In exercise of the powers conferred by Section 16 of the Equal Remuneration Act, 1976 25 of 1976) the Central Government having considered all the circumstances relating to, and terms and conditions of employment of Air Hostesses and Flight Stewards, are satisfied that the difference in regard to pay, etc. of these categories of employees are based on different conditions of service and not on the difference of sex. The Central Government, therefore, declares that any act of the employer attributable to such differences shall not be declared to be in contravention of any of the provisions of the Act.

69. Thus, the declaration is presumptive proof of the fact that in the matter of allowances, conditions of service and other types of remuneration, no discrimination has been made on the ground of sex only. The declaration by the Central Government, therefore, completely concludes the matter.

70. Even otherwise, what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. On this point, the matter is no longer res integra but is covered by several authorities of this Court. In Yusuf Abdul Aziz v. The State of Bombay and Husseinbhoy Laljee : [1954]1SCR930 sex was held to be a permissible classification. While dealing with this aspect of the matter this Court observed thus:

Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code.

71. The same view was taken by this Court in a later decision in Miss C.B. Muthamma v. U.O.I, and Ors. : [1980]1SCR668 where Krishna Iyer, J. speaking for the Court made the following observations:

We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern.

72. For these reasons, therefore, the argument of Mr. Setalvad that the conditions of service with regard to retirement, etc., amount to discrimination on the ground of sex only is overruled and it is held that the conditions of service indicated above are not violative of Article 16 on this ground.

73. This brings us now to the next limb of the argument of Mr. Setalvad which pertains to the question as to whether and not the conditions imposed on the AHs regarding their retirement and termination are manifestly unreasonable or absolutely arbitrary. We might mention here that even though the conditions mentioned above may not be violative of Article 14 on the ground of discrimination but if it is proved to our satisfaction that the conditions laid down are entirely unreasonable and absolutely arbitrary, then the provisions will have to be struck down.

74. This argument was sought to be rebutted by Mr. Nariman on the ground that the conditions mentioned above formed the subject-matter of the two Awards which have upheld the conditions to be valid. It was also contended that even though the period of the Award has expired, they continue to be binding on the parties and as these matters pertain to industrial

dispute, this Court should not disturb the settlement arrived at or the Awards given by the National Tribunals and allow the disputes to be settled in the proper forum, viz., Industrial courts. To buttress this argument, reliance was placed on certain observations in the two Awards as also some authorities.

75. In this connection, while dealing with this particular demand of the AHs, the Khosla Award observed thus:

256. With regard to air hostesses, the contention of the Management is that they are in a special class. They have to deal with passengers of various temperaments, and a young and attractive air hostess is able to cope with difficult or awkward situations more competently and more easily than an older person with less personal prepossessions. On this point there can be no two opinions. It was also pointed out that air hostesses do not stay very long in the service of Air India, and young and attractive women are more inclined to look upon service in Air India as a temporary occupation than as a career. Most of them get married and leave the service.

. . .

260. In my view, no case has been made out for raising the age of retirement and in cases where the efficiency of the employee is not impaired, there is suitable provision under Regulation 47 for extending his service upto the age of 60. As observed above, there have been no complaints of any employee being made to retire under the provision of Clause (ii) of Regulation 46....

76. Similar demands were made before the Mahesh Tribunal which have been extracted earlier. The observations of the Mahesh Tribunal may be extracted as follows:

There is no reason to have a different provision regarding the air hostesses in Air India. The social conditions in Europe and elsewhere are different from the social conditions in India. The work of an air hostess involves running hither and thither and flying at the same time. In case of an air hostess, her appearance, glamour and weight are important. The working hours are also odd. She has to walk up and down the aisles and has to be away from home for a number of days at a time. All this will not suit an Indian married woman and also places the category of an air hostess on an entirely different level from all those employed in a pharmaceutical concern. The work of an air hostess is more arduous. It seems, however, reasonable that the present practice of restricting the extension beyond 30 years to one year at a time need not be a part of the rules. The rule regarding extension of service in the settlement between the ACEU and the Indian Airlines of January 10, 1972 is better worded and it should be adopted by the Air India also in its entirety. It enables the General Manager to give extension for periods longer than one year at a time, if he considers it proper. The bar of retirement on marriage should remain.

77. With due respect to Justice Khosla, we find ourselves unable to agree with most of the observations that he has made and we shall give detailed reasons for the same a little later when we deal with the validity of the impugned regulations.

78. It is true that even though the period of the Awards may have expired yet it continues to be binding on the parties as an agreement. In *South Indian Bank Ltd. v. A.R. Chacko* : (1964) ILLJ19SC it was held that even if the Award has ceased to be operative, it would continue to be binding on the parties as a contract. In this connection, Das Gupta, J. made the following observations:

Quite apart from this, however, it appears to us that even if an award has ceased to be in operation or in force and has ceased to be binding on the parties under the provisions of

Section 19(6) it will continue to have its effect as a contract between the parties that has been made by industrial adjudication in place of the old contract.

79. The same view was taken in *Md. Qasim Larry, Factory Manager, Sasamusa Sugar Works v. Muhammad Samsuddin and Anr.* : (1964)IILLJ430SC and reiterated in *Life Insurance Corporation of India v. D.J. Bahadur and Ors.* : (1981)ILLJ1SC where the following observations were made:

It is obvious from Section 18 that a settlement, like an award, is also binding. What I emphasise is that an award, adjudicatory or arbitral, and a settlement during conciliation or by agreement shall be binding because of statutory sanction. Section 19 relates to the period of operation of settlements and awards and here also it is clear that both settlements and awards, as is evident from a reading of Section 19(2) and (6), stand on the same footing.

. . .

The power of reasoning, the purpose of industrial jurisprudence and the logic of the law presented with terse force in this pronouncement cannot be missed. The new contract which is created by an award continues to govern the relations between the parties till it is displaced by another contract.

. . .

The law is lucid and the justice manifest on termination notice or notice of change the award or settlement does not perish but survives to bind until reincarnation, in any modified form, in a fresh regulation of conditions of service by a settlement or award.

80. In view of the authorities indicated above assuming that the two awards are binding on the petitioners, the serious question for consideration is whether the agreement, which may be binding on the parties, would estop them from challenging the Regulations on the ground that the same are void as being violative of Articles 14 or 19 of the Constitution. It is well settled that there can be no estoppel against a statute much less against constitutional provisions. If, therefore, we hold in agreement with the argument of the petitioners that the provisions for termination and retirement are violative of Article 14 as being unreasonable and arbitrary, the Awards or the agreements confirmed by the Awards would be of no assistance to the Corporations.

81. We now proceed to determine the constitutional validity of the impugned Regulations. Taking the case of A.I. AHs. it would appear that their conditions of service are governed by Regulations 46 and 47, the relevant portions of which are extracted below:

46. Retiring Age:

(i) Subject to the provision of Sub-regulation (ii) hereof, an employee shall retire from the service of the Corporation upon attaining the age of 58 years, except in the following cases when/he/she shall retire earlier:

. . .

(c) An Air Hostess, upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier;

. . .

(47) Extension of Service:

Notwithstanding anything contained in Regulation 46, the services of any employee, may, at the option of the Managing Director but on the Employee being found medically fit, be extended by one year at a time beyond the age of retirement for an aggregate period not

exceeding two years except in the case of Air Hostesses and Receptionists where the period will be ten years and five years respectively.

82. A perusal of the Regulations shows that the normal age of retirement of an AH is 35 years or on marriage, if it takes place within four years of service, or on first pregnancy whichever occurs earlier. Leaving the age of retirement for the time being, let us examine the constitutional validity of the other two conditions, viz., termination if marriage takes place within four years or on first pregnancy So far as the question of marriage within four years is concerned, we do not think that the provisions suffer from any constitutional infirmity. According to the regulations an AH starts her career between the age of 19 to 26 years. Most of the AHs are not only SSC which is the minimum qualification but possess even higher qualifications and there are very few who decide to marry immediately after entering the service. Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good in the promotion and boosing up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan.

83. Having regard to these circumstances, we are unable to find any unreasonableness or arbitrariness in the provisions of the Regulations which necessitate that the AHs should not marry within four years of the service failing which their services will have to be terminated. Mr. Setalvad submitted that such a bar on marriage is an outrage on the dignity of the fair sex and is per se unreasonable. Though the argument of Mr. Setalvad is extremely attractive but having taken into consideration an overall picture of the situation and the difficulties of both the parties, we are unable to find any constitutional infirmity or any element of arbitrariness in the aforesaid provisions. The argument of Mr. Setalvad as also those who followed him on this point is, therefore, overruled.

84. Coming now to the second limb of the provisions according to which the services of AHs would stand terminated on first pregnancy, we find ourselves in complete agreement with the argument of Mr. Setalvad that this is a most unreasonable and arbitrary provision which shocks the conscience of the Court. The Regulation does not prohibit marriage after four years and if an AH after having fulfilled the first condition becomes pregnant, there is no reason why pregnancy should stand in the way of her continuing in service. The Corporations represented to us that pregnancy leads to a number of complications and to medical disabilities which may stand in the efficient discharge of the duties by the AHs. It was said that even in the early stage of pregnancy some ladies are prone to get sick due to air pressure, nausea in long flights and such other technical factors. This, however, appears to be purely an artificial argument because once a married woman is allowed to continue in service then under the provisions of the Maternity Benefit Act, 1961 and The Maharashtra Maternity Rules, 1965 (these apply to both the Corporations as their Head offices are at Bombay), she is entitled to certain benefits including maternity leave. In case, however, the Corporations feel that pregnancy from the very beginning may come in the way of the discharge of the duties by some of the AHs, they could be given maternity leave for a period of 14 to 16 months and in the meanwhile there could be no difficulty in the Management making arrangements on a temporary or ad hoc basis by employing additional AHs. We are also unable to understand the argument of the Corporation that a woman after

bearing children becomes weak in physique or in her constitution. There is neither any legal nor medical authority for this bald proposition. Having taken the AH in service and after having utilised her services for four years, to terminate her service by the Management if she becomes pregnant amounts to compelling the poor AH not to have any children and thus interfere with and divert the ordinary course of human nature. It seems to us that the termination of the services of an AH under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution. In fact, as a very fair and conscientious counsel Mr. Nariman realised the inherent weakness and the apparent absurdity of the aforesaid impugned provisions and in the course of his arguments he stated that he had been able to persuade the Management to amend the Rules so as to delete 'first pregnancy' as a ground for termination of the service and would see that suitable amendments are made to Regulation 46(i)(c) in the following manner:

(a) Regulation 46(i)(c) will be amended so as to substitute for the words "or a first pregnancy", the words "or on a third pregnancy".

(b) There will be a suitably framed Regulation to provide for the above and for the following:

(i) An air hostess having reason to believe that she is pregnant will intimate this to Air India and will also elect in writing within a reasonable time whether or not to continue in service.

(ii) If such air hostess elects to continue in service on pregnancy, she shall take leave from service for a period not later than that commencing from 90 days after conception and will be entitled to resume service only after confinement (or premature termination of pregnancy) and after she is certified by the Medical Officer of AIR INDIA as being fit for resuming her duties as an air hostess after delivery or confinement or prior termination of pregnancy. The said entire period will be treated as leave without pay subject to the air hostess being entitled to maternity leave with pay as in the case of other female employees and privilege leave under the Regulations.

(iii) Every such air hostess will submit to an annual medical examination by the Medical Officer of AIR INDIA for certification of continued physical fitness or such other specifications of health and physical condition as may be prescribed by AIR INDIA in this behalf in the interest of maintenance of efficiency.

(iv) It will be clarified that the provisions relating to continuance in service on pregnancy will only be available to married women-an unmarried woman on first pregnancy will have to retire/ from service.

85. The proposed amendment seems to us to be quite reasonable but the decision of this case cannot await the amendment which may or may not be made. We would, therefore, have to give our decision regarding the constitutional validity of the said provision. Moreover, Clause (b)(iv) above, which is the proposed amendment, also suffers from the infirmity that if an unmarried woman conceives then her service would be terminated on first pregnancy. This provision also appears to us to be wholly unreasonable because apart from being revolting to all sacred human values, it fails to take into consideration cases where a woman becomes

a victim of rape or other circumstances resulting in pregnancy by force or fraud for reasons beyond the control of the woman and having gone through such a harrowing experience she has to face termination of service for no fault of hers. Furthermore, the distinction of first pregnancy of a married woman and that of an unmarried woman does not have any reasonable or rational basis and cannot be supported.

86. In General Electric Co. v. Martha V. Gilbert 50 L. Ed. 2d 343 although the majority of the Judges of the U.S. Supreme Court were of the opinion that exclusion of pregnancy did not constitute any sex discrimination in violation of Title VII nor did it amount to gender based discrimination; three judges, namely Brennan, Marshall and Stevens, JJ. dissented from this view and held that the pregnancy disability exclusion amounted to downgrading women's role in labour force. The counsel for the Corporation relied on the majority judgments of Rehnquist, Burger, Stewart, White and Powell, JJ. while the petitioners relied strongly on the dissenting opinion. We are inclined to accept the dissenting opinion which seems to take a more reasonable and rational view. Brennan, J. with whom Marshall, J. agreed, observed as follows:

(1) the record as to the history of the employer's practices showed that the pregnancy disability exclusion stemmed from a policy that purposefully downgraded women's role in the labour force, rather than from gender-neutral risk assignment considerations.

87. Stevens, J, while endorsing the view of Brennan, J. observed thus:

The case presented only a question of statutory construction, and (2) the employers rule placed the risk of absence caused by pregnancy in a class by itself, thus violating the statute as discriminating on the basis of sex, since it was the capacity to become pregnant which primarily differentiated the female from the male.

88. In the instant case, if the Corporation has permitted the AHs to marry after the expiry of four years then the decision to terminate the services on first pregnancy seems to be wholly inconsistent and incongruous with the concession given to the AHs by allowing them to marry. Moreover, the provision itself is so outrageous that it makes a mockery of doing justice to the AHs on the imaginative plea that pregnancy will result in a number of complications which can easily be avoided as pointed out by us earlier. Mr. Setalvad cited a number of decisions of the U.S. Supreme Court on the question of sex but most of these decisions may not be relevant because they are on the question of denial of equality of opportunity. In view of our finding, however, that AHs form a separate class from the category consisting of AFPs, these authorities would have no application particularly in view of the fact that there is some difference between Articles 14, 15 and 16 of our Constitution and the due-process-clause and the 14th Amendment of the American Constitution. This Court has held that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution. While some of the principles adumbrated by the American decisions may provide a useful guide yet this Court did not favour a close adherence to those principles while applying the same to the provisions of our Constitution, because the social conditions in this country are different. In this connection in the State of West Bengal v. Anwar Ali Sarkar Mukherjea, J, observed thus:

A number of American decisions have been cited before us on behalf of both parties in course of the arguments; and while a too rigid adherence to the views expressed by the Judges of the Supreme Court of America while dealing with the equal protection clause in their own Constitution may not be necessary or desirable for the purpose of determine the true meaning and scope of Article 14 of the Indian Constitution, it cannot be denied that the general principle enunciated in many of these cases do afford considerable help and guidance in the matter.

89. Same view was taken in a later decision of this Court in A. S. Krishna v. State of Madras [1957] SCR 399 where it was held that the due process clause in the American Constitution could not apply to our Constitution. In this connection Venkatarama Ayyar, J. observed thus:

> The law would thus appear to be based on the due process clause, and it is extremely doubtful whether it can have application under our Constitution.

90. At any rate, we shall refer only to those authorities which deal with pregnancy as amounting to per se discriminatory or arbitrary. In Clevel and Board of Education v. Jo Carol La Flour 39 L. Ed 2d 52 the U.S. Supreme Court made the following observations:

> As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the boards objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.
>
> . . .
>
> While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals....
>
> While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.

91. The observations made by the U.S. Supreme Court regarding the teachers fully apply to the case of the pregnant AHs. In Sharron A. Frontiero v. Filliot L. Richardson 36 L. Ed. 2d 583 the following observations were made:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility.

92. What is said about the fair sex by Judges fully applies to a pregnant woman because pregnancy also is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Any distinction therefore, made on the ground of pregnancy cannot but be held to be extremely arbitrary.

93. In Mary Ann Turner v. Department of Employment Security 46 L. Ed. 2d 181 the U.S. Supreme Court severely criticised the maternity leave rules which required a teacher to quit her job several months before the expected child. In this connection the court observed as follows:

> The Court held that a school board's mandatory maternity leave rule which required a teacher to quit her job several months before the expected birth of her child and prohibited her return to work until three months after child birth violated the Fourteenth Amendment... the Constitution required a more individualized approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since "the ability of any particular pregnant women to continue at work past any fixed time in her pregnancy is very much an individual matter.
>
> It cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth.

We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the La Fleur case.

94. We fully endorse the observations made by the U.S. Supreme Court which, in our opinion, aptly apply to the facts of the present case. By making pregnancy a bar to continuance in service of an AH the Corporation seems to have made an individualised approach to a women's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach.

95. Similarly, very pregnant observations were made by the U.S. Supreme Court in City of *Los Angeles, Department of Water and Power v. Marie Manhart* 55 L Ed 2d 657 thus:

It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less...The question, therefore, is whether the existence or non-existence of "discrimination" is to be determined by comparison of class characteristics or individual charcteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of the statute command.

. . .

Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.

96. These observations also apply to the bar contained in the impugned regulation against continuance of service after pregnancy. In Bombay Labour Union Representing the Workmen of International Franchises Pvt. Ltd., v. International Franchises Pvt. Ltd. (2) this Court while dealing with a rule barring married women from working in a particular concern expressed views almost similar to the views taken by the U. S. Supreme Court in the decisions referred to above in that case a particular rule required that unmarried women were to give up service on marriage-a rule which existed in the Regulations of the Corporation also but appears to have been deleted now. In criticising the validity of this rule this Court observed as follows:

We are not impressed by these reasons for retaining a rule of this kind. Nor do we think that because the work has to be done as a team it cannot be done by married women. We also feel that there is nothing to show that married women would necessarily be more likely to be absent than unmarried women or widows. If it is the presence of children which may be said to account for greater absenteeism among married women, that would be so more or less in the case of widows with children also. The fact that the work has got to be done as a team and presence of all those workmen is necessary, is in our opinion no disqualification so far as married women are concerned. It cannot be disputed that even unmarried women or widows are entitled to such leave as the respondent's rules provide and they would be availing themselves of these leave facilities.

97. These observations apply with equal force to the bar of pregnancy contained in the impugned Regulation.

98. It was suggested by one of the Corporations that after a woman becomes pregnant and bears children there may be lot of difficulties in her resuming service, the reason being that her husband may not permit her to work as an AH. These reasons, however do not appeal to us because such circumstances can also exist even without pregnancy in the case

of a married woman and if a married woman leaves the job, the Corporation will have to make arrangements for a substitute. Moreover, whether the woman after bearing children would continue in service or would find it difficult to look after the children is her personal matter and a problem which affects the AH concerned and the Corporation has nothing to do with the same. These are circumstances which happen in the normal course of business and cannot be helped. Suppose fan AH dies or becomes incapacitated, it is manifest that the Corporation will have to make alternative arrangements for her substitute. In these circumstances, therefore, we are satisfied that the reasons given for imposing the bar are neither logical nor convincing.

99. In view of our recent decision explaining the scope of Article 14, it has been held that any arbitrary or unreasonable action or provision made by the State cannot be upheld. In *Dwarka Prasad Laxmi Naraian v. The State of Uttar Pradesh and Ors*. this Court made the following observations:

Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in reasonableness.

100. In *Maneka Gandhi v. Union of India* : [1978]2SCR621 Beg, C.J. observed as follows:

The view I have taken above proceeds on the assumption that there are inherent or natural human rights of the individual recognised by and embodied in our Constitution.... If either the reason sanctioned by the law is absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed. and Bhagwati, J. observed thus:

Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits...Article 14 strikes at arbitariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence...It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

101. In an earlier case in *E. P. Royappa v. State of Tamil Nadu* and Anr. : (1974)ILLJ172SC Similar observations were made by this Court thus:

In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.

102. In State of *Andhra Pradesh and Anr. v. Nalla Raja Reddy and Ors.* : [1967]3SCR28 this Court made the following observations:

Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately.

103. The impugned provisions appear to us to be a clear case of official arbitrariness. As the impugned part of the regulation is severable from the rest of the regulation, it is not necessary for us to strike down the entire Regulation.

104. For the reasons given above, we strike down the last portion of Regulation 46(i)(c) and hold that the provision 'or on first pregnancy whichever occurs earlier' is unconstitutional,

void and is violative of Article 14 of the Constitution and will, therefore, stand deleted. It will, however, be open to the Corporation to make suitable amendments in the light of our observations and on the lines indicated by Mr. Nariman in the form of draft proposals referred to earlier so as to soften the rigours of the provisions and make it just and reasonable. For instance, the rule could be suitably amended so as to terminate the services of an AH on third pregnancy provided two children are alive which would be both salutary and reasonable for two reasons. In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly, as indicated above while dealing with the rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over population which, if not controlled, may lead to serious social and economic problems throughout the world.

105. The next provision which has been the subject matter of serious controversy between the parties, is the one contained in Regulation 46(i)(c). According to this provision, the normal age of retirement of an AH is 35 years which may at the option of the Managing Director be extended to 45 years subject to other conditions being satisfied. A similar regulation is to be found in the Rules made by the I.A.C. to which we shall refer hereafter. The question of fixation of retirement age of an AH is to be decided by the authorities concerned after taking into consideration various factors such as the nature of the work, the prevailing conditions, the practice prevalent in other establishments and the like. In *Imperial Chemical Industries (India) Pvt. Ltd. v. The Workmen* : (1960)IILLJ716SC this Court pointed out that in fixing the age of retirement, changing the terms and conditions of service, the determination of the age on industry-cum-region basis would undoubtedly be a relevant factor. In this connection, Gajendragadkar, J. made the following further observations:

There is no doubt that in fixing the age of retirement no hard and fast rule can be laid down. The decision on the question would always depend on a proper assessment of the relevant factors and may conceivably vary from case to case.

106. Similarly, in an earlier case in Guest, Keen, Williams Pvt. Ltd. v. P.J. Sterling and Ors. : (1959) IILLJ405SC , this Court made the following observations:

In fixing the age of superannuation industrial tribunals have to take into account several relevant factors. What is the nature of the work assigned to the employees in the course of their employment....What is generally the practice prevailing in the industry in the past in the matter of retiring its employees ? These and other relevant facts have to be weighed by the tribunal in every case when it is called upon to fix an age of superannuation in an industrial dispute.

107. It is, therefore, manifest that the factors to be considered must be relevant and bear a close nexus to the nature of the organisation and the duties of the employees. Where the authority concerned takes into account factors or circumstances which are inherently irrational or illogical or tainted, the decision fixing the age of retirement is open to serious scrutiny.

108. The stand taken by A.I. regarding this particular provision is that there are several reasons which prompted the Management to persuade the Government to make this Regulation. In the first place, it was contended that in view of the arduous and strenuous work that the AHs have to put in an early date of retirement is in the best interest of their efficiency and also in the interest of their health. Another reason advanced by A.I. is that several years experience of the working of AHs shows that quite a large number of them retire even

before they reach the age of 35; hence a lower age for retirement is fixed in their case under the Regulation with a provision for extension in suitable cases. These reasons are no doubt understandable and prima facie appear to be somewhat sound. We are, however, not quite sure if the premises on the basis of which these arguments have been put forward are really correct. In the present times with advancing medical technology it may not be very correct to say that a woman loses her normal faculties or that her efficiency is impaired at the age of 35, 40 or 45, years. It is difficult to generalise a proposition like this which will have to vary from individual to individual. On the other hand, there may be cases where an AFP may be of so weak and unhealthy a Constitution that he may not be able to function upto the age of 58, which is the age of retirement of AFP according to the Regulalion. As, however, the distinction regarding the age of retirement made by the Regulation between AHs and AFPs cannot be said to be discriminatory because AHs have been held by us to be a separate class yet we will have to examine the provision from other points of view as well. Another line of reasoning which has been placed before us and which smacks of a most perverse and morbid approach is to be found in para 9 of the counter-affidavit in vol. II of the Paperbook where the following averments have been made:

With reference to paragraph 30 of the Affidavit, I repeat that Air Hostesses are recruited for providing attractive and pleasing service to passengers in a highly competitive field and consequently stress is laid on their appearance, youth, glamour and charm.

109. We are rather surprised that similar arguments made before the two Tribunals seem to have found favour with them because at page 204 (para 256) the Khosla Award having been carried away by the arguments of the Corporation made the following observations:

They have to deal with passengers of various temperaments, and a young and attractive air hostess is able to cope with difficult or awkward situations more competently and more easily than an older person with less personal prepossession.

110. We fail to see how a young and attractive AH would be able to cope with difficult or awkward situations more effectively than others because smartness or beauty cannot be the only hallmark of competency. Similar observations were made by the Mahesh Tribunal in the following terms.

The management claims this on the ground that the cabin crew service has to be attractive to passengers.

111. The argument that AHs should be young and attractive and should possess pleasing manners seems to suggest that AHs should by their sweet smiles and pleasant behaviour entertain and look after the passengers which cannot be done by women of older age. This argument seems to us to be based on pure speculation and an artificial understanding of the qualities of the fair sex and, if we may say so, it amounts to an open insult to the institution of our sacred womanhood. Such a morbid approach is totally against our ancient culture and heritage as a woman in our country occupies a very high and respected position in the society as a mother, a wife, a companion and a social worker. It is idle to contend that young women with pleasing manners should be employed so as to act as show pieces in order to cater to the varied tastes of the passengers when in fact older women with greater experience and goodwill can look after the comforts of the passengers much better than a young woman can. Even if the Corporation had been swayed or governed by these considerations, it must immediately banish or efface the same from its approach. More particularly such observations coming from a prestigious Corporation like A.I. appear to be in bad taste and is proof positive of denigration of the role of women and a demonstration of male chauvinism and verily involves nay discloses an element of unfavourable bias against the fair sex which

is palpably unreasonable and smacks of pure official arbitrariness. The observations of Sastri, C.J. in Kathi Raning Rawat's case (supra) may be extracted thus:

> All legislative differentiation is not necessarily discriminatory....Discrimination this involves an element of unfavourable bias...If such bias is disclosed...it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition.

112. At any rate, it is not possible for us to entertain such an argument which must be rejected outright. In fact, there is no substantial and weighty reason for upholding the impugned provisions and this part of the line of reasoning adopted by the respondent-Corporations cannot be countenanced.

113. In the same token it was contended by the counsel for the petitioners that whereas the retirement age in a number of other international airlines is 50 to 55 years, there is no reasonable basis for keeping the retirement age of A.I. AHs at 35, extendable to 45 years. In proof of this argument a chart was submitted before us of the various international airlines to show that the age of retirement of AHs of those airlines was much more than those of AHs employed by A.I.

114. In the first place, it is difficult to agree that the service conditions which apply to foreign airlines, should pro tanto apply to the employees of A.I. because the conditions of service including the age of retirement depend on various geographical and economic factors. Sometimes a small country may be rich enough or in view of limited number of flights or small population, it can afford to keep the AHs in service for a longer time. Local influences, social conditions and legal or political pressures may account for the terms and conditions to be fixed in the case of the AHs employed by international airlines other than A.I. In view of these diverse factors, it is not possible to easily infer unfavourable treatment to the petitioners because certain more favourable conditions of service are offered by international airlines of other countries. For instance, the retirement age of AHs in KLM (Royal Dutch) and Ghana airlines is 50 years whereas in the case of Swiss airlines it is 57 and in the case of Malaysian airlines it is 45 years. In the case of Singapore airlines the retirement age of Check stewardess is 45 years. Similarly, in other airlines like Austrian, Germanair, Lufthansa and Nigeria Airways the retirement age of female AHs is 55 whereas in the case of Air International, U.T.A. (France) and Air France it is 50. In case of Sudan Airways and British Airways the retirement age is 60 whereas in Nordair (Canada) and Transair (Canada) airlines the age is 65 years.

115. A perusal of the scheme of retirement age given above would clearly show that several considerations weigh with the Governments or Corporations concerned in fixing the retirement age which would naturally differ from country to country having regard to the various factors mentioned above. In fact, a similar grievance seems to have been made before the Mahesh Tribunal which also pointed out that the social conditions in Europe and other countries being different, the same rules could not apply to A.I. In this connection, the Tribunal observed thus:

> There is no reason to have a different provision regarding the air hostesses in Air India. The social conditions in Europe and elsewhere are different from the social conditions in India.

116. In this view of the matter the argument on this score must be rejected. This Court has pointed out that there cannot be any cut and dried formula for determining the age of retirement which is to be linked with various circumstances and a variety of factors.

117. We might further mention that even before the Mahesh Tribunal, the stand taken by the AHs was merely that their age of retirement should be extended to 45 years and they never put forward or suggested any claim to increase the retirement age to 58 which clearly shows

that their present claim is not merely belated but an afterthought particularly because the Mahesh Tribunal was dealing with this particular grievance and if the AHs were really serious in getting their retirement age equated with that of the AFPs, i.e. 58, they would not have failed to put forward this specific claim before the Tribunal. This is yet another ground on which the claim of the AHs to be retired at the age of 58 cannot be entertained because as we have already shown the Award binds the parties even though its period may have expired.

118. This brings us now to the question as to whether or not the impugned regulation suffers from any constitutional infirmity as it stands. The fixation of the age of retirement of AHs who fall within a special class depends on various factors which have to be taken into consideration by the employers. In the instant case, the Corporations have placed good material before us to show some justification for keeping the age of retirement at 35 years (extendable upto 45 years) but the regulation seems to us to arm the Managing Director with uncanalized and unguided discretion to extend the age of AHs at his option which appears to us to suffer from the vice of excessive delegation of powers. It is true that a discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to decide matters of moment without laying down any guidelines or principles norms the power has to be struck down as being violative of Article 14.

119. The doctrine of a provision suffering from the vice of excessive delegation of power has been explained and discussed in several decisions of this Court. In Anwar Ali Sarkar's case (supra) which may justly be regarded as the locus classicus on the subject, Fazal Ali, J. (as he then was) clearly observed as follows:

> but the second criticism cannot be so easily met, since an Act which gives uncontrolled authority to discriminate cannot but be hit by Article 14 and it will be no answer simply to say that the legislature having more or less the unlimited power to delegate has merely exercised that power.
>
> . . .
>
> Secondly, the Act itself does not state that public interest and administrative exigencies will provide the occasion for its application. Lastly, the discrimination involved in the application of the Act is too evident to be explained away.

and Mahajan, J. agreeing with the same expressed his views thus:

> The present statute suggests no reasonable basis or classification, either in respect of offences or in respect of cases. It has laid down no yardstick or measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those who are outside the purview of the Special Act. The Act has left this matter entirely to the unregulated discretion of the provincial government.

Mukherjea, J. observed thus:

> In the case before us the language of Section 5(1) is perfectly clear and free from any ambiguity. It vests an unrestricted discretion in the State Government to direct any cases or classes of cases to be tried by the Special Court in accordance with the procedure laid down in the Act....I am definitely of opinion that the necessity of a speedier trial is too vague, uncertain and elusive a criterion to form a rational basis for the discriminations made....But the question is: how is this necessity of speedier trial to be determined ? Not by reference to the nature of the offences or the circumstances under which or the area in which they are committed, nor even by reference to any peculiarities or antecedents of the offenders themselves, but the selection is left to the absolute and unfettered discretion of the executive

government with nothing in the law to guide or control its action. This is not a reasonable classification at all but an arbitrary selection.

and Chandrasekhara Aiyar, J. elucidated the law thus:

If the Act does not state what exactly are the offences which in its opinion need a speedier trial and why it is so considered, a mere statement in general words of the object sought to be achieved, as we find in this case, is of no avail because the classification, if any, is illusive or evasive. The policy or idea behind the classification should at least be adumbrated, if not stated, so that the Court which has to decide on the constitutionality might be seized of something on which it could base its view about the propriety of the enactment from the standpoint of discrimination or equal protection. Any arbitrary division or ridge will render the equal protection clause moribund or lifeless.

Apart from the absence of any reasonable or rational classification, we have in this case the additional feature of a carte blanche being given to the State Government to send any offences or cases for trial by a Special Court.

and Bose, J. held thus:

It is the differentiation which matters; the singling out of cases or groups of cases, or even of offences or classes of offences, of a kind fraught with the most serious consequences to the individuals concerned, for special, and what some would regard as peculiar, treatment.

120. The five Judges whose decisions we have extracted constituted the majority decision of the Bench.

121. In Lala Hari Chand Sard v. Mizo District Council and Anr. : [1967]1SCR1012 it was highlighted that where a Regulation does not contain any principles or standard for the exercise of the executive power, it was a bad regulation as being violative of Article 14. In this connection, the Court observed as follows:

A perusal of Regulation shows that it nowhere provides any principles or standards on which the Executive Committee has to act in granting or refusing to grant the licence... There being no principles or standards laid down in the Regulation there are obviously no restraints or limits within which the power of the Executive Committee to refuse to grant or renew a licence is to be exercised...The power of refusal is thus left entirely unguided and untrammelled.

. . .

A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable. Section 3 of the Regulation is one such provision and is therefore liable to be struck down as violative of Article 19(1)(g).

122. To the same effect is another decision of this Court in State of Mysore v. S.R. Jayaram : [1968]1SCR349 where the following observations were made:

The Rules are silent on the question as to how the Government is to find out the suitability of a candidate for a particular cadre...It follows that under the latter part of Rule 9(2) it is open to the Government to say at its sweet will that a candidate is more suitable for a particular cadre and to deprive him of his opportunity to join the cadre for which he indicated his preference.

. . .

We hold that the latter part of Rule 9(2) gives the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It is violative of Articles 14 and 16(1) of the Constitution and must be struck down.

123. Here also the Rules were struck down because no principle or guidelines were given by the statute to determine the suitability of a particular candidate.

124. Regulation 46(i)(c) provides that an AH would retire on attaining the age of 35 years or on marriage if it takes place within four years of service. The last limb of this provision relating to first pregnancy in the case of AHs has already been struck down by us and the remaining Sub-clause (c) has to be read with Regulation 47 which provides that the services of any employee may, at the option of the Managing Director, on the employee being found medically fit, be extended by one year beyond the age of retirement, the aggregate period not exceeding two years. This provision applies to employees who retire at the age of 58. So far as the AHs are concerned, under the Regulation the discretion is to be exercised by the Managing Director to extend the period upto ten years. In other words, the spirit of the Regulation is that an AH, if medically fit, is likely to continue upto the age of 45 by yearly extensions given by the Managing Director. Unfortunately, however, the real intention of the makers of the Regulations has not been carried out because the Managing Directors has been given an uncontrolled, unguided and absolute discretion to extend or not to extend the period of retirement in the case of AHs after 35 years. The words 'at the option' are wide enough to allow the Managing Director to exercise his discretion in favour of one AH and not in favour of the other which may result in discrimination. The Regulation does not provide any guidelines, rules, or principles which may govern the exercise of the discretion by the Managing Director. Similarly, there is also no provision in the Regulation requiring the authorities to give reason for refusing to extend the period of retirement of AHs. The provision does not even give any right of appeal to higher authorities against the order passed by the Managing Director. Under the provision, as it stands, the extension of the retirement of an AH is entirely at the mercy and sweet will of the Managing Director. The conferment of such a wide and uncontrolled power on the Managing Director is clearly violative of Article 14, as the provision suffers from the vice of excessive delegation of powers.

125. For these reasons, therefore, we have no alternative but to strike down as invalid that part of Regulation 47 which gives option to the Managing Director to extend the service of an AH. The effect of striking down this provision would be that an AH, unless the provision is suitably amended to bring it in comfirmity with the provisions of Article 14 would continue to retire at the age of 45 years and the Managing Director would be bound to grant yearly extensions as a matter of course, for a period of ten years if the AH is found to be medically fit. This will prevent the Managing Director from discriminating between one AH and Anr..

126. So far as the case of the AHs employed by I.A.C. is concerned, the same reasons which we have detailed in the case of AHs employed by A.I. would apply with slight modifications which we shall indicate hereafter. So far as the organisation of AHs employed by I.A.C. is concerned, the cabin crew consisting of males are known as flight stewards (F.S.) and those consisting of females as AHs. There are 105 posts of F.Ss and 517 of AHs. It is also not disputed that job functions of F.S. and the AHs are the same and in fact there are some flights in which the cabin crew consists only of AHs. But like the A,I. AHs, the mode of recruitment, conditions of service, etc., are quite different in the case of F.Ss and AHs. The I.A.C. also contended that FSs and AHs are two different categories with different avenues of promotion. As in the case of A.I. AHs, a declaration under the 1976 Act has also been made in the case of IAC, AHs.

127. The promotional avenues so far as the AHs are concerned are: AH, Dy. Chief AH, and Chief AH. It is also alleged by the Management and not disputed by the petitioners, that FSs and AHs have got separate seniority and their promotion is made according to the separate seniority of each. Further, while the AHs have to do a minimum period of three years, FSs are required to serve for five years. Gratuity is payable to AHs after completion of 5 years' service whereas in the case of FSs it is payable after completion of 15 years of

service. Similarly, retiral concessional passage is given to AHs after completion of four years of service whereas to FSs it is given after completion of seven years of service. It may be specially noticed that while long service memento is given to an AH after completion of ten years of service, to a FS it is given after completion of 25 years of service. Retirement benefit is given to an AH on completion of 15 years of service whereas to an F.S. it is given after 30 years of service. Finally, retiral benefits are given to an AH after completion of 10 years of service but in the case of F.S. after twenty years of Service. These retiral benefits are really meant to compensate the AHs because they have to retire at the age of 35, extendable up to 40, though the F.Ss retire at the age of 58 years.

128. We might stress at the risk of repetition that in State of Mysore v. M.N. Krishna Murthy and Ors. : (1973)ILLJ42SC this Court clearly held that where classes of service are different, inequality of promotional avenues was legally permissible. In this connection, Beg, J. speaking for the Court observed as follows:

"If, on the facts of a particular case, the classes to be considered are really different, inequality of opportunity in promotional chances may be justifiable.

129. Thus, there can be no doubt that the case of I.A.C. AHs is exactly similar to the case of A.I. AHs and hence the complaint of discrimination made by the petitioners has no substance.

130. The next argument is almost the same as in the case of A.I. AHs, namely, retirement on first pregnancy and on marriage within four years and retirement at 35 years extendable to 40 years.

131. So far as the age of retirement and termination of service on first pregnancy is concerned a short history of the Rules made by the I.A.C. may be given. Regulation 12 as it stood may be extracted thus:

Flying Crew shall be retained in the service of the Corporation only for so long as they remain medically fit for flying duties....Further, an Air hostess shall retire from the service of Corporation on her attaining the age of 30 years or when she gets married whichever is earlier. An unmarried Air Hostess may, however, in the interest of the Corporation be retained in the service of the Corporation upto the age of 35 years with the approval of the General Manager.

132. It is obvious that under this Rule an AH had to retire at the age of 30 years or when she got married and an unmarried AH could continue upto 35 years. The rule was obviously unjust and discriminatory and was therefore amended by a Notification published in the Gazette of India dated 13.7.1968. The amended rule ran thus:

An Air hostess shall retire from the service of the Corporation on her attaining the age of 30 years or when she gets married, whichever is earlier. The General Manager, may however, retain in the service an unmarried Air Hostess upto the age of 35 years.

133. This amendment continued the bar of marriage but gave discretion to the General Manager to retain an unmarried AH upto 35 years. In order, however, to bring the provision in line with the A.I. Regulation, the I.A.C. Regulation was further amended by a Notification dated 12.4.80 published in Part III, Section 4, Gazette of India by which para 3 of Regulation 12 was substituted thus:

An Air Hostess shall retire from the service of the Corporation upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier.

134. It appears that by a Settlement dated 10-1-1972, which was accepted and relied upon by the Mahesh Tribunal the following clause was incorporated in the Rule:

An Air Hostess shall retire from the service of the Corporation on her attaining the age of 30 years or when she gets married, whichever is earlier. The General Manager may, however, retain in service an unmarried air hostess upto the age of 40 years.

135. The first part of this Regulation has become redundant in view of the Notification dated 12.4.80, referred to above, but the latter part which gives the General Manager a blanket power to retain an AH till the age of 40 years, still remains. As, however, the bar of marriage is gone, the Rules of 1972 which empower the General Manager to retain an AH in service will have to be read as a power to retain an AH upto the age of 40 years. Thus, the Notification as also the Rules suffer from two serious constitutional infirmities which are present in the case of Regulation 46 framed by the A.I. The clauses regarding retirement and pregnancy will have to be held as unconstitutional and therefore struck down. Secondly, for the reasons that we have given in the case of A.I. AHs that Regulation 46 contains an unguided and uncontrolled power and therefore suffers from the vice of excessive delegation of powers, on a parity of reasoning the power conferred on the General Manager to retain an AH upto the age of 40 years will have to be struck down as invalid because it does not lay down any guidelines or principles. Furthermore, as the cases of A.I. AHs and I.A.C. AHs are identical, an extension upto the age 45 in the case of one and 40 in the case of other, amounts to discrimination inter se in the same class of AHs and must be struck down on that ground also.

136. The result of our striking down these provisions is that like A.I. AHs, I.A.C. AHs also would be entitled to their period of retirement being extended upto 45 years until a suitable amendment is made by the Management in the light of the observations made by us.

137. For the reasons given above, therefore, the writ petitions are allowed in part as indicated in the judgment and the Transfer case is disposed of accordingly. So long as the Rule of I.A.C. is not amended the General Manager will continue to extend the age of retirement of I.A.C. AHs upto 45 years subject to their being found medically fit. In the circumstances of the case, there will be no order as to costs.

❑❑❑

Danial Latifi & Anr.Vs. Union Of India

CASE NO.: Writ Petition (civil) 868 of 1986

PETITIONER: DANIAL LATIFI & ANR. Vs. RESPONDENT: UNION OF INDIA

DATE OF JUDGMENT: 28/09/2001

BENCH:
G.B. Pattanaik, S. RAjendra Babu, D.P. Mohapatra, Doraiswamy Raju & Shivaraj V. Patil

JUDGMENT:

[With WP(C) Nos. 996/86, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86, 1281/86, T.C. (C) 22/ 87, 86/88, 68/88, T.P. (C) No. 276- 77/87, Crl. A. No. 702/90, SLP (Crl.) Nos. 655/88, 596-97/92, WP(C) No. 12273/84, SLP(Crl.) No. 2513/94, Crl. A. Nos. 508/95, 843/95, 102-103/89, 292/90, SLP (Crl.) Nos. 2165/96, 3786/99, 2462/99]

J U D G M E N T

RAJENDRA BABU, J.:

The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 [hereinafter referred to as the Act] is in challenge before us in these cases.

The facts in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. (1985) 2 SCC 556, are as follows.

The husband appealed against the judgment of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs.179/- per month, enhancing the paltry sum of Rs.25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husbands residence. For about two years the husband paid maintenance to his wife at the rate of Rs.200/- per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs.5,000/- per month provided Rs.200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

Thus, the principle question for consideration before this Court was the interpretation of Section 127(3)(b) CrPC that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation under the provisions of Section 125 CrPC. A Five-Judge Bench of this Court reiterated that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties. If there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 CrPC even if it is not relevant in the context of Section 127(3)(b) CrPC. Therefore, this Court held that it

is a sum payable on divorce within the meaning of Section 127(3)(b) CrPC and held that mahr is such a sum which cannot ipso facto absolve the husbands liability under the Act.

It was next considered whether the amount of mahr constitutes a reasonable alternative to the maintenance order. If mahr is not such a sum, it cannot absolve the husband from the rigour of Section 127(3)(b) CrPC but even in that case, mahr is part of the resources available to the woman and will be taken into account in considering her eligibility for a maintenance order and the quantum of maintenance. Thus this Court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 CrPC and such applications were not barred under Section 127(3)(b) CrPC. The husband had based his entire case on the claim to be excluded from the operation of Section 125 CrPC on the ground that Muslim law exempted from any responsibility for his divorced wife beyond payment of any mahr due to her and an amount to cover maintenance during the iddat period and Section 127(3)(b) CrPC conferred statutory recognition on this principle. Several Muslim organisations, which intervened in the matter, also addressed arguments. Some of the Muslim social workers who appeared as interveners in the case supported the wife brought in question the issue of mata contending that Muslim law entitled a Muslim divorced woman to claim provision for maintenance from her husband after the iddat period. Thus, the issue before this Court was: the husband was claiming exemption on the basis of Section 127(3)(b) CrPC on the ground that he had given to his wife the whole of the sum which, under the Muslim law applicable to the parties, was payable on such divorce while the woman contended that he had not paid the whole of the sum, he had paid only the mahr and iddat maintenance and had not provided the mata i.e. provision or maintenance referred to in the Holy Quran, Chapter II, Sura 241. This Court, after referring to the various text books on Muslim law, held that the divorced wives right to maintenance ceased on expiration of iddat period but this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats [the Holy Quran, Chapter II, Suras 241-242] leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran. On this note, this Court concluded its judgment.

There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in Shah Banos case ineffective.

The Statement of Objects & Reasons to the bill, which resulted in the Act, reads as follows :

The Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. [AIR 1985 SC 945), has held that although the Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husbands liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely:-

(a) A Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the deliver of the properties;

(b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where, a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The object of enacting the Act, as stated in the Statement of Objects & Reasons to the Act, is that this Court, in Shah Banos case held that Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973 and, therefore, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to hisdivorced wife, who is unable to maintain herself.

As held in Shah Banos case, the true position is that if the divorced wife is able to maintain herself, the husbands liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 CrPC. Thus it was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim Personal Law on the question of the Muslim husbands obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in *Bai Tahira vs. Ali Hussain Fidaalli Chothia,* (1979) 2 SCC 316, and *Fuzlunbi vs. K.Khader Vali & Anr.,* (1980) 4 SCC 125.

Smt. Kapila Hingorani and Smt. Indira Jaisingh raised the following contentions in support of the petitioners and they are summarised as follows :

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahr or dower and absence of consideration will discharge the marriage. On the other hand, Section 125 CrPC has been enacted as a matter of public policy.

2. To enable a divorced wife, who is unable to maintain herself, to seek from her husband, who is having sufficient means and neglects or refuses to maintain her, payment of maintenance at a monthly rate not exceeding Rs.500/-. The expression wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. The religion professed by a spouse or the spouses has no relevance in the scheme of these provisions whether they are Hindus, Muslims, Christians or

the Parsis, pagans or heathens. It is submitted that Section 125 CrPC is part of the Code of Criminal Procedure and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 CrPC, it is submitted, was enacted in order to provide a quick and summary remedy. The basis there being, neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves, these provisions have been made and the moral edict of the law and morality cannot be clubbed with religion.

3. The argument is that the rationale of Section 125 CrPC is to off- set or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Section 125 CrPC is enacted to prevent the same in furtherance of the concept of social justice embodied in Article 21 of the Constitution.

4. It is, therefore, submitted that this Court will have to examine the questions raised before us not on the basis of Personal Law but on the basis that Section 125 CrPC is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in Shah Banos case. Thus there is a violation of not only equality before law but also equal protection of laws and inherent infringement of Article 21 as well as basic human values. If the object of Section 125 CrPC is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

5. The Act is an un-islamic, unconstitutional and it has the potential of suffocating the muslim women and it undermines the secular character, which is the basic feature of the Constitution; that there is no rhyme or reason to deprive the muslim women from the applicability of the provisions of Section 125 CrPC and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application of Section 125 CrPC is violative of Articles 14 and 21 of the Constitution; that the conferment of power on the Magistrate under sub-section (2) of Section 3 and Section 4 of the Act is different from the right of a muslim woman like any other woman in the country to avail of the remedies under Section 125 CrPC and such deprivement would make the Act unconstitutional, as there is no nexus to deprive a muslim woman from availing of the remedies available under Section 125 CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

The learned Solicitor General, who appeared for the Union of India, submitted that when a question of maintenance arises which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act, it is provided that a reasonable and fair provision and maintenance to be made and paid by her former husband within the iddat period would make it clear that it cannot be for life but would only be for a period of iddat and when that fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of iddat would not arise. Challenge raised in this petition is dehors the personal law. Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. If the legislature, as a matter of policy, wants to apply Section 125 CrPC to Muslims, it could also be stated that the same legislature can, by implication, withdraw such application and make some other provision in that regard. Parliament can amend Section 125 CrPC so as to exclude them and apply personal law and the policy of Section 125 CrPC is not to create a right of maintenance dehors the personal law. He further submitted that in Shah Banos case, it has been held that a divorced woman is entitled to maintenance even after the iddat period from the husband and that is how Parliament also understood the

ratio of that decision. To overcome the ratio of the said decision, the present Act has been enacted and Section 3(1)(a) is not in discord with the personal law.

Shri Y.H.Muchhala, learned Senior Advocate appearing for the All India Muslim Personal Law Board, submitted that the main object of the Act is to undo the Shah Banos case. He submitted that this Court has harzarded interpretation of an unfamiliar language in relation to religious tenets and such a course is not safe as has been made clear by Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee & Ors., 24 IA 196, particularly in relation to Suras 241 and 242 Chapter II, the Holy Quran.. He submitted that in interpreting Section 3(1)(a) of the Act, the expressions provision and maintenance are clearly the same and not different as has been held by some of the High Courts. He contended that the aim of the Act is not to penalise the husband but to avoid vagrancy and in this context Section 4 of the Act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband.

He adverted to the works of religious thoughts by Sir Syed Ahmad Khan and Bashir Ahmad, published from Lahore in 1957 at p. 735. He also referred to the English translation of the Holy Quran to explain the meaning of gift in Sura 241. In conclusion, he submitted that the interpretation to be placed on the enactment should be in consonance with the Muslim personal law and also meet a situation of vagrancy of a Muslim divorced wife even when there is a denial of the remedy provided under Section 125 CrPC and such a course would not lead to vagrancy since provisions have been made in the Act. This Court will have to bear in mind the social ethos of Muslims, which are different and the enactment is consistent with law and justice.

It was further contended on behalf of the respondents that the Parliament enacted the impugned Act, respecting the personal law of muslims and that itself is a legitimate basis for making a differentiation; that a separate law for a community on the basis of personal law applicable to such community, cannot be held to be discriminatory; that the personal law is now being continued by a legislative enactment and the entire policy behind the Act is not to confer a right of maintenance, unrelated to the personal law; that the object of the Act itself was to preserve the personal law and prevent inroad into the same; that the Act aims to prevent the vagaries and not to make a muslim woman, destitute and at the same time, not to penalise the husband; that the impugned Act resolves all issues, bearing in mind the personal law of muslim community and the fact that the benefits of Section 125 CrPC have not been extended to muslim women, would not necessarily lead to a conclusion that there is no provision to protect the muslim women from vagaries and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

On behalf of the All India Muslim Personal Law Board, certain other contentions have also been advanced identical to those advanced by the other authorities and their submission is that the interpretation placed on the Arabic word mata by this Court in Shah Banos case is incorrect and submitted that the maintenance which includes the provision for residence during the iddat period is the obligation of the husband but such provision should be construed synonymously with the religious tenets and, so construed, the expression would only include the right of residence of a Muslim divorced wife during iddat period and also during the extended period under Section 3(1)(a) of the Act and thus reiterated various other contentions advanced on behalf of others and they have also referred to several opinions expressed in various text books, such as, -

1. The Turjuman al-Quran by Maulana Abul Kalam Azad, translated into English by Dr. Syed Abdul Latif;

2. Persian Translation of the Quran by Shah Waliullah Dahlavi
3. Al-Manar Commentary on the Quran (Arabic);
4. Al-Isaba by Ibne Hajar Asqualani [Part-2]; Siyar Alam-in-Nubla by Shamsuddin Mohd. Bin Ahmed BinUsman Az-Zahbi;
5. Al-Maratu Bayn Al-Fiqha Wa Al Qanun by Dr. Mustafa As- Sabai;
6. Al-Jamil ahkam-il Al-Quran by Abu Abdullah Mohammad Bin Ahmed Al Ansari Al-Qurtubi;
7. Commentary on the Quran by Baidavi (Arabic);
8. Rooh-ul-Bayan (Arabic) by Ismail Haqqi Affendi;
9. Al Muhalla by Ibne Hazm (Arabic);
10. Al-Ahwalus Shakhsiah (the Personal Law) by Mohammad abu Zuhra Darul Fikrul Arabi.

On the basis of the aforementioned text books, it is contended that the view taken in Shah Banos case on the expression mata is not correct and the whole object of the enactment has been to nullify the effect of the Shah Banos case so as to exclude the application of the provision of Section 125 CrPC, however, giving recognition to the personal law as stated in Sections 3 and 4 of the Act. As stated earlier, the interpretation of the provisions will have to be made bearing in mind the social ethos of the Muslim and there should not be erosion of the personal law.

On behalf of the Islamic Shariat Board, it is submitted that except for Mr. M. Asad and Dr. Mustafa-as-Sabayi no author subscribed to the view that the Verse 241 of Chapter II of the Holy Quran casts an obligation on a former husband to pay maintenance to the Muslim divorced wife beyond the iddat period. It is submitted that Mr. M. Asads translation and commentary has been held to be unauthentic and unreliable and has been subscribed by the Islamic World League only. It is submitted that Dr. Mustafa-as-Sabayi is a well-known author in Arabic but his field was history and literature and not the Muslim law. It was submitted that neither are they the theologists nor jurists in terms of Muslim law. It is contended that this Court wrongly relied upon Verse 241 of Chapter II of the Holy Quran and the decree in this regard is to be referred to Verse 236 of Chapter II which makes paying mata as obligatory for such divorcees who were not touched before divorce and whose Mahr was not stipulated. It is submitted that such divorcees do not have to observe iddat period and hence not entitled to any maintenance. Thus the obligation for mata has been imposed which is a one time transaction related to the capacity of the former husband. The impugned Act has no application to this type of case. On the basis of certain texts, it is contended that the expression mata which according to different schools of Muslim law, is obligatory only in typical case of a divorce before consummation to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing iddat period or for breast-feeding the child. Thereafter, various other contentions were raised on behalf of the Islamic Shariat Board as to why the views expressed by different authors should not be accepted.

Dr. A.M.Singhvi, learned Senior Advocate who appeared for the National Commission for Women, submitted that the interpretation placed by the decisions of the Gujarat, Bombay, Kerala and the minority view of the Andhra Pradesh High Courts should be accepted by us. As regards the constitutional validity of the Act, he submitted that if the interpretation of Section 3 of the Act as stated later in the course of this judgment is not acceptable then the consequence would be that a Muslim divorced wife is permanently rendered without remedy insofar as her former husband is concerned for the purpose of her survival after

the iddat period. Such relief is neither available under Section 125 CrPC nor is it properly compensated by the provision made in Section 4 of the Act. He contended that the remedy provided under Section 4 of the Act is illusory inasmuch as firstly, she cannot get sustenance from the parties who were not only strangers to the marital relationship which led to divorce; secondly, wakf boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touch stone ofArticles 14, 15 and also Article 21 of the Constitution and thus the denial of right to life and liberty is exasperated by the fact that it operates oppressively, unequally and unreasonably only against one class of women. While Section 5 of the Act makes the availability and applicability of the remedy as provided by Section 125 CrPC dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee who in the first place is sought to be excluded from the ambit of Section 3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

This Court in Shah Banos case held that although Muslim personal law limits the husbands liability to provide maintenance for his divorced wife to the period of iddat, it does not contemplate a situation envisaged by Section 125 CrPC of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim Law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court came to the conclusion that if the divorced wife is able to maintain herself the husbands liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to recourse to Section 125 CrPC. This decision having imposed obligations as to the liability of Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights. The learned counsel have also raised certain incidental questions arising in these matters to the following effect-

1) Whether the husband who had not complied with the orders passed prior to the enactments and were in arrears of payments could escape from their obligation on the basis of the Act, or in other words, whether the Act is retrospective in effect?

2) Whether Family Courts have jurisdiction to decide the issues under the Act?

3) What is the extent to which the Wakf Board is liable under the Act?

The learned counsel for the parties have elaborately argued on a very wide canvass. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life

a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The Preamble to the Act sets out that it is an Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; iddat period is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,-

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante clause overriding all other laws and provides that a divorced woman shall be entitled to -

(a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband;

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and

(d) all the properties given to her by her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relatives of the husband or his friends.

Where such reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made and paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case

may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him as the case may be. It is, however, significant to note that Section 4 of the Act refers only to payment of maintenance and does not touch upon the provision to be made by the husband referred to in Section 3(1)(a) of the Act.

Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128 CrPC. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 CrPC, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the divorced woman has been defined as Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under Indian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the Court can order the State Wakf Boards to pay the maintenance.

Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a

Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced womans right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the

Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision in Section 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Banos case. In this case to find out the personal law of Muslims with regard to divorced womens rights, the starting point should be Shah Banos case and not the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another

conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Banos case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Banos case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Banos case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality.

In Shah Banos case this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslims organisations who are interveners before us is that under the Act vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language of Sections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in *Olga Tellis v. Bombay Municipal Corporation*, 1985(3) SCC 545, and *Maneka Gandhi v. Union of India*, 1978 (1) SCC 248, held that the concept of right to life and personal liberty guaranteed under Article 21 of the Constitution would include the right to live with dignity. Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may re-marry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divoced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate

reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.

The learned counsel appearing for the Muslim organisations contended after referring to various passages from the text books to which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only upto the stage of iddat and not thereafter. What is to be provided by way of Mata is only a benevolent provision to be made in case of divorced Muslim woman who is unable to maintain herself and that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata. That is the basis on which the Bench of Five Judges of this Court interpreted the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mata is indeed the statutorily recognised by making provision under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in Shah Banos case. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

In *Arab Ahemadhia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc.,* AIR 1988 (Guj.) 141; *Ali vs. Sufaira*, (1988) 3 Crimes 147; *K. Kunhashed Hazi v. Amena,* 1995 Crl.L.J. 3371; *K. Zunaideen v. Ameena Begum*, (1998] II DMC 468; *Karim Abdul Shaik v. Shenaz Karim Shaik*, 2000 Cr.L.J. 3560 and *Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr.*, 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in *Kaka v. Hassan Bano & Anr.*, II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddatperiod. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC 60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act.

The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

While upholding the validity of the Act, we may sum up our conclusions:

1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. 2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

In the result, the writ petition Nos. 868/86, 996/86, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86 and 1281/86 challenging the validity of the provisions of the Act are dismissed.

All other matters where there are other questions raised, the same shall stand relegated for consideration by appropriate Benches of this Court.

[G.B. PATTANAIK] J.

[S. RAJENDRA BABU] J.

[D.P. MOHAPATRA] J.

[DORAISWAMY RAJU]

SEPTEMBER 28, 2001. J.

[SHIVARAJ V. PATIL]

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IN THE SUPREME COURT OF INDIA

Shabnam Hashmi Vs. Union of India (UOI) and Ors.

Writ Petition (Civil) No. 470 of 2005 (Under Article 32 of the Constitution of India)

Equivalent Citation: 2014(2)ADJ619, AIR 2014 SC1 281, 2014(2) AKR 185, 2014(2)ALLMR944, ILR2014(1)Kerala771, 2014 (1) KHC 625, 2014(2)KLT444, (2014)2MLJ379, 2014(1) RCR(Civil)1052, 2014(2)SCALE529, MANU/SC/0119/2014MANU/SC/0119/2014

Decided On: 19.02.2014

Appellants: Shabnam Hashmi Vs. Respondent: Union of India (UOI) and Ors.

Hon'ble Judges/Coram: P. Sathasivam, C.J.I., Ranjan Gogoi and Shiva Kirti Singh, JJ.

Counsels: For Appearing Parties: R.K. Khanna, ASG, Colin Gonslaves, J.S. Attri, Raju Rama Chandran, Y.H. Muchhala, Huzefa Ahmadi and A. Mariaputham, Sr. Advs., Saurab Ajay Gupta, Suryanarayana Singh and Manjit Singh, AAGs, Varnika Singh, Jyoti Mendiratta, Sunita Sharma, Seema Rao, Anirudh Tanwar, V.N. Subramanium, A.K. Kaul, D.S. Mahra, Sushma Suri, B. Krishna Prasad, Ejaz Maqbool, Tanima Kishore, Mrigank Prabhakar, K. Enatoli Sema, Amit Kumar Singh, J.S. Chhabra, Pragati Neekhra, Mishra Saurabh, Naveen Sharma, Vanshaja Shukla, Mukul Singh, Anil K. Jha, Priyanka Tyagi, Bina Madhavan, Sapam Biswajit Meitei, Khwairakpam Nobin Singh, Aruna Mathur, Yusuf, Advs. M/s. Arputham, Aruna and Co., Balasubramanian, K.V. Jagdishvaran, G. Indira, Abhishek Atrey, Ashutosh Kr. Sharma, Babita Tyagi, Hemantika Wahi, Preeti Bhardwaj, Anip Sachthey, Mohit Paul, Advs. M/s. K.J. John and Co., Neeru Vaid, Ajay Pal, Gopal Singh, Advs. M/s. Corporate Law Group, Shibashish Misra, Milind Kumar, P.V. Yogeswaran, Sanjay R. Hegde, B.S. Banthia, Anuvrat Sharma, T.V. George, G. Prakash, Naresh K. Sharma, Kamini Jaiwal, T. Harish Kumar, D. Bharathi Reddy, Aniruddha P. Mayee, Balaji Srinivasan, A. Subhashini and Debasis Misra, Advs.

Subject: Constitution

Acts/Rules/Orders: Juvenile Justice (Care And Protection of Children) Act, 2000 - Section 41, Juvenile Justice (Care And Protection of Children) Act, 2000 - Section 41(3), Juvenile Justice (Care And Protection of Children) Act, 2000 - Section 41(5), Juvenile Justice (Care And Protection of Children) Act, 2000 - Section 42, Juvenile Justice (Care And Protection of Children) Act, 2000 - Section 43, Juvenile Justice (Care And Protection of Children) Act, 2000 - Section 44, Juvenile Justice (Care And Protection of Children) Act, 2000 - Section 68; Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 33(2), Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 33(3), Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 33(4), Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 33(5); Juvenile Justice (Care And Protection of Children) Amended Act, 2006; Special Marriage Act, 1954; Juvenile Justice Act, 1986; Constitution of India - Article 20(3), Constitution of India - Article 21, Constitution of India - Article 32, Constitution of India - Article 44; Uniform Civil Code; All India Muslim Personal Law; Islamic Law

Cases Referred: Lakshmi Kant Pandey v. Union of India MANU/SC/0054/1984MANU/SC/0054/1984 : (1984) 2 SCC 244; In Re: Manuel Theodore D'souza MANU/MH/0295/2000MANU/MH/0295/2000 : (2000) 3 BomCR 244; Philips Alfred Malvin v. Y.J. Gonsalvis and Ors. MANU/KE/1025/1999MANU/KE/1025/1999 : AIR 1999 Ker 187

Disposition: Disposed off

Citing Reference: Discussed 3

Case Note: Constitution - Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution - Petition under Article 32 of the Constitution of India, 1950 alongwith an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat - Held, even though no serious or substantial debate had been made on behalf of the petitioner on the issue, abundant literature including the holy scripts were placed before the Court by the Board - Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens - While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country - Legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect - Conflicting viewpoints prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint - Accordingly present was held as not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution - Decisions of the Bombay High Court in Manuel Theodore D'souza and the Kerala High Court in Philips Alfred Malvincases can be best understood to have been rendered in the facts of the respective cases - While the larger question i.e. qua Fundamental Rights was not directly in issue before the Kerala High Court, in Manuel Theodore D'souza case the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith - Consequently, the writ petition was disposed of in terms of our directions and observations made

JUDGMENT

Ranjan Gogoi, J.

1. Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the Respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

2. The aforesaid alternative prayer made in the writ petition appears to have been substantially fructified by the march that has taken place in this sphere of law, gently nudged by the judicial verdict in Lakshmi Kant Pandey v. Union of India MANU/SC/0054/1984MANU/SC/0054/1984 : (1984) 2 SCC 244 and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care And Protection of Children) Act, 2000 as amended in 2006 (hereinafter for short 'the JJ Act, 2000) as also The Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007 (hereinafter for short 'the JJ Rules, 2007').

3. The alternative prayer made in the writ petition may be conveniently dealt with at the outset.

   The decision of this Court in Lakshmi Kant Pandey (supra) is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid by this Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power Under Section 68 of the JJ Act, 2000.

4. A brief outline of the statutory developments in the concerned sphere may now be sketched.

   In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short 'the JJ Act, 1986') dealt with only "neglected" and "delinquent juveniles". While the provisions of the 1986 Act dealing with delinquent juveniles are not relevant for the present, all that was contemplated for a 'neglected juvenile' is custody in a juvenile home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behavior during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head 'Rehabilitation and Social Reintegration' for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organization.

5. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

   2(aa)-"adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship

6. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. [Rule 33 (5)] Substantial changes were made in the other Sub-sections of Section 41 of the JJ Act, 2000. The CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Govt. [Section 41(3)].

7. In exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deal with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by the CARA, as notified by the Central Government Under Section 41(3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules, 2007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the States have followed suit and adopted

the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the concerned State.

Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption and lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organization. Whatever the Rules do not provide for are supplemented by the CARA guidelines of 2011 which additionally provide measures for post adoption follow up and maintenance of data of adoptions.

8. It will now be relevant to take note of the stand of the Union of India. Way back on 15th May, 2006 the Union in its counter affidavit had informed the Court that prospective parents, irrespective of their religious background, are free to access the provisions of the Act for adoption of children after following the procedure prescribed. The progress on the ground as laid before the Court by the Union of India through the Ministry of Women and Child Development (Respondent No. 3 herein) may also be noticed at this stage. The Union in its written submission before the Court has highlighted that at the end of the calendar year 2013 Child Welfare Committees (CWC) are presently functioning in a total of 619 districts of the country whereas State Adoption Resource Agencies (SARA) has been set up in 26 States/ Union Territories; Adoption Recommendation Committees (ARCs) have been constituted in 18 States/Union Territories whereas the number of recognized adoption organizations in the country are 395. According to the Union the number of reported adoptions in the country from January, 2013 to September, 2013 was 19884 out of which 1712 cases are of inter-country adoption. The third Respondent has also drawn the attention of the Court that notwithstanding the time schedule specified in the guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay in processing of adoption cases at the level of Child Welfare Committees (CWS), the Adoption Recommendation Committees (ARCs) as well as the concerned courts.

9. In the light of the aforesaid developments, the Petitioner in his written submission before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the Petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified.

10. The All India Muslim Personal Law Board (hereinafter referred to as 'the Board') which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child. According to the Board, Islamic Law professes what is known as the "Kafala" system under which the child is placed under a 'Kafil' who provides for the well being of the child including financial support and thus is legally allowed to take care

of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "Kafala" system which is recognized by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption Under Section 41(5) of the JJ Act, 2000.

11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

12. The writ Petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. Reliance is placed in this regard on the views of the Bombay and Kerala High Courts in In re: Manuel Theodore D'souza MANU/MH/0295/2000MANU/MH/0295/2000 : (2000) 3 BomCR 244 and Philips Alfred Malvin v. Y.J. Gonsalvis and Ors. MANU/KE/1025/1999MANU/KE/1025/1999 : AIR 1999 Ker 187 respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

13. Even though no serious or substantial debate has been made on behalf of the Petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention, noted above. Though enriched by the lengthy discourse laid before us, we do not think it necessary to go into any of the issues raised. The Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the

right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. In this regard we would like to observe that the decisions of the Bombay High Court in Manuel Theodore D'souza (supra) and the Kerala High Court in Philips Alfred Malvin (supra) can be best understood to have been rendered in the facts of the respective cases. While the larger question i.e. qua Fundamental Rights was not directly in issue before the Kerala High Court, in Manuel Theodore D'souza (supra) the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith. We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable.

14. Consequently, the writ petition is disposed of in terms of our directions and observations made above.

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IN THE SUPREME COURT OF INDIA

Vishaka and others Vs. State of Rajasthan and Others

Writ Petn. (Criminal) Nos. 666-70 of 1992

Decided On: 13.08.1997

Appellants:Vishaka and others Vs. Respondent: State of Rajasthan and Others

Hon'ble Judges/Coram: J.S Verma, C.J.I., Sujata V.Manohar and B.N. Kirpal, JJ.

Counsels: For Appellant/Petitioner/Plaintiff: F.S. Nariman, Meenakshi Arora and Niti Dixit, Advs For Respondents/Defendant: T.R. Andhyarujina, Solicitor General, Mukul Mudgal, Suvira Lal, C.V.S. Rao, K.S. Bhati and M.K.Singh, Advs.

Subject: Constitution

Acts/Rules/Orders: Constitution of India - Article 11, Constitution of India - Article 14, Constitution of India - Article 15, Constitution of India - Article 19, Constitution of India - Article 21, Constitution of India - Article 24, Constitution of India - Article 32, Constitution of India - Article 51A, Constitution of India - Article 73, Constitution of India - Article 141; Protection of Human Rights Act, 1993 - Section 2; Industrial Employment (Standing Orders) Act, 1946

Cases Referred: Nilabati Behera v. State of Orissa

Case Note: Constitution - gender justice - Articles 14 and 21 of Constitution of India and Section 2 of Protection of Human Rights Act, 1993 - petition for preservation and enforcement of right to gender equality and fundamental rights of working women - Court framed various guidelines including disciplinary action, complaint mechanism and complaints committee - Court directed that guidelines and norms would be strictly observed in all work places for preservation and enforcement of right to gender equality of working women.

ORDER

Verma, C.J.I.

1. This writ petition has been filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aim of focusing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject-matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

3. Each such incident results in violation of" the fundamental rights of 'Gender Equality' and the 'Right to Life and Liberty'. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19 (1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

4. The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment. Shri Fali S. Nariman appeared as Amicus Curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provisions which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19(1)(g) and 21, which have relevance are:

Article 15:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-

(1) The State shall not discriminate against any citizen on only of religion, race, caste, sex, place of birth or any of them.

(2) xxx xxx xxx

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) xxx xxx xxx Article 42:

42. Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 51A:

51 A. Fundamental duties.- It shall be the duty of every citizen of India;-

(a) to abide by the Constitution and respect its ideals and institutions....

xxx xxx xxx

(c) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

xxx xxx xxx

6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51:

51. Promotion of international peace and security.- The State shall endeavour to-

xxx xxx xxx

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another; and

xxx xxx xxx

Article 253:

253. Legislation for giving effect to international agreements.- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Seventh Schedule:

List I - Union List:

xxx xxx xxx

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

xxx xxx xxx

7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil.

8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the

constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

9. The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behavior of the employers and all others at the work places to curb this social evil.

10. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

Objectives of the Judiciary:

10. The objectives and functions of the judiciary include the following:

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.

12. Some provisions in the 'Convention on the Elimination of All Forms of Discrimination against Women', of significance in the present context are:

Article 11:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

xxx xxx xxx

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction

xxx xxx xxx

Article 24:

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.

13. The general recommendations of CEDAW in this context in respect of Article 11 are:

Violence and equality in employment:

22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.

23. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place.

The Government of India has ratified the above resolution on June 25, 1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India has also made an official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's to act as a public defender of women's human rights; to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Tech128 ALR 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

15. In *Nilabati Behera v. State of Orissa* : 1993CriLJ2899 , a provision in the ICCPR was referred to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental

rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

The guidelines and norms pre-scribed herein are as under:

Having regard to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time.

It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the Employer or other responsible persons in work places and other institutions:

   It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition:

   For this purpose, sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as:

   a) physical contact and advances;

   b) a demand or request for sexual favours;

   c) sexually coloured remarks;

   d) showing pornography;

   e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

   Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:

   All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

   (a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

   (b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual

harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:

   Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment:

    Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.

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IN THE SUPREME COURT OF INDIA

V.D. Bhanot Vs. Savita Bhanot

Special Leave Petition (Crl.) No. 3916 of 2010

Decided On: 07.02.2012

Equivalent Citation: MANU/SC/0115/2012, 2012 (1) ACR 654 (SC), AIR 2012 SC 965, 2012(2) ALD(Cri)457, 2012(3)ALT(Cri)SC298, 2012BomCR(Cri)362, 2012(1) CGBCLJ 255, 2012(2) CGLJ369, 187(2012)DLT295, I(2012)DMC482SC, 2012(128)DRJ409, 2012GLH(1)688, (2012)3GLR2719, 2012(2)J.L.J.R.316, 2012(3)JCC1854(SC), 2012(1)KLJ723, 2012-4-LW580, (2012)2MLJ361(SC), 2012(1)N.C.C.451, 2012(2)PLJR432, 2012(1)RCR(Civil)972, 2012(1) RCR(Criminal)834, 2012(2)SCALE367, (2012) 3 SCC 183

Appellants: V.D. Bhanot Vs. Respondent: Savita Bhanot

Hon'ble Judges/Coram: Altamas Kabir and Jasti Chelameswar, JJ.

Counsels: For Appellant/Petitioner/Plaintiff: Jitendra Mohan Sharma, Anjali Bhargva and Sandeep Singh, Advs. For Respondents/Defendant: Anil Kumar Bakshi, Sushil Balwada, Rakesh Kumar, Rajeshwar Tyagi and Ashok Kumar Shukla, Advs.

Subject: Criminal, Family

Acts/Rules/Orders: Protection of Women from Domestic Violence Act, 2005 - Section 3, Protection of Women from Domestic Violence Act, 2005 - Section 12, Protection of Women from Domestic Violence Act, 2005 - Section 18, Protection of Women from Domestic Violence Act, 2005 - Section 19, Protection of Women from Domestic Violence Act, 2005 - Section 20, Protection of Women from Domestic Violence Act, 2005 - Section 31, Protection of Women from Domestic Violence Act, 2005 - Section 33; Constitution of India - Article 14, Constitution of India - Article 15, Constitution of India - Article 21

Prior History / High Court Status: From the Judgment and Order dated 22.03.2010 of the High Court of Delhi at New Delhi in CRMC No. 3959 of 2009 (MANU/DE/0669/2010)

Case Note: Protection of Women from Domestic Violence Act, 2005 - Sections 3, 12, 18, 19 and 20--Applicability of Act to incidents having taken place before coming into force of Act--On looking into complaint under Section 12--Conduct of parties even prior to coming into force of Act--Could be taken into consideration--While passing order under Sections 18, 19 and 20--High Court rightly held that even if wife who had shared household in past--But was no longer doing so when Act came into force--Would still be entitled to protection under Act--Order of High Court modified.

ORDER

Altamas Kabir, J.

1. The Special Leave Petition is directed against the judgment and order dated 22nd March, 2010, passed by the Delhi High Court in Cr.M.C. No. 3959 of 2009 filed by the Respondent wife, Mrs. Savita Bhanot, questioning the order passed by the learned Additional Sessions Judge on 18th September, 2009, dismissing the appeal filed by her against the order of the Metropolitan Magistrate dated 11th May, 2009.

2. There is no dispute that marriage between the parties was solemnized on 23rd August, 1980 and till 4th July, 2005, they lived together. Thereafter, for whatever reason, there were misunderstandings between the parties, as a result whereof, on 29th November, 2006, the Respondent filed a petition before the Magistrate under Section 12 of the Protection of Women from Domestic Violence Act, 2005, hereinafter referred to as the "PWD Act", seeking various reliefs. By his order dated 8th December, 2006, the learned Magistrate granted interim relief to the Respondent and directed the Petitioner to pay her a sum of Rs. 6,000/- per month. By a subsequent order dated 17th February, 2007, the Magistrate passed a protection/residence order under Sections 18 and 19 of the above Act, protecting the right of the Respondent wife to reside in her matrimonial home in Mathura. The said order was challenged before the Delhi High Court, but such challenge was rejected.

3. In the meantime, the Petitioner, who was a member of the Armed Forces, retired from service on 6th December, 2007, and on 26th February, 2008, he filed an application for the Respondent's eviction from the Government accommodation in Mathura Cantonment. The learned Magistrate directed the Petitioner herein to find an alternative accommodation for the Respondent who had in the meantime received an eviction notice requiring her to vacate the official accommodation occupied by her. By an order dated 11th May, 2009, the learned Magistrate directed the Petitioner to let the Respondent live on the 1st Floor of House No. D-279, Nirman Vihar, New Delhi, which she claimed to be her permanent matrimonial home. The learned Magistrate directed that if this was not possible, a reasonable accommodation in the vicinity of Nirman Vihar was to be made available to the Respondent wife. She further directed that if the second option was also not possible, the Petitioner would be required to pay a sum of Rs. 10,000/- per month to the Respondent as rental charges, so that she could find a house of her choice.

4. Being dissatisfied with the order passed by the learned Metropolitan Magistrate, the Respondent preferred an appeal, which came to be dismissed on 18th September, 2009, by the learned Additional Sessions Judge, who was of the view that since the Respondent had left the matrimonial home on 4th July, 2005, and the Act came into force on 26th October, 2006, the claim of a woman living in domestic relationship or living together prior to 26th October, 2006, was not maintainable. The learned Additional Sessions Judge was of the view that since the cause of action arose prior to coming into force of the PWD Act, the Court could not adjudicate upon the merits of the Respondent's case.

5. Before the Delhi High Court, the only question which came up for determination was whether the petition under the provisions of the PWD Act, 2005, was maintainable by a woman, who was no longer residing with her husband or who was allegedly subjected to any act of domestic violence prior to the coming into force of the PWD Act on 26th October, 2006. After considering the constitutional safeguards under Article 21 of the Constitution, vis--vis, the provisions of Sections 31 and 33 of the PWD Act, 2005, and after examining the statement of objects and reasons for the enactment of the PWD Act, 2005, the learned Judge held that it was with the view of protecting the rights of women under Articles 14, 15 and 21 of the Constitution that the Parliament enacted the PWD Act, 2005, in order to provide for some effective protection of rights guaranteed under the Constitution to women, who are victims of any kind of violence occurring within the family and matters connected therewith and incidental thereto, and to provide an efficient and expeditious civil remedy to them. The learned Judge accordingly held that a petition under the provisions of the PWD Act, 2005, is maintainable even if the acts of domestic violence had been committed prior to the coming into force of the said Act, notwithstanding the fact that in the past she had lived together with her husband in a shared household, but was no more living with him, at the time when the Act came into force. The learned Judge, accordingly, set aside the order passed by the

Additional Sessions Judge and directed him to consider the appeal filed by the Respondent wife on merits.

6. As indicated hereinbefore, the Special Leave Petition is directed against the said order dated 22nd March, 2010, passed by the Delhi High Court and the findings contained therein.

7. During the pendency of the Special Leave Petition, on 15th September, 2011, the Petitioner appearing in-person submitted that the disputes between him and the Respondent had been resolved and the parties had decided to file an application for withdrawal of the Special Leave Petition. The matter was, thereafter, referred to the Supreme Court Mediation Centre and during the mediation, a mutual settlement signed by both the parties was prepared so that the same could be filed in the Court for appropriate orders to be passed thereupon. However, despite the said settlement, which was mutually arrived at by the parties, on 17th January, 2011, when the matter was listed for orders to be passed on the settlement arrived at between the parties, an application filed by the Petitioner was brought to the notice of the Court praying that the settlement arrived at between the parties be annulled. Thereafter, the matter was listed in-camera in Chambers and we had occasion to interact with the parties in order to ascertain the reason for change of heart. We found that while the wife was wanting to rejoin her husband's company, the husband was reluctant to accept the same. For reasons best known to the Petitioner, he insisted that the mutual settlement be annulled as he was not prepared to take back the Respondent to live with him.

8. The attitude displayed by the Petitioner has once again thrown open the decision of the High Court for consideration. We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005.

9. On facts it may be noticed that the couple has no children. Incidentally, the Respondent wife is at present residing with her old parents, after she had to vacate the matrimonial home, which she had shared with the Petitioner at Mathura, being his official residence, while in service. After more than 31 years of marriage, the Respondent wife having no children, is faced with the prospect of living alone at the advanced age of 63 years, without any proper shelter or protection and without any means of sustenance except for a sum of Rs. 6,000/- which the Petitioner was directed by the Magistrate by order dated 8th December, 2006, to give to the Respondent each month. By a subsequent order dated 17th February, 2007, the Magistrate also passed a protection-cum-residence order under Sections 18 and 19 of the PWD Act, protecting the rights of the Respondent wife to reside in her matrimonial home in Mathura. Thereafter, on the Petitioner's retirement from service, the Respondent was compelled to vacate the accommodation in Mathura and a direction was given by the Magistrate to the Petitioner to let the Respondent live on the 1st Floor of House No. D-279, Nirman Vihar, New Delhi, and if that was not possible, to provide a sum of Rs. 10,000/- per month to the Respondent towards rental charges for acquiring an accommodation of her choice.

10. In our view, the situation comes squarely within the ambit of Section 3 of the PWD Act, 2005, which defines "domestic violence" in wide terms, and, accordingly, no interference is called for with the impugned order of the High Court. However, considering the fact that the couple is childless and the Respondent has herself expressed apprehension of her safety if she were to live alone in a rented accommodation, we are of the view that keeping in mind the object of the Act to provide effective protection of the rights of women guaranteed under

the Constitution, who are victims of violence of any kind occurring within the family, the order of the High Court requires to be modified. We, therefore, modify the order passed by the High Court and direct that the Respondent be provided with a right of residence where the Petitioner is residing, by way of relief under Section 19 of the PWD Act, and we also pass protection orders under Section 18 thereof. As far as any monetary relief is concerned, the same has already been provided by the learned Magistrate and in terms of the said order, the Respondent is receiving a sum of Rs. 6,000/- per month towards her expenses.

11. Accordingly, in terms of Section 19 of the PWD Act, 2005, we direct the Petitioner to provide a suitable portion of his residence to the Respondent for her residence, together with all necessary amenities to make such residential premises properly habitable for the Respondent, within 29th February, 2012. The said portion of the premises will be properly furnished according to the choice of the Respondent to enable her to live in dignity in the shared household. Consequently, the sum of Rs. 10,000/- directed to be paid to the Respondent for obtaining alternative accommodation in the event the Petitioner was reluctant to live in the same house with the Respondent, shall stand reduced from Rs. 10,000/- to Rs. 4,000/-, which will be paid to the Respondent in addition to the sum of Rs. 6,000/- directed to be paid to her towards her maintenance. In other words, in addition to providing the residential accommodation to the Respondent, the Petitioner shall also pay a total sum of Rs. 10,000/- per month to the Respondent towards her maintenance and day-to-day expenses.

12. In the event, the aforesaid arrangement does not work, the parties will be at liberty to apply to this Court for further directions and orders. The Special Leave Petition is disposed of accordingly.

13. There shall, however, be no order as to costs.

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SUPREME COURT OF INDIA

D. Velusamy vs D. Patchaiammal

CRIMINAL APPEAL NOS. 2028-2029 OF 2010

Decided on 21 October, 2010

[Arising out of Special Leave Petition (Crl.) Nos.2273-2274/2010]

Appellant : D. Velusamy Vs. Respondent : D. Patchaiammal

Hon'ble Judges/Coram : Markandey Katju, J.

JUDGMENT

Markandey Katju, J.

1. Leave granted.

2. Heard learned counsel for the appellant. None has appeared for the respondent although she has been served notice. We had earlier requested Mr. Jayant Bhushan, learned Senior counsel to assist us as Amicus Curiae in the case, and we record our appreciation of Mr. Bhushan who was of considerable assistance to us.

3. These appeals have been filed against the judgment of the Madras High Court dated 12.10.2009.

4. The appellant herein has alleged that he was married according to the Hindu Customary Rites with one Lakshmi on 25.6.1980. Out of the wedlock with Lakshmi a male child was born, who is now studying in an Engineering college at Ooty. The petitioner is working as a Secondary Teacher in Thevanga Higher Secondary School, Coimbatore.

5. It appears that the respondent-D. Patchaiammal filed a petition under Section 125 Cr.P.C. in the year 2001 before the Family Court at Coimbatore in which she alleged that she was married to the appellant herein on 14.9.1986 and since then the appellant herein and she lived together in her father's house for two or three years. It is alleged in the petition that after two or three years the appellant herein left the house of the respondent's father and started living in his native place, but would visit the respondent occasionally.

6. It is alleged that the appellant herein (respondent in the petition under Section 125 Cr.P.C.) deserted the respondent herein (petitioner in the proceeding under Section 125 Cr.P.C.) two or three years after marrying her in 1986. In her petition under Section 125 Cr.P.C. she alleged that she did not have any kind of livelihood and she is unable to maintain herself whereas the respondent (appellant herein) is a Secondary Grade Teacher drawing a salary of Rs.10000/- per month. Hence it was prayed that the respondent (appellant herein) be directed to pay Rs.500/- per month as maintenance to the petitioner.

7. In both her petition under Section 125 Cr.P.C. as well as in her deposition in the case the respondent has alleged that she was married to the appellant herein on 14.9.1986, and that he left her after two or three years of living together with her in her father's house.

8. Thus it is the own case of the respondent herein that the appellant left her in 1988 or 1989 (i.e. two or three years after the alleged marriage in 1986). Why then was the petition under Section 125 Cr.P.C. filed in the year 2001, i.e. after a delay of about twelve years, shall have to be satisfactorily explained by the respondent. This fact also creates some doubt about the case of the respondent herein.

9. In his counter affidavit filed by the appellant herein before the Family Court, Coimbatore, it was alleged that the respondent (appellant herein) was married to one Lakshmi on 25.6.1980 as per the Hindu Marriage rites and customs and he had a male child, who is studying in C.S.I. Engineering college at Ooty. To prove his marriage with Lakshmi the appellant produced the ration card, voter's identity card of his wife, transfer certificate of his son, discharge certificate of his wife Lakshmi from hospital, photographs of the wedding, etc.

10. The learned Family Court Judge has held by his judgment dated 5.3.2004 that the appellant was married to the respondent and not to Lakshmi. These findings have been upheld by the High Court in the impugned judgment.

11. In our opinion, since Lakshmi was not made a party to the proceedings before the Family Court Judge or before the High Court and no notice was issued to her hence any declaration about her marital status vis-`- vis the appellant is wholly null and void as it will be violative of the rules of natural justice. Without giving a hearing to Lakshmi no such declaration could have validly be given by the Courts below that she had not married the appellant herein since such as a finding would seriously affect her rights. And if no such declaration could have been given obviously no declaration could validly have been given that the appellant was validly married to the respondent, because if Lakshmi was the wife of the appellant then without divorcing her the appellant could not have validly married the respondent.

12. It may be noted that Section 125 Cr.P.C. provides for giving maintenance to the wife and some other relatives. The word `wife' has been defined in Explanation (b) to Section 125(1) of the Cr.P.C. as follows :

> *"Wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."*

13. In Vimala (K) vs. Veeraswamy (K) [(1991) 2 SCC 375], a three- Judge Bench of this Court held that Section 125 of the Code of 1973 is meant to achieve a social purpose and the object is to prevent vagrancy and destitution. Explaining the meaning of the word `wife' the Court held:

> *"..the object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. The term `wife' in Section 125 of the Code of Criminal Procedure, includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is thus brought within the inclusive definition of the term `wife' consistent with the objective. However, under the law a second wife whose marriage is void on account of the survival of the first marriage is not a legally wedded wife, and is, therefore, not entitled to maintenance under this provision."*

14. In a subsequent decision of this Court in Savitaben Somabhat Bhatiya vs. State of Gujarat and others, AIR 2005 SC 1809, this Court held that however desirable it may be to take note of the plight of an unfortunate woman, who unwittingly enters into wedlock with a married man, there is no scope to include a woman not lawfully married within the expression of `wife'. The Bench held that this inadequacy in law can be amended only by the Legislature.

15. Since we have held that the Courts below erred in law in holding that Lakshmi was not married to the appellant (since notice was not issued to her and she was not heard), it cannot be said at this stage that the respondent herein is the wife of the appellant. A divorced wife

is treated as a wife for the purpose of Section 125 Cr.P.C. but if a person has not even been married obviously that person could not be divorced. Hence the respondent herein cannot claim to be the wife of the appellant herein, unless it is established that the appellant was not married to Lakshmi.

16. However, the question has also be to be examined from the point of view of The Protection of Women from Domestic Violence Act, 2005. Section 2(a) of the Act states :

"2(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent";

Section 2(f) states :

"2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family";

Section 2(s) states :

"2(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."

Section 3(a) states that an act will constitute domestic violence in case it-

"3(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;" or (emphasis supplied)

17. The expression "economic abuse" has been defined to include :

"(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance". (emphasis supplied)

18. An aggrieved person under the Act can approach the Magistrate under Section 12 for the relief mentioned in Section 12(2). Under Section 20(1)(d) the Magistrate can grant maintenance while disposing of the application under Section 12(1).

19. Section 26(1) provides that the relief mentioned in Section 20 may also be sought in any legal proceeding, before a civil court, family court or a criminal court.

20. Having noted the relevant provisions in The Protection of Women from Domestic Violence Act, 2005, we may point out that the expression `domestic relationship' includes not only the relationship of marriage but also a relationship `in the nature of marriage'. The question, therefore, arises as to what is the meaning of the expression `a relationship in the nature of marriage'. Unfortunately this expression has not been defined in the Act. Since there is no direct decision of this Court on the interpretation of this expression we think it necessary

to interpret it because a large number of cases will be coming up before the Courts in our country on this point, and hence an authoritative decision is required.

21. In our opinion Parliament by the aforesaid Act has drawn a distinction between the relationship of marriage and a relationship in the nature of marriage, and has provided that in either case the person who enters into either relationship is entitled to the benefit of the Act.

22. It seems to us that in the aforesaid Act of 2005 Parliament has taken notice of a new social phenomenon which has emerged in our country known as live-in relationship. This new relationship is still rare in our country, and is sometimes found in big urban cities in India, but it is very common in North America and Europe. It has been commented upon by this Court in S. Khushboo vs. Kanniammal & Anr. (2010) 5 SCC 600 (vide para 31).

23. When a wife is deserted, in most countries the law provides for maintenance to her by her husband, which is called alimony. However, earlier there was no law providing for maintenance to a woman who was having a live-in relationship with a man without being married to him and was then deserted by him.

24. In USA the expression `palimony' was coined which means grant of maintenance to a woman who has lived for a substantial period of time with a man without marrying him, and is then deserted by him (see `palimony' on Google). The first decision on palimony was the well known decision of the California Superior Court in Marvin vs. Marvin (1976) 18 C3d660. This case related to the famous film actor Lee Marvin, with whom a lady Michelle lived for many years without marrying him, and was then deserted by him and she claimed palimony. Subsequently in many decisions of the Courts in USA, the concept of palimony has been considered and developed. The US Supreme Court has not given any decision on whether there is a legal right to palimony, but there are several decisions of the Courts in various States in USA. These Courts in USA have taken divergent views, some granting palimony, some denying it altogether, and some granting it on certain conditions. Hence in USA the law is still in a state of evolution on the right to palimony.

25. Although there is no statutory basis for grant of palimony in USA, the Courts there which have granted it have granted it on a contractual basis. Some Courts in USA have held that there must be a written or oral agreement between the man and woman that if they separate the man will give palimony to the woman, while other Courts have held that if a man and woman have lived together for a substantially long period without getting married there would be deemed to be an implied or constructive contract that palimony will be given on their separation.

26. In Taylor vs. Fields (1986) 224 Cal. Rpr. 186 the facts were that the plaintiff Taylor had a relationship with a married man Leo. After Leo died Taylor sued his widow alleging breach of an implied agreement to take care of Taylor financially and she claimed maintenance from the estate of Leo. The Court of Appeals in California held that the relationship alleged by Taylor was nothing more than that of a married man and his mistress. It was held that the alleged contract rested on meretricious consideration and hence was invalid and unenforceable. The Court of Appeals relied on the fact that Taylor did not live together with Leo but only occasionally spent weekends with him. There was no sign of a stable and significant cohabitation between the two.

27. However, the New Jersey Supreme Court in Devaney vs. L' Esperance 195 N.J., 247 (2008) held that cohabitation is not necessary to claim palimony, rather "it is the promise to support, expressed or implied, coupled with a marital type relationship, that are indispensable elements to support a valid claim for palimony". A law has now been passed in 2010 by the

State legislature of New Jersey that there must be a written agreement between the parties to claim palimony.

28. Thus, there are widely divergent views of the Courts in U.S.A. regarding the right to palimony. Some States like Georgia and Tennessee expressly refuse to recognize palimony agreements.

29. Written palimony contracts are rare, but some US Courts have found implied contracts when a woman has given up her career, has managed the household, and assisted a man in his business for a lengthy period of time. Even when there is no explicit written or oral contract some US Courts have held that the action of the parties make it appear that a constructive or implied contract for grant of palimony existed.

30. However, a meretricious contract exclusively for sexual service is held in all US Courts as invalid and unenforceable.

31. In the case before us we are not called upon to decide whether in our country there can be a valid claim for palimony on the basis of a contract, express or implied, written or oral, since no such case was set up by the respondent in her petition under Section 125 Cr.P.C.

32. Some countries in the world recognize common law marriages. A common law marriage, sometimes called de facto marriage, or informal marriage is recognized in some countries as a marriage though no legally recognized marriage ceremony is performed or civil marriage contract is entered into or the marriage registered in a civil registry (see details on Google).

33. In our opinion a `relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married :-

    (a) The couple must hold themselves out to society as being akin to spouses.

    (b) They must be of legal age to marry.

    (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

    (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

    (see `Common Law Marriage' in Wikipedia on Google) In our opinion a `relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a `shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a `domestic relationship'.

34. In our opinion not all live in relationships will amount to a relationship in the nature of marriag8e to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a `keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'

35. No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression `relationship in the nature of marriage' and not `live in relationship'. The Court in the grab of interpretation cannot change the language of the statute.

36. In feudal society sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel `Anna Karenina', Gustave Flaubert's novel `Madame Bovary' and the novels of the great Bengali writer Sharat Chandra Chattopadhyaya.

37. However, Indian society is changing, and this change has been reflected and recognized by Parliament by enacting The Protection of Women from Domestic Violence Act, 2005.

38. Coming back to the facts of the present case, we are of the opinion that the High Court and the learned Family Court Judge erred in law in holding that the appellant was not married to Lakshmi without even issuing notice to Lakshmi. Hence this finding has to be set aside and the matter remanded to the Family Court which may issue notice to Lakshmi and after hearing her give a fresh finding in accordance with law. The question whether the appellant was married to the respondent or not can, of course, be decided only after the aforesaid finding.

39. There is also no finding in the judgment of the learned Family Court Judge on the question whether the appellant and respondent had lived together for a reasonably long period of time in a relationship which was in the nature of marriage. In our opinion such findings were essential to decide this case. Hence we set aside the impugned judgment of the High Court and Family Court Judge, Coimbatore and remand the matter to the Family Court Judge to decide the matter afresh in accordance with law and in the light of the observations made above. Appeals allowed.

❑❑❑

IN THE SUPREME COURT OF INDIA

Indra Sarma Vs. V.K.V. Sarma

CRIMINAL APPEAL NO. 2009 OF 2013
(@ SPECIAL LEAVE PETITION (CRL.) NO.4895 OF 2012)

Appellant : Indra Sarma vs. Respondent : V.K.V. Sarma

Hon'ble Judges/Coram : K.S. Radhakrishnan, J.

JUDGMENT

K.S. Radhakrishnan, J.

1. Leave granted.

2. Live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal.

3. We are, in this case, concerned with the question whether a "live-in relationship" would amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 (for short "the DV Act") and the disruption of such a relationship by failure to maintain a women involved in such a relationship amounts to "domestic violence" within the meaning of Section 3 of the DV Act.

FACTS:

4. Appellant and respondent were working together in a private company. The Respondent, who was working as a Personal Officer of the Company, was a married person having two children and the appellant, aged 33 years, was unmarried. Constant contacts between them developed intimacy and in the year 1992, appellant left the job from the above-mentioned Company and started living with the respondent in a shared household. Appellant's family members, including her father, brother and sister, and also the wife of the respondent, opposed that live-in-relationship. She has also maintained the stand that the respondent, in fact, started a business in her name and that they were earning from that business. After some time, the respondent shifted the business to his residence and continued the business with the help of his son, thereby depriving her right of working and earning. Appellant has also stated that both of them lived together in a shared household and, due to their relationship, appellant became pregnant on three occasions, though all resulted in abortion. Respondent, it was alleged, used to force the appellant to take contraceptive methods to avoid pregnancy. Further, it was also stated that the respondent took a sum of Rs.1,00,000/- from the appellant stating that he would buy a land in her name, but the same was not done. Respondent also took money from the appellant to start a beauty parlour for his wife. Appellant also alleged that, during the year 2006, respondent took a loan of Rs.2,50,000/- from her and had not returned. Further, it was also stated that the respondent, all along, was harassing the appellant by not exposing her as his wife publicly, or permitting to suffix his name after the name of the appellant. Appellant also alleged that the respondent never used to take her anywhere, either to the houses of relatives or friends or functions. Appellant also alleged that the respondent never used to accompany her to the hospital or make joint Bank account, execute documents, etc. Respondent's family constantly opposed their live-in relationship and ultimately forced him to leave the company of the appellant and it was alleged that he left the company of the appellant without maintaining her.

5. Appellant then preferred Criminal Misc. No. 692 of 2007 under Section 12 of the DV Act before the III Additional Chief Metropolitan Magistrate, Bangalore, seeking the following reliefs:

   1) Pass a Protection Order under Section 18 of the DV Act prohibiting the respondent from committing any act of domestic violence against the appellant and her relatives, and further prohibiting the respondent from alienating the assets both moveable and immoveable properties owned by the respondent;

   2) Pass a residence order under Section 19 of the DV Act and direct the respondent to provide for an independent residence as being provided by the respondent or in the alternative a joint residence along with the respondent where he is residing presently and for the maintenance of Rs.25,000/- per month regularly as being provided earlier or in the alternative to pay the permanent maintenance charges at the rate of Rs.25,000/- per month for the rest of the life;

   3) Pass a monetary order under Section 20 of the DV Act directing the respondent to pay a sum of Rs.75,000/- towards the operation, pre and post operative medication, tests etc and follow up treatments;

   4) Pass a compensation order under Section 22 of the DV Act to a sum of Rs.3,50,000/- towards damages for misusing the funds of the sister of the appellant, mental torture and emotional feelings; and

   5) Pass an ex-parte interim order under Section 23 of the DV Act directing the respondent to pay Rs.75,000/- towards the medical expenses and pay the maintenance charges @ Rs.25,000/- per month as being paid by the respondent earlier.

6. Respondent filed detailed objections to the application stating that it was on sympathetical grounds that he gave shelter to her in a separate house after noticing the fact that she was abandoned by her parents and relatives, especially after the demise of her father. She had also few litigations against her sister for her father's property and she had approached the respondent for moral as well as monetary support since they were working together in a Company. The respondent has admitted that he had cohabited with the appellant since 1993. The fact that he was married and had two children was known to the appellant. Pregnancy of the appellant was terminated with her as well as her brother's consent since she was not maintaining good health. The respondent had also spent large amounts for her medical treatment and the allegation that he had taken money from the appellant was denied. During the month of April, 2007, the respondent had sent a cheque for Rs.2,50,000/- towards her medical expenses, drawn in the name of her sister which was encashed. Further, it was stated, it was for getting further amounts and to tarnish the image of the respondent, the application was preferred under the DV Act. Before the learned Magistrate, appellant examined herself as P.W.1 and gave evidence according to the averments made in the petition. Respondent examined himself as R.W.1. Child Development Project Officer was examined as R.W.2. The learned Magistrate found proof that the parties had lived together for a considerable period of time, for about 18 years, and then the respondent left the company of the appellant without maintaining her. Learned Magistrate took the view that the plea of "domestic violence" had been established, due to the non-maintenance of the appellant and passed the order dated 21.7.2009 directing the respondent to pay an amount of Rs.18,000/- per month towards maintenance from the date of the petition.

7. Respondent, aggrieved by the said order of the learned Magistrate, filed an appeal before the Sessions Court under Section 29 of the DV Act. The Appellate Court, after having noticed that the respondent had admitted the relationship with appellant for over a period of 14 years, took the view that, due to their livein relationship for a considerable long period,

nonmaintenance of the appellant would amount to domestic violence within the meaning of Section 3 of the DV Act. The appellate Court also concluded that the appellant has no source of income and that the respondent is legally obliged to maintain her and confirmed the order passed by the learned Magistrate.

8. The respondent took up the matter in appeal before the High Court. It was contended before the High Court that the appellant was aware of the fact that the respondent was a married person having two children, yet she developed a relationship, in spite of the opposition raised by the wife of the respondent and also by the appellant's parents. Reliance was also placed on the judgment of this Court in D. Velusamy v. D. Patchaiammal (2010) 10 SCC 469 and submitted that the tests laid down in Velusamy case (supra) had not been satisfied. The High Court held that the relationship between the parties would not fall within the ambit of "relationship in the nature of marriage" and the tests laid down in Velusamy case (supra) have not been satisfied. Consequently, the High Court allowed the appeal and set aside the order passed by the Courts below. Aggrieved by the same, this appeal has been preferred.

9. Shri Anish Kumar Gupta, learned counsel appearing for the appellant, submitted that the relationship between the parties continued from 1992 to 2006 and since then, the respondent started avoiding the appellant without maintaining her. Learned counsel submitted that the relationship between them constituted a "relationship in the nature of marriage" within the meaning of Section 2(f) of the DV Act, which takes in every relationship by a man with a woman, sharing household, irrespective of the fact whether the respondent is a married person or not. Learned counsel also submitted that the tests laid down in Velusamy case (supra) have also been satisfied.

10. Ms. Jyotika Kalra, learned amicus curiae, took us elaborately through the provisions of the DV Act as well as the objects and reasons for enacting such a legislation. Learned amicus curiae submitted that the Act is intended to provide for protection of rights of women who are victims of violence of any type occurring in the family. Learned amicus curiae also submitted that the various provisions of the DV Act are intended to achieve the constitutional principles laid down in Article 15(3), reinforced vide Article 39 of the Constitution of India. Learned amicus curiae also made reference to the Malimath Committee report and submitted that a man who marries a second wife, during the subsistence of the first wife, should not escape his liability to maintain his second wife, even under Section 125 CrPC. Learned amicus curiae also referred to a recent judgment of this Court in Deoki Panjhiyara v. Shashi Bhushan Narayan Azad and Another (2013) 2 SCC 137 in support of her contention.

11. Mr. Nikhil Majithia, learned counsel appearing for the respondent, made extensive research on the subject and made available valuable materials. Learned counsel referred to several judgments of the Constitutional Courts of South Africa, Australia, New Zealand, Canada, etc. and also referred to parallel legislations on the subject in other countries. Learned counsel submitted that the principle laid down in Velusamy case (supra) has been correctly applied by the High Court and, on facts, appellant could not establish that their relationship is a "relationship in the nature of marriage" so as to fall within Section 2(f) of the DV Act. Learned counsel also submitted that the parties were not qualified to enter into a legal marriage and the appellant knew that the respondent was a married person. Further, the appellant was not a victim of any fraudulent or bigamous marriage and it was a live-in relationship for mutual benefits, consequently, the High Court was right in holding that there has not been any domestic violence, within the scope of Section 3 of the DV Act entitling the appellant to claim maintenance.

12. We have to examine whether the non maintenance of the appellant in a broken live-in-relationship, which is stated to be a relationship not in the nature of a marriage, will amount

to "domestic violence" within the definition of Section 3 of the DV Act, enabling the appellant to seek one or more reliefs provided under Section 12 of the DV Act.

13. Before examining the various issues raised in this appeal, which have far reaching consequences with regard to the rights and liabilities of parties indulging in live-in relationship, let us examine the relevant provisions of the DV Act and the impact of those provisions on such relationships.

D.V. ACT

14. The D.V. Act has been enacted to provide a remedy in Civil Law for protection of women from being victims of domestic violence and to prevent occurrence of domestic violence in the society. The DV Act has been enacted also to provide an effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family.

15. "Domestic Violence" is undoubtedly a human rights issue, which was not properly taken care of in this country even though the Vienna Accord 1994 and the Beijing Declaration and Platform for Action (1995) had acknowledged that domestic violence was undoubtedly a human rights issue. UN Committee on Convention on Elimination of All Forms of Discrimination Against Women in its general recommendations had also exhorted the member countries to take steps to protect women against violence of any kind, especially that occurring within the family, a phenomenon widely prevalent in India. Presently, when a woman is subjected to cruelty by husband or his relatives, it is an offence punishable under Section 498A IPC. The Civil Law, it was noticed, did not address this phenomenon in its entirety. Consequently, the Parliament, to provide more effective protection of rights of women guaranteed under the Constitution under Articles 14, 15 and 21, who are victims of violence of any kind occurring in the family, enacted the DV Act.

16. Chapter IV is the heart and soul of the DV Act, which provides various reliefs to a woman who has or has been in domestic relationship with any adult male person and seeks one or more reliefs provided under the Act. The Magistrate, while entertaining an application from an aggrieved person under Section 12 of the DV Act, can grant the following reliefs:

(1) Payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for injuries caused by the acts of domestic violence committed by the adult male member, with a prayer for set off against the amount payable under a decree obtained in Court;

(2) The Magistrate, under Section 18 of the DV Act, can pass a "protection order" in favour of the aggrieved person and prohibit the respondent from:

(a) committing any act of domestic violence;

(b) aiding or abetting in the commission of acts of domestic violence;

(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;

(d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g) committing any other act as specified in the protection order.

(3) The Magistrate, while disposing of an application under Section 12(1) of the DV Act, can pass a "residence order" under Section 19 of the DV Act, in the following manner:

"19. Residence orders.- (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order-

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.

xxx xxx xxx

xxx xxx xxx"

(4) An aggrieved person, while filing an application under Section 12(1) of the DV Act, is also entitled, under Section 20 of the DV Act, to get "monetary reliefs" to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to,-

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

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of

the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

xxx xxx xxx

xxx xxx xxx"

The monetary reliefs granted under the above mentioned section shall be adequate, fair, reasonable and consistent with the standard of living to which an aggrieved person is accustomed and the Magistrate has the power to order an appropriate lump sum payment or monthly payments of maintenance.

(5) The Magistrate, under Section 21 of the DV Act, has the power to grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent.

(6) The Magistrate, in addition to other reliefs, under Section 22 of the DV Act, can pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent.

17. Section 26 of the DV Act provides that any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a Civil Court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act. Further, any relief referred to above may be sought for in addition to and along with any other reliefs that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. Further, if any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

18. Section 3 of the DV Act deals with "domestic violence" and reads as under:

"3. Definition of domestic violence.- For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it-

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.- For the purposes of this section,-

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) "verbal and emotional abuse" includesPage

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.- For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

19. In order to examine as to whether there has been any act, omission, or commission or conduct so as to constitute domestic violence, it is necessary to examine some of the definition clauses under Section 2 of the DV Act. Section 2(a) of the DV Act defines the expression "aggrieved person" as follows:

"2(a). "Aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent."

Section 2(f) defines the expression "domestic relationship" as follows:

"2(f). "Domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

Section 2(q) defines the expression "respondent" as follows:

"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."

Section 2(s) defines the expression "shared household" and reads as follows:

"2(s). "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."

20. We are, in this case, concerned with a "live-in relationship" which, according to the aggrieved person, is a "relationship in the nature of marriage" and it is that relationship which has been disrupted in the sense that the respondent failed to maintain the aggrieved person, which, according to the appellant, amounts to "domestic violence". The respondent maintained the stand that the relationship between the appellant and the respondent was not a relationship in the nature of marriage but a live-in-relationship simplicitor and the alleged act, omission, commission or conduct of the respondent would not constitute "domestic violence" so as to claim any protection orders under Section 18, 19 or 20 of the DV Act.

21. We have to first examine whether the appellant was involved in a domestic relationship with the respondent. Section 2(f) refers to five categories of relationship, such as, related by consanguinity, marriage, relationship in the nature of marriage, adoption, family members living together as a joint family, of which we are, in this case, concerned with an alleged relationship in the nature of marriage.

22. Before we examine whether the respondent has committed any act of domestic violence, we have to first examine whether the relationship between them was a "relationship in the nature of marriage" within the definition of Section 3 read with Section 2(f) of the DV Act. Before examining the term "relationship in the nature of marriage", we have to first examine what is "marriage", as understood in law.

MARRIAGE AND MARITAL RELATIONSHIP:

23. Marriage is often described as one of the basic civil rights of man/woman, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife. Three elements of common law marriage are (1) agreement to be married (2) living together as husband and wife, (3) holding out to the public that they are married. Sharing a common household and duty to live together form part of the 'Consortium Omnis Vitae" which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences flow out of that relationship.

24. Marriages in India take place either following the personal Law of the Religion to which a party is belonged or following the provisions of the Special Marriage Act. Marriage, as per the Common Law, constitutes a contract between a man and a woman, in which the parties undertake to live together and support each other. Marriage, as a concept, is also nationally and internationally recognized. O'Regan, J., in Dawood and Another v. Minister of Home Affairs and Others 2000 (3) SA 936 (CC) noted as follows:

"Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that

marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends...."

25. South African Constitutional Court in various judgments recognized the above mentioned principle. In Satchwell v. President of the Republic of South Africa and Another 2002 (6) SA 1 (CC), Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC), the Constitutional Court of South Africa recognized the right "free to marry and to raise family". Section 15(3)(a)(i) of the Constitution of South Africa, in substance makes provision for the recognition of "marriages concluded under the tradition, or a system of religious, personal or family law." Section 9(3) of the Constitution of South Africa reads as follows:

"The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

26. Article 23 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that:

"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

27. Article 16 of the Universal Declaration of Human Rights, 1948 provides that: "1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.

They are entitled to equal rights as to marriage, during marriage and at it dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

28. Parties in the present case are Hindus by religion and are governed by the Hindu Marriage Act, 1955.

The expression "marriage", as stated, is not defined under the Hindu Marriage Act, but the "conditions for a Hindu marriage" are dealt with in Section 5 of the Hindu Marriage Act and which reads as under:

"5. Conditions for a Hindu marriage - A marriage may be solemnized between any two hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity;

(iii) the bridegroom has completed the age of twenty- one years and the bride the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

29. Section 7 of the Hindu Marriage Act deals with the "Ceremonies for a Hindu marriage" and reads as follows:

"7. Ceremonies for a Hindu marriage. -

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

30. Entering into a marriage, therefore, either through the Hindu Marriage Act or the Special Marriage Act or any other Personal Law, applicable to the parties, is entering into a relationship of "public significance", since marriage being a social institution, many rights and liabilities flow out of that legal relationship. The concept of marriage as a "civil right" has been recognised by various courts all over the world, for example, Skinner v. Oklahoma 316 US 535 (1942), Perez v. Lippold 198 P.2d 17, 20.1 (1948), Loving v. Virginia 388 US 1 (1967).

31. We have referred to, in extenso, about the concept of "marriage and marital relationship" to indicate that the law has distinguished between married and unmarried people, which cannot be said to be unfair when we look at the rights and obligations which flow out of the legally wedded marriage. A married couple has to discharge legally various rights

and obligations, unlike the case of persons having live-in relationship or, marriage-like relationship or defacto relationship.

32. Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law on solemnization of the marriage and the rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. This Court in Pinakin Mahipatray Rawal v. State of Gujarat (2013) 2 SCALE 198 held that marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their up-bringing, services in the home, support, affection, love, liking and so on.

RELATIONSHIP IN THE NATURE OF MARRIAGE:

33. Modern Indian society through the DV Act recognizes in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood. Section 2(f), as already indicated, deals with a relationship between two persons (of the opposite sex) who live or have lived together in a shared household when they are related by:

    (a) Consanguinity

    (b) Marriage

    (c) Through a relationship in the nature of marriage

    (d) Adoption

    (e) Family members living together as joint family.

34. The definition clause mentions only five categories of relationships which exhausts itself since the expression "means", has been used. When a definition clause is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive. Section 2(f) has not used the expression "include" so as to make the definition exhaustive. It is in that context we have to examine the meaning of the expression "relationship in the nature of marriage".

35. We have already dealt with what is "marriage", "marital relationship" and "marital obligations". Let us now examine the meaning and scope of the expression "relationship in the nature of marriage" which falls within the definition of Section 2(f) of the DV Act. Our concern in this case is of the third enumerated category that is "relationship in the nature of marriage" which means a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognized, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage.

36. Distinction between the relationship in the nature of marriage and marital relationship has to be noted first. Relationship of marriage continues, notwithstanding the fact that there are differences of opinions, marital unrest etc., even if they are not sharing a shared household, being based on law. But live-inrelationship is purely an arrangement between the parties unlike, a legal marriage. Once a party to a livein-relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the legislature has used the expression "in the nature of".

37. Reference to certain situations, in which the relationship between an aggrieved person referred to in Section 2(a) and the respondent referred to in Section 2(q) of the DV Act,

would or would not amount to a relationship in the nature of marriage, would be apposite. Following are some of the categories of cases which are only illustrative:

(a) Domestic relationship between an unmarried adult woman and an unmarried adult male:

Relationship between an unmarried adult woman and an unmarried adult male who lived or, at any point of time lived together in a shared household, will fall under the definition of Section 2(f) of the DV Act and in case, there is any domestic violence, the same will fall under Section 3 of the DV Act and the aggrieved person can always seek reliefs provided under Chapter IV of the DV Act.

(b) Domestic relationship between an unmarried woman and a married adult male: Situations may arise when an unmarried adult women knowingly enters into a relationship with a married adult male. The question is whether such a relationship is a relationship "in the nature of marriage" so as to fall within the definition of Section 2(f) of the DV Act.

(c) Domestic relationship between a married adult woman and an unmarried adult male:

Situations may also arise where an adult married woman, knowingly enters into a relationship with an unmarried adult male, the question is whether such a relationship would fall within the expression relationship "in the nature of marriage".

(d) Domestic relationship between an unmarried woman unknowingly enters into a relationship with a married adult male: An unmarried woman unknowingly enters into a relationship with a married adult male, may, in a given situation, fall within the definition of Section 2(f) of the DV Act and such a relationship may be a relationship in the "nature of marriage", so far as the aggrieved person is concerned.

(e) Domestic relationship between same sex partners (Gay and Lesbians): DV Act does not recognize such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act. Legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (U.K.), have recognized the relationship between the same sex couples and have brought these relationships into the definition of Domestic relationship.

38. Section 2(f) of the DV Act though uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act.

39. We should, therefore, while determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence", have a common sense/balanced approach, after weighing up the various factors which exist in a particular relationship and then reach a conclusion as to whether a particular relationship is a relationship in the "nature of marriage". Many a times, it is the common intention of the parties to that relationship as to what their relationship is to be, and to involve and as to their respective roles and responsibilities, that primarily governs that relationship. Intention may be expressed or implied and what is relevant is their intention as to matters that are characteristic of a marriage. The expression "relationship in the nature of marriage", of course, cannot be construed in the abstract, we must take it in the context in which it appears and apply the same bearing in mind the purpose and object of the Act as well as the meaning of the expression "in the nature of

marriage". Plight of a vulnerable section of women in that relationship needs attention. Many a times, the women are taken advantage of and essential contribution of women in a joint household through labour and emotional support have been lost sight of especially by the women who fall in the categories mentioned in (a) and (d) supra. Women, who fall under categories (b) and (c), stand on a different footing, which we will deal with later. In the present case, the appellant falls under category (b), referred to in paragraph 37(b) of the Judgment.

40. We have, therefore, come across various permutations and combinations, in such relationships, and to test whether a particular relationship would fall within the expression "relationship in the nature of marriage", certain guiding principles have to be evolved since the expression has not been defined in the Act.

41. Section 2(f) of the DV Act defines "domestic relationship" to mean, inter alia, a relationship between two persons who live or have lived together at such point of time in a shared household, through a relationship in the nature of marriage. The expression "relationship in the nature of marriage" is also described as defacto relationship, marriage – like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship) etc.

42. Courts and legislatures of various countries now began to think that denying certain benefits to a certain class of persons on the basis of their marital status is unjust where the need of those benefits is felt by both unmarried and married cohabitants. Courts in various countries have extended certain benefits to heterosexual unmarried cohabitants. Legislatures too, of late, through legislations started giving benefits to heterosexual cohabitants.

43. In U.K. through the Civil Partnership Act, 2004, the rights of even the same-sex couple have been recognized. Family Law Act, 1996, through the Chapter IV, titled 'Family Homes and Domestic Violence', cohabitants can seek reliefs if there is domestic violence. Canada has also enacted the Domestic Violence Intervention Act, 2001. In USA, the violence against woman is a crime with far-reaching consequences under the Violence Against Women Act, 1994.

44. The Interpretation Act, 1984 (Australia) has laid down certain indicators to determine the meaning of "de facto relationship", which are as follows:

"13A . De facto relationship and de facto partner, references to

(1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.

(2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential —

(a) the length of the relationship between them;

(b) whether the 2 persons have resided together;

(c) the nature and extent of common residence;

(d) whether there is, or has been, a sexual relationship between them;

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(f) the ownership, use and acquisition of their property (including property they own individually);

(g) the degree of mutual commitment by them to a shared life;

(h) whether they care for and support children;

(i) the reputation, and public aspects, of the relationship between them.

xxx xxx xxx

xxx xxx xxx"

45. The Domestic and Family Violence Protection Act, 2012 (Queensland) has defined the expression "couple relationship" to mean as follows":

"18. Meaning of couple relationship

(1) xxx xxx xxx

(2) In deciding whether a couple relationship exists, a court may have regard to the following –

(a) the circumstances of the relationship between the persons, including, for example–

(i) the degree of trust between the persons; and

(ii) the level of each person's dependence on, and commitment to, the other person;

(b) the length of time for which the relationship has existed or did exist;

(c) the frequency of contact between the persons;

(d) the degree of intimacy between the persons.

(3) Without limiting sub-section (2), the court may consider the following factors in deciding whether a couple relationship exists-

(a) Whether the trust, dependence or commitment is or was of the same level;

(b) Whether one of the persons is or was financially dependent on the other;

(c) Whether the persons jointly own or owned any property;

(d) Whether the persons have or had joint bank accounts;

(e) Whether the relationship involves or involved a relationship of a sexual nature;

(f) Whether the relationship is or was exclusive.

(4) A couple relationship may exist even if the court makes a negative finding in relation to any or all of the factors mentioned in subsection (3).

(5) A couple relationship may exist between two persons whether the persons are of the same or a different gender.

(6) A couple relationship does not exist merely because two persons date or dated each other on a number of occasions."

46. The Property (Relationships) Act, 1984 of North South Wales, Australia also provides for some guidelines with regard to the meaning and content of the expression "de facto relationship", which reads as follows:

"4 De facto relationships

(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

(a) who live together as a couple, and

(b) who are not married to one another or related by family.

(2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

(a) the duration of the relationship,

(b) the nature and extent of common residence,

(c) whether or not a sexual relationship exists,

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,

(e) the ownership, use and acquisition of property,

(f) the degree of mutual commitment to a shared life,

(g) the care and support of children,

(h) the performance of household duties,

(i) the reputation and public aspects of the relationship.

(3) No finding in respect of any of the matters mentioned in subsection (2) (a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship."

47. "In Re Marriage of Lindsay, 101 Wn.2d 299 (1984), Litham v. Hennessey 87 Wn.2d 550 (1976), Pennington 93 Wash.App. at 917, the Courts in United States took the view that the relevant factors establishing a meretricious relationship include continuous cohabitation, duration of the relationship, purpose of the relationship, and the pooling of resources and services for joint projects. The Courts also ruled that a relationship need not be "long term" to be characterized as meretricious relationship. While a long term relationship is not a threshold requirement, duration is a significant factor. Further, the Court also noticed that a short term relationship may be characterized as a meretricious, but a number of other important factors must be present.

48. In Stack v. Dowden [2007] 2 AC 432, Baroness Hale of Richmond said:

"Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage….. So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: John Ermisch, Personal Relationships and Marriage Expectations (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage

as a legal institution to regarding themselves 'as good as married' anyway: Law Commission, Consultation Paper No 179, Part 2, para 2.45."

49. In MW v. The Department of Community Services [2008] HCA 12, Gleeson, CJ, made the following observations:

"Finn J was correct to stress the difference between living together and living together 'as a couple in a relationship in the nature of marriage or civil union'. The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved."

50. In Lynam v. The Director-General of Social Security (1983) 52 ALR 128, the Court considered whether a man and a woman living together 'as husband and wife on a bona fide domestic basis' and Fitzgerald, J. said:

"Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test."

51. Tipping, J. in Thompson v. Department of Social Welfare (1994) 2 SZLR 369 (HC), listed few characteristics which are relevant to determine relationship in the nature of marriage as follows:

"(1) Whether and how frequently the parties live in the same house.

(2) Whether the parties have a sexual relationship.

(3) Whether the parties give each other emotional support and companionship.

(4) Whether the parties socialize together or attend activities together as a couple.

(5) Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children.

(6) Whether the parties share household and other domestic tasks.

(7) Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise.

(8) Whether the parties run a common household, even if one or other partner is absent for periods of time.

(9) Whether the parties go on holiday together.

(10) Whether the parties conduct themselves towards, and are treated by friends, relations and others as if they were a married couple."

52. Live-in relationship, as such, as already indicated, is a relationship which has not been socially accepted in India, unlike many other countries. In Lata Singh v. State of U.P. [AIR 2006 SC 2522] it was observed that a live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as

immoral. However, in order to provide a remedy in Civil Law for protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society, first time in India, the DV Act has been enacted to cover the couple having relationship in the nature of marriage, persons related by consanguinity, marriages etc. We have few other legislations also where reliefs have been provided to woman placed in certain vulnerable situations.

53. Section 125 Cr.P.C., of course, provides for maintenance of a destitute wife and Section 498A IPC is related to mental cruelty inflicted on women by her husband and in-laws. Section 304-B IPC deals with the cases relating to dowry death. The Dowry Prohibition Act, 1961 was enacted to deal with the cases of dowry demands by the husband and family members. The Hindu Adoptions and Maintenance Act, 1956 provides for grant of maintenance to a legally wedded Hindu wife, and also deals with rules for adoption. The Hindu Marriage Act, 1955 refers to the provisions dealing with solemnization of marriage also deals with the provisions for divorce. For the first time, through, the DV Act, the Parliament has recognized a "relationship in the nature of marriage" and not a live-in relationship simplicitor.

54. We have already stated, when we examine whether a relationship will fall within the expression "relationship in the nature of marriage" within the meaning of Section 2(f) of the DV Act, we should have a close analysis of the entire relationship, in other words, all facets of the interpersonal relationship need to be taken into account. We cannot isolate individual factors, because there may be endless scope for differences in human attitudes and activities and a variety of combinations of circumstances which may fall for consideration. Invariably, it may be a question of fact and degree, whether a relationship between two unrelated persons of the opposite sex meets the tests judicially evolved.

55. We may, on the basis of above discussion cull out some guidelines for testing under what circumstances, a live-in relationship will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the DV Act. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.

(1) Duration of period of relationship Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration.

(3) Pooling of Resources and Financial Arrangements Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.

(6) Children Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialization in Public Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

STATUS OF THE APPELLANT

56. Appellant, admittedly, entered into a live-inrelationship with the respondent knowing that he was married person, with wife and two children, hence, the generic proposition laid down by the Privy Council in Andrahennedige Dinohamy v. Wiketunge Liyanapatabendage Balshamy, AIR 1927 PC 185, that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the appellant and the respondent was not a relationship in the nature of a marriage, and the status of the appellant was that of a concubine. A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character. Reference may also be made to the judgments of this Court in Badri Prasad v. Director of Consolidation 1978 (3) SCC 527 and Tulsa v. Durghatiya 2008 (4) SCC 520. In Gokal Chand v. Parvin Kumari AIR 1952 SC 231 this Court held that the continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabition is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.

57. We may note, in the instant case, there is no necessity to rebut the presumption, since the appellant was aware that the respondent was a married person even before the commencement of their relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. Long standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, which is restrictive and exhaustive.

58. Velusamy case (supra) stated that instances are many where married person maintain and support such types of women, either for sexual pleasure or sometimes for emotional support. Woman, a party to that relationship does suffer social disadvantages and prejudices, and historically, such a person has been regarded as less worthy than the married woman. Concubine suffers social ostracism through the denial of status and benefits, who cannot, of course, enter into a relationship in the nature of marriage.

59. We cannot, however, lose sight of the fact that inequities do exist in such relationships and on breaking down such relationship, the woman invariably is the sufferer. Law of Constructive Trust developed as a means of recognizing the contributions, both pecuniary and non-pecuniary, perhaps comes to their aid in such situations, which may remain as a recourse for such a woman who find herself unfairly disadvantaged. Unfortunately, there is no express statutory provision to regulate such types of live-in relationships upon termination or

disruption since those relationships are not in the nature of marriage. We can also come across situations where the parties entering into live-inrelationship and due to their joint efforts or otherwise acquiring properties, rearing children, etc. and disputes may also arise when one of the parties dies intestate.

60. American Jurisprudence, Second Edition, Vol. 24 (2008) speaks of Rights and Remedies of property accumulated by man and woman living together in illicit relations or under void marriage, which reads as under:

"Although the courts have recognized the property rights of persons cohabiting without benefit of marriage, these rights are not based on the equitable distribution provisions of the marriage and divorce laws because the judicial recognition of mutual property rights between unmarried cohabitants would violate the policy of the state to strengthen and preserve the integrity of marriage, as demonstrated by its abolition of common-law marriage."

61. Such relationship, it may be noted, may endure for a long time and can result pattern of dependency and vulnerability, and increasing number of such relationships, calls for adequate and effective protection, especially to the woman and children born out of that live-in-relationship. Legislature, of course, cannot promote pre-marital sex, though, at times, such relationships are intensively personal and people may express their opinion, for and against. See S. Khushboo v. Kanniammal and another (2010) 5 SCC 600.

62. Parliament has to ponder over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and the children, born out of such kinds of relationships be protected, though those types of relationship might not be a relationship in the nature of a marriage.

63. We may now consider whether the tests, we have laid down, have been satisfied in the instant case. We have found that the appellant was not ignorant of the fact that the respondent was a married person with wife and two children, hence, was party to an adulterous and bigamous relationship. Admittedly, the relationship between the appellant and respondent was opposed by the wife of the respondent, so also by the parents of the appellant and her brother and sister and they knew that they could not have entered into a legal marriage or maintained a relationship in the nature of marriage. Parties never entertained any intention to rear children and on three occasions the pregnancy was terminated. Having children is a strong circumstance to indicate a relationship in the nature of marriage. No evidence has been adduced to show that the parties gave each other mutual support and companionship. No material has been produced to show that the parties have ever projected or conducted themselves as husband and wife and treated by friends, relatives and others, as if they are a married couple. On the other hand, it is the specific case of the appellant that the respondent had never held out to the public that she was his wife. No evidence of socialization in public has been produced. There is nothing to show that there was pooling of resources or financial arrangements between them. On the other hand, it is the specific case of the appellant that the respondent had never opened any joint account or executed any document in the joint name. Further, it was also submitted that the respondent never permitted to suffix his name after the name of the appellant. No evidence is forthcoming, in this case, to show that the respondent had caused any harm or injuries or endangered the health, safely, life, limb or well-being, or caused any physical or sexual abuse on the appellant, except that he did not maintain her or continued with the relationship.

ALIENATION OF AFFECTION

64. Appellant had entered into this relationship knowing well that the respondent was a married person and encouraged bigamous relationship. By entering into such a relationship, the

appellant has committed an intentional tort, i.e. interference in the marital relationship with intentionally alienating respondent from his family, i.e. his wife and children. If the case set up by the appellant is accepted, we have to conclude that there has been an attempt on the part of the appellant to alienate respondent from his family, resulting in loss of marital relationship, companionship, assistance, loss of consortium etc., so far as the legally wedded wife and children of the respondent are concerned, who resisted the relationship from the very inception. Marriage and family are social institutions of vital importance. Alienation of affection, in that context, is an intentional tort, as held by this Court in Pinakin Mahipatray Rawal case (supra), which gives a cause of action to the wife and children of the respondent to sue the appellant for alienating the husband/father from the company of his wife/ children, knowing fully well they are legally wedded wife/children of the respondent..

65. We are, therefore, of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a livein relationship in the nature of marriage. All live-inrelationships are not relationships in the nature of marriage. Appellant's and the respondent's relationship is, therefore, not a "relationship in the nature of marriage" because it has no inherent or essential characteristic of a marriage, but a relationship other than "in the nature of marriage" and the appellant's status is lower than the status of a wife and that relationship would not fall within the definition of "domestic relationship" under Section 2(f) of the DV Act.

If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to "domestic violence" under Section 3 of the DV Act.

66. We have, on facts, found that the appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation.

67. We are conscious of the fact that if any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the appellant for alienating the companionship and affection of the husband/parent which is an intentional tort.

68. We, therefore, find no reason to interfere with the judgment of the High Court and the appeal is accordingly dismissed.

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IN THE SUPREME COURT OF INDIA

S.R. Batra and Anr. Vs. Smt. TarunaBatra

Civil Appeal No. 5837 of 2006 (Arising out of Special Leave Petition (Civil) Nos. 6651-6652/2005) and Contempt Petition(C) No. 38 of 2006

Decided On: 15.12.2006

Equivalent Citation: 2007(2)ALD66(SC), 2007(3)ALT18(SC), 2007 1 AWC(Supp)664SC, 2007(3) CTC219, 136(2007)DLT1(SC), I(2007)DMC1SC, 2007(1)OLR399, (2007)146PLR425, RLW2007(2) SC1546, 2006(13)SCALE652, (2007)3SCC169, [2006]Supp(10)SCR1206, 2007(1)UJ0007

Appellants: S.R. Batra and Anr. Vs. Respondent: Smt. TarunaBatra

Hon'ble Judges/Coram: S.B. Sinha and MarkandeyKatju, JJ.

Right of Wife Over Shared Household Case

Counsels: For Appellant/Petitioner/Plaintiff: UdayUmeshLalit, Sr. Adv., MeeraAgarwal and R.C. Mishra, Advs For Respondents/Defendant: L.N. Rao, Sr. Adv. and SudhirNandrajog, Adv.

Subject: Family

Catch Words

Mentioned IN

Acts/Rules/Orders: Protection of Women from Domestic Violence Act, 2005 - Section 2, Protection of Women from Domestic Violence Act, 2005 - Section 12(1), Protection of Women from Domestic Violence Act, 2005 - Section 17, Protection of Women from Domestic Violence Act, 2005 - Section 17(1), Protection of Women from Domestic Violence Act, 2005 - Section 19(1); Indian Penal Code (IPC) - Section 34, Indian Penal Code (IPC) - Section 406, Indian Penal Code (IPC) - Section 498A, Indian Penal Code (IPC) - Section 506; Constitution of India - Article 226, Constitution of India - Article 227

Cases Referred: B.R. Mehta v. Atma Devi and Ors. MANU/SC/0740/1987

Prior History / High Court Status: From the final Judgment and Order dated 17.1.2005 of the High Court of Delhi at New Delhi in C.M.M. Nos. 1367/2004 and 1420/2004 (MANU/DE/0002/2005)

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Relied On

Case Note:

(1) Code of Civil Procedure, 1908 - Order XXXIX, Rules 1 and 2--Protection of Women from Domestic Violence Act, 2005--Sections 2 (s), 17 and 19 (1)--Temporary injunction--Right of wife to live in matrimonial home--There is no law in India as British Matrimonial Homes Act--Right available under any law--Can only be against husband and not against father-in-law and mother-in-law--House in question belonging to mother-in-law and not to husband--Hence, cannot claim any right to live in that house--Finding of trial court that wife not residing in premises in question--She cannot claim any injunction restraining appellant being parents of husband -- No question of dispossession--House in question cannot be said to be shared householdwithin meaning of Section 2 (s)--Impugned judgment set aside.

(2) Protection of Women from Domestic Violence Act, 2005--Sections 2 (s), 17 and 19 (1)--Right of residence of wife--She can claim such right in shared household--Such household would mean only house belonging to or taken on rent by husband--Or house belonging to joint family of which husband is member--House in question not being such--But is exclusive property of mother-in-law--It cannot be held to be shared households.

(3) Interpretation of statutes--Interpretation leading to absurdity--Should not be accepted.

Ratio Decidendi:

"Wife is only entitled to claim a right to residence in a shared household, and a 'shared household' would only mean house belonging to or taken on rent by husband, or house which belongs to joint family of which husband is a member."

JUDGMENT

Markandey Katju, J.

1. Leave granted.

2. This appeal has been filed against the impugned judgment of the Delhi High Court dated 17.1.2005 in C.M.M. No. 1367 of 2004 and C.M.M. No. 1420 of 2004.

3. Heard learned Counsel for the parties and perused the record.

4. The facts of the case are that respondent Smt. TarunaBatra was married to AmitBatra, son of the appellants, on 14.4.2000. After the marriage respondent TarunaBatra started living with her husband AmitBatra in the house of the appellant No. 2 in the second floor. It is not disputed that the said house which is at B-135, Ashok Vihar, Phase-I, Delhi belongs to the appellant No. 2 and not to her son AmitBatra.

5. AmitBatra filed a divorce petition against his wife TarunaBatra, and it is alleged that as a counter blast to the divorce petition Smt. TarunaBatra filed an F.I.R. under Sections 406/498A/506 and 34 of the Indian Penal Code and got her father-in-law, mother-in-law, her husband and married sister-in-law arrested by the police and they were granted bail only after three days.

6. It is admitted that Smt. TarunaBatra had shifted to her parent's residence because of the dispute with her husband. She alleged that later on when she tried to enter the house of the appellant No. 2 which is at property No. B-135, Ashok Vihar, Phase-I, Delhi she found the main entrance locked and hence she filed Suit No. 87/2003 for a mandatory injunction to enable her to enter the house. The case of the appellants was that before any order could be passed by the trial Judge on the suit filed by their daughter-in-law, Smt. TarunaBatra, along with her parents forcibly broke open the locks of the house at Ashok Vihar belonging to appellant No. 2, the mother-in-law of Smt. TarunaBatra. The appellants alleged that they have been terrorized by their daughter-in-law and for some time they had to stay in their office. It is stated by the appellants that their son AmitBatra, husband of the respondent, had shifted to his own flat at Mohan Nagar, Ghaziabad before the above litigation between the parties had started.

7. The learned trial Judge decided both the applications for temporary injunction filed in suit No. 87/2003 by the parties by his order on 4.3.2003. He held that the petitioner was in possession of the second floor of the property and he granted a temporary injunction restraining the appellants from interfering with the possession of Smt. TarunaBatra, respondent herein.

8. Against the aforesaid order the appellants filed an appeal before the Senior Civil Judge, Delhi who by his order dated 17.9.2004 held that Smt. TarunaBatra was not residing in the second floor of the premises in question. He also held that her husband AmitBatra was not living in the suit property and the matrimonial home could not be said to be a place where only wife was residing. He also held that Smt. TarunaBatra had no right to the properties other than that of her husband. Hence, he allowed the appeal and dismissed the temporary injunction application.

9. Aggrieved, Smt. TarunaBatra filed a petition under Article 227 of the Constitution which was disposed of by the impugned judgment. Hence, these appeals.

10. The learned Single Judge of the High Court in the impugned judgment held that the second floor of the property in question was the matrimonial home of Smt. TarunaBatra. He further held that even if her husband AmitBatra had shifted to Ghaziabad that would not make Ghaziabad the matrimonial home of Smt. TarunaBatra. The Learned Judge was of the view that mere change of the residence by the husband would not shift the matrimonial home from Ashok Vihar, particularly when the husband had filed a divorce petition against his wife. On this reasoning, the learned Judge of the High Court held that Smt. TarunaBatra was entitled to continue to reside in the second floor of B-135, Ashok Vihar, Phase-I, Delhi as that is her matrimonial home.

11. With respect, we are unable to agree with the view taken by the High Court. As held by this Court in B.R. Mehta v. Atma Devi and Ors. MANU/SC/0740/1987 : [1987]3SCR1184 , whereas in England the rights of the spouses to the matrimonial home are governed by the Matrimonial Homes Act, 1967, no such right exists in India.

    In the same decision it was observed "it may be that with change of situation and complex problems arising it is high time to give the wife or the husband a right of occupation in a truly matrimonial home, in case of the marriage breaking up or in case of strained relationship between the husband and the wife."

12. In our opinion, the above observation is merely an expression of hope and it does not lay down any law. It is only the legislature which can create a law and not the Court. The courts do not legislate, and whatever may be the personal view of a Judge, he cannot create or amend the law, and must maintain judicial restraint.

13. There is no such law in India, like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law.

14. Here, the house in question belongs to the mother-in-law of Smt. TarunaBatra and it does not belong to her husband AmitBatra. Hence, Smt. TarunaBatra cannot claim any right to live in the said house. Appellant No. 2, the mother-in-law of Smt. TarunaBatra has stated that she had taken a loan for acquiring the house and it is not a joint family property. We see no reason to disbelieve this statement.

15. Learned Counsel for the respondent then relied upon the Protection of Women from Domestic Violence Act, 2005. He stated that in view of the said Act respondent Smt. TarunaBatra cannot be dispossessed from the second floor of the property in question.

16. It may be noticed that the finding of the learned Senior Civil Judge that in fact Smt. TarunaBatra was not residing in the premises in question is a finding of fact which cannot be interfered with either under Article 226 or 227 of the Constitution. Hence, Smt. TarunaBatra cannot claim any injunction restraining the appellants from dispossessing her from the property in question for the simple reason that she was not in possession at all of the said property and hence the question of dispossession does not arise.

17. Apart from the above, we are of the opinion that the house in question cannot be said to be a 'shared household' within the meaning of Section 2(s) of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the 'Act').

Section 2(s) states:

Shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

18. Learned Counsel for the respondent Smt. TarunaBatra has relied upon Sections 17 and 19(1) of the aforesaid Act, which state:

17. (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

19. (1) While disposing of an application under Sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order-

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under Clause (b) shall be passed against any person who is a woman.

19. Learned Counsel for the respondent Smt. TarunaBatra stated that the definition of shared household includes a household where the person aggrieved lives or at any stage had lived in a domestic relationship. He contended that since admittedly the respondent had lived in the property in question in the past, hence the said property is her shared household. We cannot agree with this submission

20. If the aforesaid submission is accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite

possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grand parents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces etc. If the interpretation canvassed by the learned Counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in the all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.

It is well settled that any interpretation which leads to absurdity should not be accepted.

21. Learned Counsel for the respondent Smt. TarunaBatra has relied upon Section 19(1)(f) of the Act and claimed that she should be given an alternative accommodation. In our opinion, the claim for alternative accommodation can only be made against the husband and not against the husband's in-laws or other relatives.

22. As regards Section 17(1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and a 'shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to AmitBatra nor was it taken on rent by him nor is it a joint family property of which the husband AmitBatra is a member, it is the exclusive property of appellant No. 2, mother of AmitBatra. Hence it cannot be called a 'shared household'.

23. No doubt, the definition of 'shared household' in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society.

24. In view of the above, the appeal is allowed. The impugned judgment of the High Court is set aside and the order of Senior Civil Judge dismissing the injunction application of Smt. TarunaBatra is upheld. No costs.

25. In view of the judgment given above, the contempt petition stands dismissed.

❑❑❑

IN THE SUPREME COURT OF INDIA

K. Srinivas Rao Vs. D.A. Deepa

Civil Appeal No. 1794 of 2013
(Arising out of Special Leave Petition (Civil) No. 4782 of 2007)

Decided On: 22.02.2013

Equivalent Citation: 2013III AD (S.C.) 458, AIR2013SC2176, 2013(3)ALD11, 2013 (97) ALR 732, 2013 3 AWC2462SC, 2013(3)B.L.J.379, 2013(3)BomCR129, 2013(1)CDR161(SC), 2013 (1) CG.L.R.W. 484, 2013(2)CHN92, I(2013)DMC458SC, ILR2013(1)Kerala813, 2013(1)J.L.J.R.443, JT2013(3)SC97, 2013 (1) KHC 647, 2013-2-LW883, 2013(5)MhLj10, (2013)3MLJ85(SC), 2013(4) MPHT1, 2013(3)MPLJ567, 2013(1)PLJR321, (2013)171PLR149, 2013(2)RCR(Civil)232, 2013(2) SCALE735, (2013)5SCC226, (2013)4WBLR(SC)412, 2014 (4) WLN 132 (SC)

Appellants: K. SrinivasRao Vs. Respondent: D.A. Deepa

Hon'ble Judges/Coram: Aftab Alam and RanjanaPrakash Desai, JJ.

Counsels: For Appellant/Petitioner/Plaintiff: JayanthMuth Raj, Adv. for C.K. Sasi, Adv. For Respondents/Defendant: D. Rama Krishna Reddy, Adv. for D. Bharathi Reddy, Adv.

Subject: Family

Relevant Section: Hindu Marriage Act, 1955 - Section 9; Hindu Marriage Act, 1955 - Section 13; Indian Penal Code,1860 - Section 498A

Acts/Rules/Orders: Hindu Marriage Act, 1955 - Section 9, Hindu Marriage Act, 1955 - Section 13(1); Dowry Prohibition Act; Family Courts Act - Section 9; Indian Penal Code (IPC) - Section 324, Indian Penal Code (IPC) - Section 354, Indian Penal Code (IPC) - Section 498A; Code of Criminal Procedure (CrPC) - Section 482

Cases Referred: G.V.N. KameswaraRao v. G. Jabilli MANU/SC/0019/2002 : (2002) 2 SCC 296; Parveen Mehta v. Inderjit Mehta MANU/SC/0582/2002 : (2002) 5 SCC 706; Vijayakumar R. Bhate v. NeelaVijayakumarBhate MANU/SC/0316/2003 : (2003) 6 SCC 334; DurgaPrasannaTripathy v. ArundhatiTripathy MANU/SC/0500/2005 : (2005) 7 SCC 353; Naveen Kohli v. NeeluKohli MANU/SC/1387/2006 : (2006) 4 SCC 558; Samar Ghosh v. Jaya Ghosh MANU/SC/1386/2007 : (2007) 4 SCC 511; V. Bhagat v. D. Bhagat MANU/SC/0155/1994 : (1994) 1 SCC 337; Ramgopal and Anr. v. State of Madhya Pradesh and Anr. MANU/SC/0562/2010 : (2010) 13 SCC 540; G.V. Rao v. L.H.V. Prasad and Ors. MANU/SC/3156/2000 : (2000) 3 SCC 693; B.S. Joshi and Ors. v. State of Haryana and Anr. MANU/SC/0230/2003 : AIR 2003 SC 1386; Gian Singh v. State of Punjab and Anr. MANU/SC/0781/2012 : (2012) 10 SCC 303

Prior History: From the Judgment and Order dated 08/11/2006 in AAO No. 797/2003 of the High Court of A.P at Hyderabad

Citing Reference: Discussed

Mentioned

Case Note: Hindu Marriage Act, 1955 - Section 13(1)(ia) and (b)--Divorce--Decree of divorce granted by family court in favour of appellant-husband on ground of cruelty and desertion by wife--High Court set aside decree of divorce--Some instances of mental cruelty--High Court wrongly held that because husband and wife did not stay together--No question of parties causing cruelty to each other--Marriage has irretrievably broken down--Decree of divorce granted--Permanent

alimony of ` 15 lakhs awarded to respondent-wife to be paid by appellant-husband--Importance of mediation in matrimonial disputes emphasised--Necessary directions issued in that behalf.

Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the Court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.

The High Court wrongly held that because the appellant-husband and the respondent-wife did not stay together, there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouse's life miserable. This is what has happened in this case.

In the instant case, the marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act. 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up, there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree.

Ratio Decidendi: "Court shall grant decree for divorce if the case is based on grounds of cruelty."

Subject Category : FAMILY LAW MATTER - DIVORCE MATTERS

JUDGMENT

RanjanaPrakash Desai, J.

1. Leave granted.

2. This appeal, by special leave, has been filed by the Appellant-husband, being aggrieved by the judgment and order dated 8/11/2006 passed by the Andhra Pradesh High Court in Civil Miscellaneous Appeal No. 797/03, setting aside the decree of divorce granted in his favour.

3. The Appellant-husband is working as Assistant Registrar in the Andhra Pradesh High Court. The marriage between the Appellant-husband and the Respondent-wife was solemnized on 25/4/1999 as per Hindu rites and customs. Unfortunately, on the very next day disputes arose between the elders on both sides which resulted in their abusing each other and hurling chappals at each other. As a consequence, on 27/4/1999, the newly married couple got separated without consummation of the marriage and started living separately. On 4/10/1999, the Respondent-wife lodged a criminal complaint against the Appellant-husband before the Women Protection Cell alleging inter alia that the Appellant-husband is harassing her for more dowry. This complaint is very crucial to this case. We shall advert to it more in detail a little later. Escalated acrimony led to complaints and counter complaints. The Respondent-wife filed a petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights before the Family Court, Secunderabad. The Appellant-husband filed a counter-claim seeking dissolution of marriage on the ground of cruelty and desertion under Section 13(1)(i-a) and (b) of the Hindu Marriage Act, 1955.

4. The Family Court while dismissing the petition for restitution of conjugal rights and granting decree of divorce inter alia held that the Respondent-wife stayed in the Appellant-husband's house only for a day, she admitted that she did not have any conversation with anyone and hence any amount of oral evidence adduced by her will not support her plea that she was harassed and driven out of the house; that the story that the Appellant-husband made a demand of dowry of Rs. 10,00,000/- is false; that by filing false complaint against the Appellant-husband and his family, alleging offence under Section 498-A of the Indian Penal Code in the Metropolitan Magistrate Court, Hyderabad and by filing complaints against the Appellant-husband in the High Court where he is working, the Respondent-wife caused mental cruelty to the Appellant-husband and that reunion was not possible. The Family Court directed the Appellant-husband to repay Rs. 80,000/- given by the Respondent-wife's father to him with interest at 8% per annum from the date of the marriage till payment.

5. By the impugned judgment the High Court allowed the appeal carried by the Respondent-wife against the said judgment and set aside the decree of divorce granted in favour of the Appellant-husband. The High Court inter alia observed that the finding of the Family Court that lodging a complaint with the police against the Appellant-husband amounts to cruelty is perverse because it is not a ground for divorce under the Hindu Marriage Act, 1955. The High Court further held that the Appellant-husband and the Respondent-wife did not live together for a long time and, therefore, the question of their treating each other with cruelty does not arise. According to the High Court, the conclusion that the Respondent-wife caused mental cruelty to the Appellant-husband is based on presumptions and assumptions.

6. Mr. JayanthMuthRaj, learned Counsel for the Appellant-husband assailed the conduct of the Respondent-wife and submitted that it disentitles her from getting any relief from this Court. Counsel took us through the complaint lodged by the Respondent-wife with the Superintendent of Police, Women Protection Cell, Hyderabad, making defamatory allegations against the mother of the Appellant-husband and drew our attention to the various legal proceedings initiated by her against the Appellant-husband and his family. Counsel submitted that she also lodged complaints with the High Court asking for the removal of the Appellant-husband from his job. Counsel submitted that by lodging such false complaints the Respondent-wife caused extreme mental cruelty to the Appellant-husband. Counsel submitted that the High Court fell into a grave error in observing that because the Respondent-wife did not live with the Appellant-husband for long she could not have caused mental cruelty to him. Counsel submitted that this observation is erroneous and is contrary to the law laid down by this Court. False and defamatory allegations made in the pleadings can also cause mental cruelty. Counsel submitted that the marriage has irretrievably broken down and, therefore, it is necessary to dissolve it by a decree of divorce. In support of his submissions counsel placed reliance on G.V.N. KameswaraRao v. G. Jabilli MANU/SC/0019/2002 : (2002) 2 SCC 296, Parveen Mehta v. Inderjit Mehta MANU/SC/0582/2002 : (2002) 5 SCC 706, Vijayakumar R. Bhate v. NeelaVijayakumarBhate MANU/SC/0316/2003 : (2003) 6 SCC 334, DurgaPrasannaTripathy v. ArundhatiTripathy MANU/SC/0500/2005 : (2005) 7 SCC 353, Naveen Kohli v. NeeluKohli MANU/SC/1387/2006 : (2006) 4 SCC 558 and Samar Ghosh v. Jaya Ghosh MANU/SC/1386/2007 : (2007) 4 SCC 511.

7. Mr. D. Rama Krishna Reddy, learned Counsel for the Respondent-wife, on the other hand, submitted that the father of the Respondent-wife had given Rs. 80,000/- and 15 tolas of gold as dowry to the Appellant-husband's family. However, they demanded additional cash of Rs. 10,00,000/-. Because this demand could not be met, the Respondent-wife and her family was humiliated and ill-treated. Therefore, the parents of the Respondent-wife had to return to their house along with her immediately after marriage. The father of the Respondent-wife made efforts to talk to the Appellant- husband's family, but, they did not respond to

his efforts. They persisted with their demands and, therefore, the Respondent-wife had no alternative but to lodge complaint against them under Section 498-A of the Indian Penal Code before the Metropolitan Magistrate, Hyderabad. The Appellant-husband thereafter gave a false assurance that he will not harass her and, therefore, she withdrew the complaint and went to the matrimonial house. However, the approach of the Appellant-husband and his family did not change. She had to therefore renew her complaint. Counsel submitted that only because of the obstinate and uncompromising attitude of the Appellant-husband and his family that the Respondent-wife had to take recourse to court proceedings. Counsel submitted that the Respondent-wife values the matrimonial tie. She wants to lead a happy married life with the Appellant-husband. She had, therefore, filed a petition for restitution of conjugal rights which should have been allowed by the Family Court. Counsel submitted that after properly evaluating all the circumstances the High Court has rightly set aside the decree of divorce and granted a decree of restitution of conjugal rights. The High Court's judgment, therefore, merits no interference.

8. The matrimonial dispute started with a quarrel between the elders of both sides in which initially the Appellant-husband and the Respondent-wife were not involved. The ego battle of the elders took an ugly turn. Parties were dragged to the court and the inevitable happened. The relations between the two families got strained. With a fond hope that we could bring about a settlement we requested the counsel to talk to the parties and convey our wishes that they should bury the hatchet and start living together. We also tried to counsel them in the court. The Respondent-wife appears to be very keen to go back to the matrimonial home and start life afresh, but the Appellant-husband is adamant. He conveyed to us through his counsel that by filing repeated false complaints against him and his family the Respondent-wife has caused extreme cruelty to them and therefore it will not be possible to take her back. In view of this we have no option but to proceed with the case.

9. The High Court has taken a view that since the Appellant-husband and the Respondent-wife did not stay together, there is no question of their causing cruelty to each other. The High Court concluded that the conclusion drawn by the Family Court that the Respondent-wife caused mental cruelty to the Appellant-husband is erroneous. We are unable to agree with the High Court.

10. Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnization of the marriage, treated the Petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term 'cruelty'. Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental.

11. In Samar Ghosh this Court set out illustrative cases where inference of 'mental cruelty' can be drawn. This list is obviously not exhaustive because each case presents it's own peculiar factual matrix and existence or otherwise of mental cruelty will have to be judged after applying mind to it. We must quote the relevant paragraph of Samar Ghosh. We have reproduced only the instances which are relevant to the present case.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) xxxxxxxxx

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) xxxxxxxxx

(viii) xxxxxxxxx

(ix) xxxxxxxxx

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) xxxxxxxxx

(xii) xxxxxxxxx

(xiii) xxxxxxxxx

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

It is pertinent to note that in this case the husband and wife had lived separately for more than sixteen and a half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli.

12. In V. Bhagat v. D. Bhagat MANU/SC/0155/1994 : (1994) 1 SCC 337 in the divorce petition filed by the husband the wife filed written statement stating that the husband was suffering from mental hallucination, that his was a morbid mind for which he needs expert psychiatric treatment and that he was suffering from 'paranoid disorder'. In cross-examination her counsel put several questions to the husband suggesting that several members of his family including his grandfather were lunatics. This Court held that these assertions cannot but constitute mental cruelty of such a nature that the husband cannot be asked to live with the wife thereafter. Such pleadings and questions it was held, are bound to cause immense mental pain and anguish to the husband. In VijaykumarBhate disgusting accusations of unchastity

and indecent familiarity with a neighbour were made in the written statement. This Court held that the allegations are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous to live with her husband. In Naveen Kohli the Respondent-wife got an advertisement issued in a national newspaper that her husband was her employee. She got another news item issued cautioning his business associates to avoid dealing with him. This was treated as causing mental cruelty to the husband.

13. In Naveen Kohli the wife had filed several complaints and cases against the husband. This Court viewed her conduct as a conduct causing mental cruelty and observed that the finding of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage is wholly unsustainable.

14. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.

15. We shall apply the above principles to the present case. Firstly, it is necessary to have a look at the legal proceedings initiated by both sides against each other. The facts on record disclose that after the marriage, due to some dispute which arose between the elders, both sides abused and virtually attacked each other. The Respondent-wife was taken by her parents to their house. According to the Respondent-wife, her father made efforts to bring about an amicable settlement but the other side did not respond favourably and, therefore, on 4/10/1999 she lodged a complaint with the Superintendent of Police, Women Protection Cell against the Appellant-husband and members of his family. In our opinion, this complaint is, to a large extent, responsible for widening the rift between the parties. In this complaint, after alleging ill-treatment and harassment for dowry, it is alleged that mother of the Appellant-husband asked the Respondent-wife to sleep with the father of the Appellant-husband. When she was cross-examined in the Family Court during the hearing of her petition for restitution of conjugal rights the Respondent-wife admitted that she had lodged the complaint. PW-2 her mother, in her cross-examination stated that though they had asked her not to lodge the complaint, the Respondent-wife lodged it. She told them that she had lodged the complaint because the Appellant-husband was not listening to her. Thus, it appears that this complaint was lodged out of frustration and anger and was a reaction to the Appellant-husband's refusal to live with her. It was, perhaps, felt by her that because of the pressure of such a complaint the Appellant-husband would take her back to his house. Far from helping the Respondent-wife, the complaint appears to have caused irreparable harm to her. It increased the bitterness. Perhaps, the Respondent-wife was misguided by someone. But, such evidence is not on record. Even in this Court, this complaint appears to us to be a major factor amongst others impeding settlement. Pursuant to the said complaint, Crime No. 8/2000 was registered by C.I.D., Hyderabad, in the Metropolitan Magistrate (Mahila Court), Hyderabad against the Appellant-husband and his family under Section 498-A of the Indian Penal Code. It is the Respondent-wife's case that the Appellant-husband gave an assurance before the police that he will not harass her. She, therefore, withdrew the complaint. The police then filed a closure report. According to the Respondent-wife, the Appellant-husband did not abide by the promise made by him and, therefore, she filed a protest petition. The Magistrate Court, Hyderabad, then, took cognizance of the case and renumbered the case as C.C. No. 62/2002.

16. In the meantime, the Respondent-wife filed O.P. No. 88/2001 in the Family Court, Secunderabad, for restitution of conjugal rights. The Appellant-husband filed a counter claim for divorce on 27/12/2002. The Family Court dismissed the petition for restitution of conjugal rights and allowed the counter claim for divorce filed by the Appellant-husband. The Respondent-wife challenged the Family Court judgment in the High Court. On 8/12/2006 the High Court reversed the Family Court's order and allowed the petition for restitution of conjugal rights. The present appeal is filed by the Appellant-husband against the said judgment.

17. According to the Respondent-wife, on 17/9/2007 when she, along with her mother, came out of the court after a case filed by her against the Appellant-husband was adjourned, the Appellant-husband beat her mother and kicked her on her stomach. Both of them received injuries. She, therefore, filed complaint for the offence punishable under Section 324 of the Indian Penal Code against the Appellant-husband (C.C. No. 79/2009). It may be stated here that on 19/10/2009 the Appellant-husband was acquitted in this case.

18. On 24/6/2008 the judgment was delivered by Additional Chief Metropolitan Magistrate, Hyderabad in C.C. No. 62/2002. The Appellant-husband was convicted under Section 498-A of the Indian Penal Code and was sentenced to undergo six months simple imprisonment. He and his parents were acquitted of the offences under the Dowry Prohibition Act. His parents were acquitted of the offence under Section 498-A of the Indian Penal Code. After this judgment the Respondent-wife and her parents filed a complaint in the High Court saying that since the Appellant-husband was convicted he should be dismissed from service. Similar letters were sent to the High Court by the maternal uncle of the Respondent-wife.

19. On 14/7/2008 the Appellant-husband filed Criminal Appeal No. 186/2008 challenging his conviction under Section 498-A of the Indian Penal Code before the Metropolitan Sessions Judge. It is pertinent to note that the Respondent-wife filed Criminal Appeal No. 1219/2008 in the High Court questioning the acquittal of the Appellant-husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence punishable under Section 498-A of the Indian Penal Code. This appeal is pending in the High Court. Not being content with this, the Respondent-wife filed Criminal Revision Case No. 1560/2008 in the High Court seeking enhancement of punishment awarded to the Appellant-husband for offence under Section 498-A of the Indian Penal Code.

20. According to the Appellant-husband on 6/12/2009 the brother of the Respondent-wife came to their house and attacked his mother. His mother filed a complaint and the police registered a complaint under Section 354 of the Indian Penal Code. The brother of the Respondent-wife also lodged a complaint and an offence came to be registered. Both the cases are pending.

21. On 29/6/2010 Criminal Appeal No. 186/2010 filed by the Appellant-husband challenging his conviction for the offence under Section 498-A of the Indian Penal Code was allowed by the Metropolitan Sessions Judge and he was acquitted. The Respondent-wife has filed criminal appeal in the High Court challenging the said acquittal which is pending.

22. We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the Respondent-wife in her complaint dated 4/10/1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the Appellant-husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to us to be justified. This complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from

the evidence of the mother of the Respondent-wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the Respondent-wife was anxious to go back to the Appellant-husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the Respondent-wife has caused mental cruelty to the Appellant-husband.

23. Pursuant to this complaint, the police registered a case under Section 498-A of the Indian Penal Code. The Appellant-husband and his parents had to apply for anticipatory bail, which was granted to them. Later, the Respondent-wife withdrew the complaint. Pursuant to the withdrawal, the police filed a closure report. Thereafter, the Respondent-wife filed a protest petition. The trial court took cognizance of the case against the Appellant-husband and his parents (CC No. 62/2002). What is pertinent to note is that the Respondent-wife filed criminal appeal in the High Court challenging the acquittal of the Appellant-husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence punishable under Section 498-A of the Indian Penal Code. She filed criminal revision seeking enhancement of the punishment awarded to the Appellant-husband for the offence under Section 498-A of the Indian Penal Code in the High Court which is still pending. When the criminal appeal filed by the Appellant-husband challenging his conviction for the offence under Section 498-A of the Indian Penal Code was allowed and he was acquitted, the Respondent-wife filed criminal appeal in the High Court challenging the said acquittal. During this period Respondent-wife and members of her family have also filed complaints in the High Court complaining about the Appellant-husband so that he would be removed from the job. The conduct of the Respondent-wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the Appellant-husband, in filing appeal questioning the acquittal of the Appellant-husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the Appellant-husband.

24. In our opinion, the High Court wrongly held that because the Appellant-husband and the Respondent-wife did not stay together there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouse's life miserable. This is what has happened in this case.

25. It is also to be noted that the Appellant-husband and the Respondent-wife are staying apart from 27/4/1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in Samar Ghosh, if we refuse to sever the tie, it may lead to mental cruelty.

26. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.

27. In V. Bhagat this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind. In Naveen Kohli, where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband, this Court observed that the marriage had been wrecked beyond the hope of salvage and public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. It is important to note that in this case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

28. In the ultimate analysis, we hold that the Respondent-wife has caused by her conduct mental cruelty to the Appellant-husband and the marriage has irretrievably broken down. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the Respondent-wife expressed that she wants to go back to the Appellant-husband, but, that is not possible now. The Appellant-husband is not willing to take her back. Even if we refuse decree of divorce to the Appellant-husband, there are hardly any chances of the Respondent-wife leading a happy life with the Appellant-husband because a lot of bitterness is created by the conduct of the Respondent-wife.

29. In Vijay Kumar, it was submitted that if the decree of divorce is set aside, there may be fresh avenues and scope for reconciliation between parties. This Court observed that judged in the background of all surrounding circumstances, the claim appeared to be too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. In the facts of this case we feel the same.

30. While we are of the opinion that decree of divorce must be granted, we are alive to the plight of the Respondent-wife. The Appellant-husband is working as an Assistant Registrar in the Andhra Pradesh High Court. He is getting a good salary. The Respondent-wife fought the litigation for more than 10 years. She appears to be entirely dependent on her parents and on her brother, therefore, her future must be secured by directing the Appellant-husband to give her permanent alimony. In the facts and circumstance of this case, we are of the opinion that the Appellant-husband should be directed to pay a sum of Rs. 15,00,000/- (Rupees Fifteen Lakhs only) to the Respondent-wife as and by way of permanent alimony. In the result, the impugned judgment is quashed and set aside. The marriage between the Appellant-husband - K. SrinivasRao and the Respondent-wife - D.A. Deepa is dissolved by a decree of divorce. The Appellant-husband shall pay to the Respondent-wife permanent alimony in the sum of Rs. 15,00,000/-, in three instalments. The first instalment of Rs. 5,00,000/- (Rupees Five Lakhs only) should be paid on 15/03/2013 and the remaining amount of Rs. 10,00,000/- (Rupees Ten Lakhs only) should be paid in instalments of Rs. 5,00,000/- each after a gap of two months i.e. on 15/05/2013 and 15/07/2013 respectively. Each instalment of Rs. 5,00,000/- be paid by a demand draft drawn in favour of the Respondent-wife "D.A. Deepa".

31. Before parting, we wish to touch upon an issue which needs to be discussed in the interest of victims of matrimonial disputes. Though in this case, we have recorded a finding that by her conduct, the Respondent-wife has caused mental cruelty to the Appellant-husband, we may not be understood, however, to have said that the fault lies only with the Respondent-

wife. In matrimonial disputes there is hardly any case where one spouse is entirely at fault. But, then, before the dispute assumes alarming proportions, someone must make efforts to make parties see reason. In this case, if at the earliest stage, before the Respondent-wife filed the complaint making indecent allegation against her mother-in-law, she were to be counseled by an independent and sensible elder or if the parties were sent to a mediation centre or if they had access to a pre-litigation clinic, perhaps the bitterness would not have escalated. Things would not have come to such a pass if, at the earliest, somebody had mediated between the two. It is possible that the Respondent-wife was desperate to save the marriage. Perhaps, in desperation, she lost balance and went on filing complaints. It is possible that she was misguided. Perhaps, the Appellant-husband should have forgiven her indiscretion in filing complaints in the larger interest of matrimony. But, the way the Respondent-wife approached the problem was wrong. It portrays a vindictive mind. She caused extreme mental cruelty to the Appellant-husband. Now the marriage is beyond repair.

32. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation. Section 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Even if the Counsellors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties. Being trained in the skill of mediation, they produce good results.

33. The idea of pre-litigation mediation is also catching up. Some mediation centres have, after giving wide publicity, set up "Help Desks" at prominent places including facilitation centres at court complexes to conduct pre-litigation mediation. We are informed that in Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre, several matrimonial disputes are settled. These centres have a good success rate in pre-litigation mediation. If all mediation centres set up pre-litigation desks/clinics by giving sufficient publicity and matrimonial disputes are taken up for pre-litigation settlement, many families will be saved of hardship if, at least, some of them are settled.

34. While purely a civil matrimonial dispute can be amicably settled by a Family Court either by itself or by directing the parties to explore the possibility of settlement through mediation, a complaint under Section 498-A of the Indian Penal Code presents difficulty because the said offence is not compoundable except in the State of Andhra Pradesh where by a State amendment, it has been made compoundable. Though in Ramgopal and Anr.v. State of Madhya Pradesh and Anr. MANU/SC/0562/2010 : (2010) 13 SCC 540, this Court requested the Law Commission and the Government of India to examine whether offence punishable under Section 498-A of the Indian Penal Code could be made compoundable, it has not been made compoundable as yet. The courts direct parties to approach mediation centres where offences are compoundable. Offence punishable under Section 498-A being a non-compoundable offence, such a course is not followed in respect thereof. This Court has always adopted a positive approach and encouraged settlement of matrimonial disputes and discouraged their escalation. In this connection, we must refer to the relevant paragraph from G.V. Rao v. L.H.V. Prasad and Ors. MANU/SC/3156/2000 : (2000) 3 SCC 693, where the

complaint appeared to be the result of matrimonial dispute, while refusing to interfere with the High Court's order quashing the complaint, this Court made very pertinent observations, which read thus:

12.There has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counseled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different courts.

In B.S. Joshi and Ors.v. State of Haryana and Anr. MANU/SC/0230/2003 : AIR 2003 SC 1386, after referring to the above observations, this Court stated that the said observations are required to be kept in view by courts while dealing with matrimonial disputes and held that complaint involving offence under Section 498-A of the Indian Penal Code can be quashed by the High Court in exercise of its powers under Section 482 of the Code if the parties settle their dispute. Even in Gian Singh v. State of Punjab and Anr. MANU/SC/0781/2012 : (2012) 10 SCC 303, this Court expressed that certain offences which overwhelmingly and predominantly bear civil flavour like those arising out of matrimony, particularly relating to dowry, etc. or the family dispute and where the offender and the victim had settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may quash the criminal proceedings if it feels that by not quashing the same, the ends of justice shall be defeated.

35. We, therefore, feel that though offence punishable under Section 498-A of the Indian Penal Code is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A of the Indian Penal Code, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If however they chose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine. Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes. We would, however, like to clarify that reduction of burden of cases on the courts will, however, be merely an incidental benefit and not the reason for sending the parties for mediation. We recognize 'mediation' as an effective method of alternative dispute resolution in matrimonial matters and that is the reason why we want the parties to explore the possibility of settlement through mediation in matrimonial disputes.

36. We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow:

(a) In terms of Section 9 of the Family Courts Act, the Family Courts shall make all efforts to settle the matrimonial disputes through mediation. Even if the Counsellors submit a failure report, the Family Courts shall, with the consent of the parties, refer the matter to the mediation centre. In such a case, however, the Family Courts shall set a reasonable time limit for mediation centres to complete the process of mediation because otherwise the resolution of the disputes by the Family Court may get delayed. In a given case, if there is good chance of settlement, the Family Court in its discretion, can always extend the time limit.

(b) The criminal courts dealing with the complaint under Section 498-A of the Indian Penal Code should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A of the Indian Penal Code is not diluted. Needless to say that the discretion to grant or not to grant bail is not in any way curtailed by this direction. It will be for the concerned court to work out the modalities taking into consideration the facts of each case.

(c) All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage.

37. The appeal is disposed of in the aforestated terms.

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IN THE SUPREME COURT OF INDIA

Lalita Kumari Vs. Govt. of U.P. and Ors.

Writ Petition (Criminal) No. 68 of 2008, Contempt Petition (C) No. D26722 of 2008 in Writ Petition (Criminal) No. 68 of 2008, S.L.P. (Crl.) No. 5986 of 2006, S.L.P. (Crl.) No. 5200 of 2009, Criminal Appeal No. 1410 of 2011 and Criminal Appeal No. 1267 of 2007 (Under Article 32 of the Constitution of India)

Decided On: 12.11.2013

Equivalent Citation: 2013XII AD (S.C.) 209, AIR2014SC187, 2014 (1) ALD(Crl.) 159 (SC), 2014 (84) ALLCC 719, 2013ALLMR(Cri)4444, 2013ALLMR(Cri)4444(SC), 2014 (1) ALT (Crl.) 100 (A.P.), 2013BomCR(Cri)680, 2013(4)BomCR(Cri)680, 2014(2) CHN (SC) 7, 2014CriLJ470, 2013(6)CTC353, 2014(2)GLD355 (SC), 2014(2)GLT(SC)1, 2013(4)J.L.J.R.505, 2014(1)JCC1, JT2013(14)SC399, 2014(2)KCCR1305, 2013 (4) KHC 552, 2013(4)KLJ686, 2013(4)KLT632(SC), 2014-1-LW(Crl)1, 2013(4)MLJ(Crl)579, 2013(5)MPHT336(SC), 2014(1)N.C.C.161, 2014(I)OLR5, 2013(4)PLJR504, 2013(4)RCR(Criminal)979, 2013(13)SCALE559, (2014)2SCC1, 2014 (1) SCJ 68, 2013(3)UC2017

Appellants: Lalita Kumari Vs. Respondent: Govt. of U.P. and Ors.

Hon'ble Judges/Coram: P. Sathasivam, C.J.I., B.S. Chauhan, Ranjana Prakash Desai, Ranjan Gogoi and S.A. Bobde, JJ.

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Subject: Criminal

Relevant Section: Code of Criminal Procedure, 1973 - Section 154

Acts/Rules/Orders: Prevention of Corruption Act; Criminal Law (Amendment) Act, 2013 - Section 13; Police Act, 1861 - Section 44; Delhi Special Police Establishment Act, 1946; Code of Criminal Procedure, 1973 (CrPC) - Section 2, Code of Criminal Procedure, 1973 (CrPC) - Section 2(4), Code of

Criminal Procedure, 1973 (CrPC) - Section 4(2), Code of Criminal Procedure, 1973 (CrPC) - Section 5, Code of Criminal Procedure, 1973 (CrPC) - Section 39, Code of Criminal Procedure, 1973 (CrPC) - Section 41, Code of Criminal Procedure, 1973 (CrPC) - Section 41(1), Code of Criminal Procedure, 1973 (CrPC) - Section 55, Code of Criminal Procedure, 1973 (CrPC) - Section 57, Code of Criminal Procedure, 1973 (CrPC) - Section 91, Code of Criminal Procedure, 1973 (CrPC) - Section 151, Code of Criminal Procedure, 1973 (CrPC) - Section 154, Code of Criminal Procedure, 1973 (CrPC) - Section 154(1), Code of Criminal Procedure, 1973 (CrPC) - Section 154(2), Code of Criminal Procedure, 1973 (CrPC) - Section 154(3), Code of Criminal Procedure, 1973 (CrPC) - Section 155, Code of Criminal Procedure, 1973 (CrPC) - Section 156, Code of Criminal Procedure, 1973 (CrPC) - Section 156(1), Code of Criminal Procedure, 1973 (CrPC) - Section 156(3), Code of Criminal Procedure, 1973 (CrPC) - Section 157, Code of Criminal Procedure, 1973 (CrPC) - Section 157(1), Code of Criminal Procedure, 1973 (CrPC) - Section 158, Code of Criminal Procedure, 1973 (CrPC) - Section 159, Code of Criminal Procedure, 1973 (CrPC) - Section 160, Code of Criminal Procedure, 1973 (CrPC) - Section 162, Code of Criminal Procedure, 1973 (CrPC) - Section 163, Code of Criminal Procedure, 1973 (CrPC) - Section 164, Code of Criminal Procedure, 1973 (CrPC) - Section 164(5A), Code of Criminal Procedure, 1973 (CrPC) - Section 165, Code of Criminal Procedure, 1973 (CrPC) - Section 166, Code of Criminal Procedure, 1973 (CrPC) - Section 167, Code of Criminal Procedure, 1973 (CrPC) - Section 168, Code of Criminal Procedure, 1973 (CrPC) - Section 169, Code of Criminal Procedure, 1973 (CrPC) - Section 170, Code of Criminal Procedure, 1973 (CrPC) - Section 171, Code of Criminal Procedure, 1973 (CrPC) - Section 172, Code of Criminal Procedure, 1973 (CrPC) - Section 173, Code of Criminal Procedure, 1973 (CrPC) - Section 173(1), Code of Criminal Procedure, 1973 (CrPC) - Section 173(2), Code of Criminal Procedure, 1973 (CrPC) - Section 173(3), Code of Criminal Procedure, 1973 (CrPC) - Section 173(4), Code of Criminal Procedure, 1973 (CrPC) - Section 173(5), Code of Criminal Procedure, 1973 (CrPC) - Section 173(6), Code of Criminal Procedure, 1973 (CrPC) - Section 173(8), Code of Criminal Procedure, 1973 (CrPC) - Section 174, Code of Criminal Procedure, 1973 (CrPC) - Section 175, Code of Criminal Procedure, 1973 (CrPC) - Section 176, Code of Criminal Procedure, 1973 (CrPC) - Section 190, Code of Criminal Procedure, 1973 (CrPC) - Section 190(1), Code of Criminal Procedure, 1973 (CrPC) - Section 200, Code of Criminal Procedure, 1973 (CrPC) - Section 202, Code of Criminal Procedure, 1973 (CrPC) - Section 202(1), Code of Criminal Procedure, 1973 (CrPC) - Section 204, Code of Criminal Procedure, 1973 (CrPC) - Section 340, Code of Criminal Procedure, 1973 (CrPC) - Section 438, Code of Criminal Procedure, 1973 (CrPC) - Section 491; Code of Criminal Procedure, 1898 (CrPC) - Section 154; Code of Criminal Procedure (CrPC), 1861 - Section 139; Code of Criminal Procedure (CrPC), 1872 - Section 112; Indian Penal Code 1860, (IPC) - Section 64A, Indian Penal Code 1860, (IPC) - Section 121, Indian Penal Code 1860, (IPC) - Section 122, Indian Penal Code 1860, (IPC) - Section 123, Indian Penal Code 1860, (IPC) - Section 124, Indian Penal Code 1860, (IPC) - Section 125, Indian Penal Code 1860, (IPC) - Section 126, Indian Penal Code 1860, (IPC) - Section 166A, Indian Penal Code 1860, (IPC) - Section 302, Indian Penal Code 1860, (IPC) - Section 326A, Indian Penal Code 1860, (IPC) - Section 326B, Indian Penal Code 1860, (IPC) - Section 354, Indian Penal Code 1860, (IPC) - Section 354A, Indian Penal Code 1860, (IPC) - Section 354B, Indian Penal Code 1860, (IPC) - Section 354C, Indian Penal Code 1860, (IPC) - Section 354D, Indian Penal Code 1860, (IPC) - Section 370, Indian Penal Code 1860, (IPC) - Section 370A, Indian Penal Code 1860, (IPC) - Section 376, Indian Penal Code 1860, (IPC) - Section 376A, Indian Penal Code 1860, (IPC) - Section 376B, Indian Penal Code 1860, (IPC) - Section 376C, Indian Penal Code 1860, (IPC) - Section 376D, Indian Penal Code 1860, (IPC) - Section 376E, Indian Penal Code 1860, (IPC) - Section 382, Indian Penal Code 1860, (IPC) - Section 392, Indian Penal Code 1860, (IPC) - Section 498A, Indian Penal Code 1860, (IPC) - Section 509; Punjab Police Rules, 1934 - Rule 24.1, Punjab Police Rules, 1934 - Rule 24.5; Uttar Pradesh Police Regulations; State Government Regulations; Constitution of India - Article 14, Constitution of India - Article 19, Constitution of India - Article 21, Constitution of India - Article 32, Constitution of India - Article 254(1)

Cases Referred: LalitaKumari v. Government of Uttar Pradesh and Ors. MANU/SC/8685/2008 : (2008) 7 SCC 164 : (2008) 14 SCC 337; LalitaKumari v. Government of Uttar Pradesh and Ors. MANU/SC/0157/2012 : (2012) 4 SCC 1; State of Haryana v. BhajanLal MANU/SC/0115/1992 : 1992 Supp. (1) SCC 335; Ramesh Kumari v. State (NCT of Delhi) MANU/SC/8037/2006 : (2006) 2 SCC 677; Parkash Singh Badal v. State of Punjab MANU/SC/5415/2006 : (2007) 1 SCC 1; P. Sirajuddin v. State of Madras MANU/SC/0158/1970 : (1970) 1 SCC 595; Sevi v. State of Tamil Nadu MANU/SC/0218/1981 : 1981 Supp SCC 43; Shashikant v. Central Bureau of Investigation MANU/SC/8639/2006 : (2007) 1 SCC 630; Rajinder Singh Katoch v. Chandigarh Admn. MANU/SC/8052/2007 : (2007) 10 SCC 69; B. Premanand and Ors. v. Mohan Koikal and Ors. MANU/SC/0249/2011 : (2011) 4 SCC 266; HiralalRattanlal Etc. Etc. v. State of U.P. and Anr. Etc. Etc. MANU/SC/0553/1972 : (1973) 1 SCC 216; GovindlalChhaganlal Patel v. Agricultural Produce Market Committee, Godhra and Ors. MANU/SC/0125/1975 : (1975) 2 SCC 482; Ganesh Bhavan Patel and Anr. v. State of Maharashtra MANU/SC/0083/1978 : (1978) 4 SCC 371; AlequePadamsee and Ors. v. Union of India and Ors. MANU/SC/2975/2007 : (2007) 6 SCC 171; Ram LalNarang v. State (Delhi Administration) MANU/SC/0216/1979 : (1979) 2 SCC 322; LallanChaudhary and Ors. v. State of Bihar and Anr. MANU/SC/4524/2006 : (2006) 12 SCC 229; State of Uttar Pradesh v. Bhagwant Kishore Joshi MANU/SC/0066/1963 : (1964) 3 SCR 71; Jacob Mathew v. State of Punjab and Anr. MANU/SC/0457/2005 : (2005) 6 SCC 1; Superintendent of Police, CBI v. Tapan Kumar Singh MANU/SC/0299/2003 : (2003) 6 SCC 175; Khub Chand v. State of Rajasthan MANU/SC/0015/1966 : AIR 1967 SC 1074; State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal MANU/SC/0121/2010 : (2010) 3 SCC 571; H.N. Rishbud and Inder Singh v. State of Delhi MANU/SC/0049/1954 : AIR 1955 SC 196; S.N. Sharma v. Bipen Kumar Tiwari MANU/SC/0182/1970 : (1970) 1 SCC 653; Union of India v. Prakash P. Hinduja MANU/SC/0446/2003 : (2003) 6 SCC 195;Sheikh Hasib alias Tabarak v. State of Bihar MANU/SC/0180/1971 : (1972) 4 SCC 773; Ashok Kumar Todi v. KishwarJahan and Ors. MANU/SC/0162/2011 : (2011) 3 SCC 758; Padma SundaraRao (Dead) and Ors. v. State of T.N. and Ors. MANU/SC/0182/2002 : (2002) 3 SCC 533; MannalalKhatic v. The State MANU/WB/0117/1967 : AIR 1967 Cal 478; Mohindro v. State of Punjab MANU/SC/1010/2001 : (2001) 9 SCC 581; MunnaLal v. State of Himachal Pradesh MANU/HP/0033/1991 : 1992 Crl. L.J. 1558; GiridhariLalKanak v. State and Ors. MANU/MP/0620/2001 : 2002 Crl. L.J. 2113; KatteriMoideenKutty Haji v. State of Kerala MANU/KE/0071/2002 : 2002 (2) Crimes 143; Maneka Gandhi v. Union of India MANU/SC/0133/1978 : (1978) 1 SCC 248; Chairman Board of Mining Examination and Chief Inspector of Mines and Anr. v. Ramjee MANU/SC/0061/1977 : (1977) 2 SCC 256; Lalit Mohan Pandey v. Pooran Singh MANU/SC/0422/2004 : (2004) 6 SCC 626; Prativa Bose v. Kumar Rupendra Deb Raikat MANU/SC/0251/1963 : (1964) 4 SCR 69; State of Maharashtra v. SarangdharsinghShivdassinghChavan and Anr. MANU/SC/1055/2010 : (2011) 1 SCC 577; Preeti Gupta v. State of Jharkhand MANU/SC/0592/2010 : (2010) 7 SCC 667; Swedish Match AB v. SEBI MANU/SC/0693/2004 : (2004) 11 SCC 641; MadhuBala v. Suresh Kumar MANU/SC/0806/1997 : (1997) 8 SCC 476; E.P. Royappa v. State of Tamil Nadu MANU/SC/0380/1973 : (1974) 4 SCC 3; S.M.D. Kiran Pasha v. Government of Andhra Pradesh MANU/SC/0473/1989 : (1990) 1 SCC 328;D.K. Basu v. State of W.B. MANU/SC/0157/1997 : (1997) 1 SCC 416; Uma Shankar Sitani v. Commissioner of Police, Delhi and Ors. : (1996) 11 SCC 714; Francis Coralie Mullin v. Administrator, Union Territory of Delhi MANU/SC/0517/1981 : (1981) 1 SCC 608; Common Cause, A Registered Society v. Union of India MANU/SC/0437/1999 : (1999) 6 SCC 667; District Registrar and Collector, Hyderabad v. Canara Bank MANU/SC/0935/2004 : (2005) 1 SCC 496; RanjitsingBrahmajeetsing Sharma v. State of Maharashtra MANU/SC/0268/2005 : (2005) 5 SCC 294; VineetNarain v. Union of India MANU/SC/0827/1998 : (1998) 1 SCC 226; Elumalai v. State of Tamil Nadu MANU/TN/0610/1983 : 1983 LW (CRL) 121; A. Lakshmanarao v. Judicial Magistrate, Parvatipuram MANU/SC/0076/1970 : AIR 1971 SC 186; State of Uttar Pradesh v. Ram SagarYadav and Ors. MANU/SC/0118/1985 : (1985) 1 SCC 552; Mona Panwar v. High Court of Judicature of Allahabad MANU/SC/0087/2011 : (2011) 3 SCC 496; Apren Joseph v. State of Kerala MANU/SC/0078/1972 : (1973) 3 SCC 114; King Emperor v. KhwajaNazir Ahmad

MANU/PR/0007/1944 : AIR 1945 PC 18; Thulia Kali v. State of Tamil Nadu MANU/SC/0276/1972 : (1972) 3 SCC 393; Joginder Kumar v. State of U.P. and Ors. MANU/SC/0311/1994 : (1994) 4 SCC 260

Disposition: Disposed off

Citing Reference: Discussed

Relied On

Case Note: Criminal Procedure Code, 1973 - Sec. 154 - Whether "a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under the section or the police officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering the same"? Reference answered - Details stated.

(i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

  (a) Matrimonial disputes/family disputes

  (b) Commercial offences

  (c) Medical negligence cases

  (d) Corruption cases

  (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously

reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

2. Criminal Procedure Code, 1973 - Sec. 154 - The provision of the section is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence.

   The condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

3. Interpretation of Statute - If the provision is unambiguous and the legislative intent is clear, the Court need not call into it any other rules of construction - The golden rule of interpretation can be given a go-by only in cases where the language of the section is ambiguous and/or leads to an absurdity.

4. Criminal Procedure Code, 1973 - Sec. 39 - The section casts a statutory duty on every person to inform about commission of certain offences which includes offences covered by Secs. 121 to 126, 302, 64-A, 382, 392 etc. of the IPC.

5. Constitution of India, 1950 - Art. 254(1) - Police Act, 1861 - If there is any inconsistency between the provisions of the Code and the Act, the provisions of the Code will prevail and the provisions of the Police Act would be void to the extent of the repugnancy.

6. F.I.R. - Registration of FIR is mandatory and also that it is to be recorded in the FIR Book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the Superior Police Officers as well as the competent Court to which copies of each FIR are required to be sent.

7. Maxim - "Uniusest exclusion alterius" - Expression of one thing is the exclusion of another.

8. Criminal Procedure Code, 1973 - Secs. 154, 41 - While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory.

   The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately. It is the imaginary fear that "merely because FIR has been registered, it would require arrest of the accused and thereby leading to loss of his reputation" and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence.

   The condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence.

JUDGMENT

P. Sathasivam, C.J.I.

1. The important issue which arises for consideration in the referred matter is whether "a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of

Criminal Procedure, 1973 (in short 'the Code') or the police officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering the same?"

2. The present writ petition, under Article 32 of the Constitution, has been filed by one LalitaKumari (minor) through her father, viz., ShriBholaKamat for the issuance of a writ of Habeas Corpus or direction(s) of like nature against the Respondents herein for the protection of his minor daughter who has been kidnapped. The grievance in the said writ petition is that on 11.05.2008, a written report was submitted by the Petitioner before the officer in-charge of the police station concerned who did not take any action on the same. Thereafter, when the Superintendent of Police was moved, an FIR was registered. According to the Petitioner, even thereafter, steps were not taken either for apprehending the accused or for the recovery of the minor girl child.

3. A two-Judge Bench of this Court in, LalitaKumari v. Government of Uttar Pradesh and Ors. (2008) 7 SCC 164, after noticing the disparity in registration of FIRs by police officers on case to case basis across the country, issued notice to the Union of India, the Chief Secretaries of all the States and Union Territories and Director Generals of Police/Commissioners of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaint petitions for appropriate direction(s) to the police to register the case immediately and for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown.

4. Pursuant to the above directions, when the matter was heard by the very same Bench in LalitaKumari v. Government of Uttar Pradesh and Ors. (2008) 14 SCC 337, Mr. S.B. Upadhyay, learned senior counsel for the Petitioner, projected his claim that upon receipt of information by a police officer in-charge of a police station disclosing a cognizable offence, it is imperative for him to register a case under Section 154 of the Code and placed reliance upon two-Judge Bench decisions of this Court in State of Haryana v. BhajanLal MANU/SC/0115/1992 : 1992 Supp. (1) SCC 335, Ramesh Kumari v. State (NCT of Delhi) MANU/SC/8037/2006 : (2006) 2 SCC 677 andParkash Singh Badal v. State of Punjab MANU/SC/5415/2006 : (2007) 1 SCC 1. On the other hand, Mr. ShekharNaphade, learned senior Counsel for the State of Maharashtra submitted that an officer in-charge of a police station is not obliged under law, upon receipt of information disclosing commission of a cognizable offence, to register a case rather the discretion lies with him, in appropriate cases, to hold some sort of preliminary inquiry in relation to the veracity or otherwise of the accusations made in the report. In support of his submission, he placed reliance upon two-Judge Bench decisions of this Court in P. Sirajuddin v. State of Madras MANU/SC/0158/1970 : (1970) 1 SCC 595, Sevi v. State of Tamil Nadu MANU/SC/0218/1981 : 1981 Supp SCC 43, Shashikant v. Central Bureau of Investigation MANU/SC/8639/2006 : (2007) 1 SCC 630, and Rajinder Singh Katoch v. Chandigarh Admn. MANU/SC/8052/2007 : (2007) 10 SCC 69. In view of the conflicting decisions of this Court on the issue, the said bench, vide order dated 16.09.2008, referred the same to a larger bench.

5. Ensuing compliance to the above direction, the matter pertaining to LalitaKumari was heard by a Bench of three-Judges in LalitaKumari v. Government of Uttar Pradesh and Ors. MANU/SC/0157/2012 : (2012) 4 SCC 1 wherein, this Court, after hearing various counsel representing Union of India, States and Union Territories and also after adverting to all the conflicting decisions extensively, referred the matter to a Constitution Bench while concluding as under:

97. We have carefully analysed various judgments delivered by this Court in the last several decades. We clearly discern divergent judicial opinions of this Court on the main issue: whether under Section 154 Code of Criminal Procedure, a police officer is bound to register an FIR when a cognizable offence is made out or he (police officer) has an option, discretion or latitude of conducting some kind of preliminary inquiry before registering the FIR.

98. The learned Counsel appearing for the Union of India and different States have expressed totally divergent views even before this Court. This Court also carved out a special category in the case of medical doctors in the aforementioned cases of Santosh Kumar and Suresh Gupta where preliminary inquiry had been postulated before registering an FIR. Some counsel also submitted that the CBI Manual also envisages some kind of preliminary inquiry before registering the FIR.

99. The issue which has arisen for consideration in these cases is of great public importance. In view of the divergent opinions in a large number of cases decided by this Court, it has become extremely important to have a clear enunciation of law and adjudication by a larger Bench of this Court for the benefit of all concerned--the courts, the investigating agencies and the citizens.

100. Consequently, we request the Hon'ble the Chief Justice to refer these matters to a Constitution Bench of at least five Judges of this Court for an authoritative judgment.

6. Therefore, the only question before this Constitution Bench relates to the interpretation of Section 154 of the Code and incidentally to consider Sections 156 and 157 also.

7. Heard Mr. S.B. Upadhyay, learned senior counsel for the Petitioner, Mr. K.V. Vishwanathan, learned Additional Solicitor General for the Union of India, Mr. SidharthLuthra, learned Additional Solicitor General for the State of Chhattisgarh, Mr. ShekharNaphade, Mr. R.K. Dash, Ms. VibhaDattaMakhija, learned senior counsel for the State of Maharashtra, U.P. and M.P. respectively, Mr. G. Sivabalamurugan, learned Counsel for the accused, Dr. Ashok Dhamija, learned Counsel for the CBI, Mr. KalyanBandopodhya, learned senior counsel for the State of West Bengal, Dr. Manish Singhvi, learned AAG for the State of Rajasthan and Mr. Sudarshan Singh Rawat.

8. In order to answer the main issue posed before this Bench, it is useful to refer the following Sections of the Code:

154. Information in cognizable cases.-- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156. Police officer's power to investigate cognizable case. (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

157. Procedure for investigation: (1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.

(2) In each of the cases mentioned in Clauses (a) and (b) of the proviso to Sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that subsection, and, in the case mentioned in Clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

Contentions:

9. At the foremost, Mr. S.B. Upadhyay, learned senior counsel, while explaining the conditions mentioned in Section 154 submitted that Section 154(1) is mandatory as the use of the word 'shall' is indicative of the statutory intent of the legislature. He also contended that there is no discretion left to the police officer except to register an FIR. In support of the above proposition, he relied on the following decisions, viz., B. Premanand and Ors. v. Mohan Koikal and Ors. MANU/SC/0249/2011 : (2011) 4 SCC 266, M/s. HiralalRattanlal Etc. Etc. v. State of U.P. and Anr. Etc. Etc. MANU/SC/0553/1972 : (1973) 1 SCC 216 and GovindlalChhaganlal Patel v. Agricultural Produce Market Committee, Godhra and Ors. MANU/SC/0125/1975 : (1975) 2 SCC 482.

10. Mr. Upadhyay, by further drawing our attention to the language used in Section 154(1) of the Code, contended that it merely mentions 'information' without prefixing the words

'reasonable' or 'credible'. In order to substantiate this claim, he relied on the following decisions, viz., BhajanLal (supra), Ganesh Bhavan Patel and Anr. v. State of Maharashtra MANU/SC/0083/1978 : (1978) 4 SCC 371, AlequePadamsee and Ors. v. Union of India and Ors. MANU/SC/2975/2007 : (2007) 6 SCC 171, Ramesh Kumari (supra), Ram LalNarang v. State (Delhi Administration) MANU/SC/0216/1979 : (1979) 2 SCC 322 and LallanChaudhary and Ors. v. State of Bihar and Anr.MANU/SC/4524/2006 : (2006) 12 SCC 229. Besides, he also brought to light various adverse impacts of allowing police officers to hold preliminary inquiry before registering an FIR.

11. Mr. K.V. Viswanathan, learned Additional Solicitor General appearing on behalf of Union of India submitted that in all the cases where information is received under Section 154 of the Code, it is mandatory for the police to forthwith enter the same into the register maintained for the said purpose, if the same relates to commission of a cognizable offence. According to learned ASG, the police authorities have no discretion or authority, whatsoever, to ascertain the veracity of such information before deciding to register it. He also pointed out that a police officer, who proceeds to the spot under Sections 156 and 157 of the Code, on the basis of either a cryptic information or source information, or a rumour etc., has to immediately, on gathering information relating to the commission of a cognizable offence, send a report (ruqqa) to the police station so that the same can be registered as FIR. He also highlighted the scheme of the Code relating to the registration of FIR, arrest, various protections provided to the accused and the power of police to close investigation. In support of his claim, he relied on various decisions of this Court viz., BhajanLal (supra), Ramesh Kumari (supra) and AlequePadamsee (supra). He also deliberated upon the distinguishable judgments in conflict with the mandatory proposition, viz., State of Uttar Pradesh v. Bhagwant Kishore Joshi MANU/SC/0066/1963 : (1964) 3 SCR 71, P. Sirajuddin (supra), Sevi (supra), Shashikant (supra), Rajinder Singh Katoch (supra), Jacob Mathew v. State of Punjab and Anr. MANU/SC/0457/2005 : (2005) 6 SCC 1. He concluded his arguments by saying that if any information disclosing a cognizable offence is led before an officer in-charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. Further, he emphasized upon various safeguards provided under the Code against filing a false case.

12. Dr. Ashok Dhamija, learned Counsel for the CBI, submitted that the use of the word "shall" under Section 154(1) of the Code clearly mandates that if the information given to a police officer relates to the commission of a cognizable offence, then it is mandatory for him to register the offence. According to learned Counsel, in such circumstances, there is no option or discretion given to the police. He further contended that the word "shall" clearly implies a mandate and is unmistakably indicative of the statutory intent. What is necessary, according to him, is only that the information given to the police must disclose commission of a cognizable offence. He also contended that Section 154 of the Code uses the word "information" simpliciter and does not use the qualified words such as "credible information" or "reasonable complaint". Thus, the intention of the Parliament is unequivocally clear from the language employed that a mere information relating to commission of a cognizable offence is sufficient to register an FIR. He also relied on BhajanLal (supra), Ramesh Kumari (supra), AlequePadamsee (supra), LallanChaudhary (supra), Superintendent of Police, CBI v. Tapan Kumar Singh MANU/SC/0299/2003 : (2003) 6 SCC 175, M/s. HiralalRattanlal (supra), B. Premanand (supra), Khub Chand v. State of RajasthanMANU/SC/0015/1966 : AIR 1967 SC 1074, P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra), State of West Bengal v. Committee for Protection of Democratic Rights, West BengalMANU/SC/0121/2010 : (2010) 3 SCC 571. He also pointed out various safeguards provided in the Code against filing a false case. In the end, he concluded by reiterating

that the registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. Further, he also clarified that the preliminary inquiry conducted by the CBI, under certain situations, as provided under the CBI Crime Manual, stands on a different footing due to the special provisions relating to the CBI contained in the Delhi Special Police Establishment Act, 1946, which is saved under Sections 4(2) and 5 of the Code.

13. Mr. KalyanBandopadhyay, learned senior Counsel appearing on behalf of the State of West Bengal, submitted that whenever any information relating to commission of a cognizable offence is received, it is the duty of the officer in-charge of a police station to record the same and a copy of such information, shall be given forthwith, free of cost, to the informant under Section 154(2) of the Code. According to him, a police officer has no other alternative but to record the information in relation to a cognizable offence in the first instance. He also highlighted various subsequent steps to be followed by the police officer pursuant to the registration of an FIR. With regard to the scope of Section 154 of the Code, he relied on H.N. Rishbud and Inder Singh v. State of Delhi MANU/SC/0049/1954 : AIR 1955 SC 196, BhajanLal (supra), S.N. Sharma v. Bipen Kumar Tiwari MANU/SC/0182/1970 : (1970) 1 SCC 653, Union of India v. Prakash P. Hinduja MANU/SC/0446/2003 : (2003) 6 SCC 195, Sheikh Hasib alias Tabarak v. State of Bihar MANU/SC/0180/1971 : (1972) 4 SCC 773, Shashikant (supra), Ashok Kumar Todi v. KishwarJahan and Ors. MANU/SC/0162/2011 : (2011) 3 SCC 758, Padma SundaraRao (Dead) and Ors. v. State of T.N. and Ors. MANU/SC/0182/2002 : (2002) 3 SCC 533, P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra) and MannalalKhatic v. The State MANU/WB/0117/1967 : AIR 1967 Cal 478.

14. Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, submitted that Section 154(1) of the Code mandates compulsory registration of FIR. He also highlighted various safeguards inbuilt in the Code for lodging of false FIRs. He also pointed out that the only exception relates to cases arising under the Prevention of Corruption Act as, in those cases, sanction is necessary before taking cognizance by the Magistrates and the public servants are accorded some kind of protection so that vexatious cases cannot be filed to harass them.

15. Mr. G. Sivabalamurugan, learned Counsel for the Appellant in Criminal Appeal No. 1410 of 2011, after tracing the earlier history, viz., the relevant provisions in the Code of Criminal Procedure of 1861, 1872, 1882 and 1898 stressed as to why the compulsory registration of FIR is mandatory. He also highlighted the recommendations of the Report of the 41st Law Commission and insertion of Section 13 of the Criminal Law (Amendment) Act, 2013 with effect from 03.02.2013.

16. Mr. R.K. Dash, learned senior counsel appearing for the State of Uttar Pradesh, though initially commenced his arguments by asserting that in order to check unnecessary harassment to innocent persons at the behest of unscrupulous complainants, it is desirable that a preliminary inquiry into the allegations should precede with the registration of FIR but subsequently after considering the salient features of the Code, various provisions like Sections 2(4)(h), 156(1), 202(1), 164, various provisions from the U.P. Police Regulations, learned senior counsel contended that in no case recording of FIR should be deferred till verification of its truth or otherwise in case of information relating to a cognizable offence. In addition to the same, he also relied on various pronouncements of this Court, such as, Mohindro v. State of Punjab MANU/SC/1010/2001 : (2001) 9 SCC 581, Ramesh Kumari (supra), BhajanLal (supra), Parkash Singh Badal (supra), MunnaLal v. State of Himachal Pradesh MANU/HP/0033/1991 : 1992 Crl. L.J. 1558, GiridhariLalKanak v. State and Ors. MANU/MP/0620/2001 : 2002 Crl. L.J. 2113 and KatteriMoideenKutty Haji v. State of Kerala MANU/KE/0071/2002 : 2002 (2) Crimes 143. Finally, he concluded that when the statutory

provisions, as envisaged in Chapter XII of the Code, are clear and unambiguous, it would not be legally permissible to allow the police to make a preliminary inquiry into the allegations before registering an FIR under Section 154 of the Code.

17. Mr. SidharthLuthra, learned Additional Solicitor General appearing for the State of Chhattisgarh, commenced his arguments by emphasizing the scope of reference before the Constitution Bench. Subsequently, he elaborated on various judgments which held that an investigating officer, on receiving information of commission of a cognizable offence under Section 154 of the Code, has power to conduct preliminary inquiry before registration of FIR, viz., Bhagwant Kishore Joshi (supra), P. Sirajuddin (supra), Sevi (supra) and Rajinder Singh Katoch (supra). Concurrently, he also brought to our notice the following decisions, viz., BhajanLal (supra), Ramesh Kumari (supra), Parkash Singh Badal (supra), and AlequePadamsee (supra), which held that a police officer is duty bound to register an FIR, upon receipt of information disclosing commission of a cognizable offence and the power of preliminary inquiry does not exist under the mandate of Section 154. Learned ASG has put forth a comparative analysis of Section 154 of the Code of Criminal Procedure of 1898 and of 1973. He also highlighted that every activity which occurs in a police station [Section 2(s)] is entered in a diary maintained at the police station which may be called as the General Diary, Station Diary or Daily Diary. He underlined the relevance of General Diary by referring to various judicial decisions such as Tapan Kumar Singh (supra), Re: Subbaratnam and Ors. AIR 1949 Madras 663. He further pointed out that, presently, throughout the country, in matrimonial, commercial, medical negligence and corruption related offences, there exist provisions for conducting an inquiry or preliminary inquiry by the police, without/before registering an FIR under Section 154 of the Code. He also brought to our notice various police rules prevailing in the States of Punjab, Rajasthan, U.P., Madhya Pradesh, Kolkata, Bombay, etc., for conducting an inquiry before registering an FIR. Besides, he also attempted to draw an inference from the Crime Manual of the CBI to highlight that a preliminary inquiry before registering a case is permissible and legitimate in the eyes of law. Adverting to the above contentions, he concluded by pleading that preliminary inquiry before registration of an FIR should be held permissible. Further, he emphasized that the power to carry out an inquiry or preliminary inquiry by the police, which precedes the registration of FIR will eliminate the misuse of the process, as the registration of FIR serves as an impediment against a person for various important activities like applying for a job or a passport, etc. Learned ASG further requested this Court to frame guidelines for certain category of cases in which preliminary inquiry should be made.

18. Mr. ShekharNaphade, learned senior counsel appearing on behalf of the State of Maharashtra, submitted that ordinarily the Station House Officer (SHO) should record an FIR upon receiving a complaint disclosing the ingredients of a cognizable offence, but in certain situations, in case of doubt about the correctness or credibility of the information, he should have the discretion of holding a preliminary inquiry and thereafter, if he is satisfied that there is a prima facie case for investigation, register the FIR. A mandatory duty of registering FIR should not be cast upon him. According to him, this interpretation would harmonize two extreme positions, viz., the proposition that the moment the complaint disclosing ingredients of a cognizable offence is lodged, the police officer must register an FIR without any scrutiny whatsoever is an extreme proposition and is contrary to the mandate of Article 21 of the Constitution of India, similarly, the other extreme point of view is that the police officer must investigate the case substantially before registering an FIR. Accordingly, he pointed out that both must be rejected and a middle path must be chosen. He also submitted the following judgments, viz., BhajanLal (supra), Ramesh Kumari (supra), Parkash Singh Badal (supra), and AlequePadamsee (supra) wherein it has been held that if a complaint alleging commission of a cognizable offence is received in the police station, then the SHO has no

other option but to register an FIR under Section 154 of the Code. According to learned senior counsel, these verdicts require reconsideration as they have interpreted Section 154 de hors the other provisions of the Code and have failed to consider the impact of Article 21 on Section 154 of the Code.

19. Alongside, he pointed out the following decisions, viz., Rajinder Singh Katoch (supra), P. Sirajuddin (supra), Bhagwant Kishore Joshi (supra) and Sevi (supra), which hold that before registering an FIR under Section 154 of the Code, it is open to the police officer to hold a preliminary inquiry to ascertain whether there is a prima facie case of commission of a cognizable offence or not. According to learned senior counsel, Section 154 of the Code forms part of a chain of statutory provisions relating to investigation and, therefore, the scheme of provisions of Sections 41, 157, 167, 169, etc., must have a bearing on the interpretation of Section 154. In addition, he emphasized that giving a literal interpretation would reduce the registration of FIR to a mechanical act. Parallelly, he underscored the impact of Article 21 on Section 154 of the Code by referring to Maneka Gandhi v. Union of IndiaMANU/SC/0133/1978 : (1978) 1 SCC 248, wherein this Court has applied Article 21 to several provisions relating to criminal law. This Court has also stated that the expression "law" contained in Article 21 necessarily postulates law which is reasonable and not merely statutory provisions irrespective of its reasonableness or otherwise. Learned senior counsel pleaded that in the light of Article 21, provisions of Section 154 of the Code must be read down to mean that before registering an FIR, the police officer must be satisfied that there is a prima facie case for investigation. He also emphasized that Section 154 contains implied power of the police officer to hold preliminary inquiry if he bona fide possess serious doubts about the credibility of the information given to him. By pointing out Criminal Law (Amendment) Act, 2013, particularly, Section 166A, Mr. Naphade contended that as far as other cognizable offences (apart from those mentioned in Section 166A) are concerned, police has a discretion to hold preliminary inquiry if there is some doubt about the correctness of the information.

20. In case of allegations relating to medical negligence on the part of the doctors, it is pointed out by drawing our attention to some of the decisions of this Court viz., Tapan Kumar Singh (supra), Jacob Mathew (supra) etc., that no medical professional should be prosecuted merely on the basis of the allegations in the complaint. By pointing out various decisions, Mr. Naphade emphasized that in appropriate cases, it would be proper for a police officer, on receipt of a complaint of a cognizable offence, to satisfy himself that at least prima facie allegations levelled against the accused in the complaint are credible. He also contended that no single provision of a statute can be read and interpreted in isolation, but the statute must be read as a whole. Accordingly, he prayed that the provisions of Sections 41, 57, 156, 157, 159, 167, 190, 200 and 202 of the Code must be read together. He also pointed out that Section 154(3) of the Code enables any complainant whose complaint is not registered as an FIR by the officer in-charge of the police station to approach the higher police officer for the purpose of getting his complaint registered as an FIR and in such a case, the higher police officer has all the powers of recording an FIR and directing investigation into the matter. In addition to the remedy available to an aggrieved person of approaching higher police officer, he can also move the concerned Magistrate by making a complaint under Section 190 thereof. He further emphasized that the fact that the legislature has provided adequate remedies against refusal to register FIR and to hold investigation in cognizable offences, is indicative of legislative intent that the police officer is not bound to record FIR merely because the ingredients of a cognizable offence are disclosed in the complaint, if he has doubts about the veracity of the complaint. He also pointed out that the word "shall" used in the statute does not always mean absence of any discretion in the matter. For the said proposition, he also highlighted that this Court has preferred the rule of purposive

interpretation to the rule of literal interpretation for which he relied on Chairman Board of Mining Examination and Chief Inspector of Mines and Anr. v. Ramjee MANU/SC/0061/1977 : (1977) 2 SCC 256, Lalit Mohan Pandey v. Pooran Singh MANU/SC/0422/2004 : (2004) 6 SCC 626, Prativa Bose v. Kumar Rupendra Deb Raikat MANU/SC/0251/1963 : (1964) 4 SCR 69. He further pointed out that it is impossible to put the provisions of Section 154 of the Code in a straightjacket formula. He also prayed for framing of some guidelines as regards registration or non-registration of FIR. Finally, he pointed out that the requirement of Article 21 is that the procedure should be fair and just. According to him, if the police officer has doubts in the matter, it is imperative that he should have the discretion of holding a preliminary inquiry in the matter. If he is debarred from holding such a preliminary inquiry, the procedure would then suffer from the vice of arbitrariness and unreasonableness. Thus, he concluded his arguments by pleading that Section 154 of the Code must be interpreted in the light of Article 21.

21. Ms. VibhaDattaMakhija, learned senior counsel appearing for the State of Madhya Pradesh submitted that a plain reading of Section 154 and other provisions of the Code shows that it may not be mandatory but is absolutely obligatory on the part of the police officer to register an FIR prior to taking any steps or conducting investigation into a cognizable offence. She further pointed out that after receiving the first information of an offence and prior to the registration of the said report (whether oral or written) in the First Information Book maintained at the police station under various State Government Regulations, only some preliminary inquiry or investigative steps are permissible under the statutory framework of the Code to the extent as is justifiable and is within the window of statutory discretion granted strictly for the purpose of ascertaining whether there has been a commission or not of a cognizable offence. Hence, an investigation, culminating into a Final Report under Section 173 of the Code, cannot be called into question and be quashed due to the reason that a part of the inquiry, investigation or steps taken during investigation are conducted after receiving the first information but prior to registering the same unless it is found that the said investigation is unfair, illegal, mala fide and has resulted in grave prejudice to the right of the accused to fair investigation. In support of the above contentions, she traced the earlier provisions of the Code and current statutory framework, viz., Criminal Law (Amendment) Act, 2013 with reference to various decisions of this Court. She concluded that Section 154 of the Code leaves no area of doubt that where a cognizable offence is disclosed, there is no discretion on the part of the police to record or not to record the said information, however, it may differ from case to case.

22. The issues before the Constitution Bench of this Court arise out of two main conflicting areas of concern, viz.,

(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused.

Discussion:

23. The FIR is a pertinent document in the criminal law procedure of our country and its main object from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and to bring to book the guilty.

24. Historical experience has thrown up cases from both the sides where the grievance of the victim/informant of non-registration of valid FIRs as well as that of the accused of being unnecessarily harassed and investigated upon false charges have been found to be correct.

25. An example of the first category of cases is found in State of Maharashtra v. SarangdharsinghShivdassinghChavan and Anr. MANU/SC/1055/2010 : (2011) 1 SCC 577 wherein a writ petition was filed challenging the order of the Collector in the District of Buldhana directing not to register any crime against Mr. GokulchandSananda, without obtaining clearance from the District Anti-Money Lending Committee and the District Government Pleader. From the record, it was revealed that out of 74 cases, only in seven cases, charge sheets were filed alleging illegal moneylending. This Court found that upon instructions given by the Chief Minister to the District Collector, there was no registration of FIR of the poor farmers. In these circumstances, this Court held the said instructions to be ultra vires and quashed the same. It is argued that cases like above exhibit the mandatory character of Section 154, and if it is held otherwise, it shall lead to grave injustice.

26. In AlequePadamsee (supra), while dealing with the issue whether it is within the powers of courts to issue a writ directing the police to register a First Information Report in a case where it was alleged that the accused had made speeches likely to disturb communal harmony, this Court held that "the police officials ought to register the FIR whenever facts brought to their notice show that a cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code." As such, the Code itself provides several checks for refusal on the part of the police authorities under Section 154 of the Code.

27. However, on the other hand, there are a number of cases which exhibit that there are instances where the power of the police to register an FIR and initiate an investigation thereto are misused where a cognizable offence is not made out from the contents of the complaint. A significant case in this context is the case of Preeti Gupta v. State of Jharkhand MANU/SC/0592/2010 : (2010) 7 SCC 667 wherein this Court has expressed its anxiety over misuse of Section 498A of the Indian Penal Code, 1860 (in short 'the Indian Penal Code') with respect to which a large number of frivolous reports were lodged. This Court expressed its desire that the legislature must take into consideration the informed public opinion and the pragmatic realities to make necessary changes in law.

28. The above said judgment resulted in the 243rd Report of the Law Commission of India submitted on 30th August, 2012. The Law Commission, in its Report, concluded that though the offence under Section 498A could be made compoundable, however, the extent of misuse was not established by empirical data, and, thus, could not be a ground to denude the provision of its efficacy. The Law Commission also observed that the law on the question whether the registration of FIR could be postponed for a reasonable time is in a state of uncertainty and can be crystallized only upon this Court putting at rest the present controversy.

29. In order to arrive at a conclusion in the light of divergent views on the point and also to answer the above contentions, it is pertinent to have a look at the historical background of the Section and corresponding provisions that existed in the previous enactments of the Code of Criminal Procedure.

Code of Criminal Procedure, 1861

> 139. Every complaint or information preferred to an officer in charge of a police station, shall be reduced into writing and the substance thereof shall be entered in a diary to be kept by such officer, in such form as shall be prescribed by the local government.

Code of Criminal Procedure, 1872

112. Every complaint preferred to an officer in charge of a police station, shall be reduced into writing, and shall be signed, sealed or marked by the person making it; and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the local government.

Code of Criminal Procedure, 1882

154. Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him, or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such form as the government may prescribe in this behalf.

Code of Criminal Procedure, 1898

154. Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Government may prescribe in this behalf.

Code of Criminal Procedure, 1973

154. Information in cognizable cases: 1) Every information relating to the commission of a cognizable offence, it given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[Provided that if the information is given by the woman against whom an offence under Sections 326A, 326B, 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer:

Provided further that:

(a) in the event that the person against whom an offence under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal code is alleged to have been committed or attempted is temporarily or permanently mentally or physically disabled then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under Clause (a) of Sub-section (5A) of Section 164 as soon as possible.]

(Inserted by Section 13 of 'The Criminal Law (Amendment) Act, 2013 w.e.f. 03.02.2013)

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

A perusal of the above said provisions manifests the legislative intent in both old codes and the new code for compulsory registration of FIR in a case of cognizable offence without conducting any Preliminary Inquiry.

30. The precursor to the present Code of 1973 is the Code of 1898 wherein substantial changes were made in the powers and procedure of the police to investigate. The starting point of the powers of police was changed from the power of the officer in-charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing and into the book separately prescribed by the Provincial government for recording such first information.

31. As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Section 154, i.e., the provision imposing requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Section 156, i.e., the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of the informant, would act as an "extremely valuable safeguard" against the excessive, mala fide and illegal exercise of investigative powers by the police.

32. Provisions contained in Chapter XII of the Code deal with information to the police and their powers to investigate. The said Chapter sets out the procedure to be followed during investigation. The objective to be achieved by the procedure prescribed in the said Chapter is to set the criminal law in motion and to provide for all procedural safeguards so as to ensure that the investigation is fair and is not mala fide and there is no scope of tampering with the evidence collected during the investigation.

33. In addition, Mr. ShekharNaphade, learned senior counsel contended that insertion of Section 166A in Indian Penal Code indicates that registration of FIR is not compulsory for all offences other than what is specified in the said Section. By Criminal Law (Amendment) Act 2013, Section 166A was inserted in Indian Penal Code which reads as under:

Section 166A--Whoever, being a public servant.-

(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

(c) fails to record any information given to him under Sub-section (1) of Section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable

under Section 326A, Section 326B, Section 354, Section 354B, Section 370, Section 370A, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, Section 509 shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years and shall also be liable to fine.

Section 166A(c) lays down that if a public servant (Police Officer) fails to record any information given to him under Section 154(1) of the Code in relation to cognizable offences punishable under Sections 326A, 326B, 354, 354B, 370, 370A, 376, 376A, 376B, 376C, 376D, 376E or Section 509, he shall be punished with rigorous imprisonment for a term which shall not be less than six months but may extend to two years and shall also be liable to fine. Thus, it is the stand of learned Counsel that this provision clearly indicates that registration of FIR is imperative and police officer has no discretion in the matter in respect of offences specified in the said section. Therefore, according to him, the legislature accepts that as far as other cognizable offences are concerned, police has discretion to hold a preliminary inquiry if there is doubt about the correctness of the information.

34. Although, the argument is as persuasive as it appears, yet, we doubt whether such a presumption can be drawn in contravention to the unambiguous words employed in the said provision. Hence, insertion of Section 166A in the Indian Penal Code vide Criminal Law (Amendment) Act 2013, must be read in consonance with the provision and not contrary to it. The insertion of Section 166A was in the light of recent unfortunate occurrence of offences against women. The intention of the legislature in putting forth this amendment was to tighten the already existing provisions to provide enhanced safeguards to women. Therefore, the legislature, after noticing the increasing crimes against women in our country, thought it appropriate to expressly punish the police officers for their failure to register FIRs in these cases. No other meaning than this can be assigned to for the insertion of the same.

35. With this background, let us discuss the submissions in the light of various decisions both in favour and against the referred issue.

Interpretation of Section 154:

36. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. All that we have to see at the very outset is what does the provision say? As a result, the language employed in Section 154 is the determinative factor of the legislative intent. A plain reading of Section 154(1) of the Code provides that any information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police station shall be reduced into writing by him or under his direction. There is no ambiguity in the language of Section 154(1) of the Code.

37. At this juncture, it is apposite to refer to the following observations of this Court in M/s. HiralalRattanlal (supra) which are as under:

22...In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear....

The above decision was followed by this Court in B. Premanand (supra) and after referring the abovesaid observations in the case of HiralalRattanlal (supra), this Court observed as under:

9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB v. SEBI MANU/SC/0693/2004 : (2004) 11 SCC 641.

The language of Section 154(1), therefore, admits of no other construction but the literal construction.

38. The legislative intent of Section 154 is vividly elaborated in BhajanLal (supra) which is as under:

30. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined Under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer incharge of a police station" (within the meaning of Section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without

qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that 'every complaint or information' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

39. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

'Shall'

40. The use of the word "shall" in Section 154(1) of the Code clearly shows the legislative intent that it is mandatory to register an FIR if the information given to the police discloses the commission of a cognizable offence.

41. In Khub Chand (supra), this Court observed as under:

7...The term "shall" in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations....

42. It is relevant to mention that the object of using the word "shall" in the context of Section 154(1) of the Code is to ensure that all information relating to all cognizable offences is promptly registered by the police and investigated in accordance with the provisions of law.

43. Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable offences", a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

44. Therefore, the context in which the word "shall" appears in Section 154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement

of the direction to register FIRs, all these factors clearly show that the word "shall" used in Section 154(1) needs to be given its ordinary meaning of being of "mandatory" character. The provisions of Section 154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer in-charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.

45. In view of the above, the use of the word 'shall' coupled with the Scheme of the Act lead to the conclusion that the legislators intended that if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer in-charge of the police station. Reading 'shall' as 'may', as contended by some counsel, would be against the Scheme of the Code. Section 154 of the Code should be strictly construed and the word 'shall' should be given its natural meaning. The golden rule of interpretation can be given a go-by only in cases where the language of the section is ambiguous and/or leads to an absurdity.

46. In view of the above, we are satisfied that Section 154(1) of the Code does not have any ambiguity in this regard and is in clear terms. It is relevant to mention that Section 39 of the Code casts a statutory duty on every person to inform about commission of certain offences which includes offences covered by Sections 121 to 126, 302, 64A, 382, 392 etc., of the Indian Penal Code. It would be incongruous to suggest that though it is the duty of every citizen to inform about commission of an offence, but it is not obligatory on the officer-incharge of a Police Station to register the report. The word 'shall' occurring in Section 39 of the Code has to be given the same meaning as the word 'shall' occurring in Section 154(1) of the Code.

'Book'/'Diary'

47. It is contented by learned ASG appearing for the State of Chhattisgarh that the recording of first information under Section 154 in the 'book' is subsequent to the entry in the General Diary/Station Diary/Daily Diary, which is maintained in police station. Therefore, according to learned ASG, first information is a document at the earliest in the general diary, then if any preliminary inquiry is needed the police officer may conduct the same and thereafter the information will be registered as FIR.

48. This interpretation is wholly unfounded. The First Information Report is in fact the "information" that is received first in point of time, which is either given in writing or is reduced to writing. It is not the "substance" of it, which is to be entered in the diary prescribed by the State Government. The term 'General Diary' (also called as 'Station Diary' or 'Daily Diary' in some States) is maintained not under Section 154 of the Code but under the provisions of Section 44 of the Police Act, 1861 in the States to which it applies, or under the respective provisions of the Police Act(s) applicable to a State or under the Police Manual of a State, as the case may be. Section 44 of the Police Act, 1861 is reproduced below:

> 44. Police-officers to keep diary.--It shall be the duty of every officer in charge of a police-station to keep a general diary in such form as shall, from time to time, be prescribed by the State Government and to record therein all complaints and charged preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for any inspect such diary.

49. It is pertinent to note that during the year 1861, when the aforesaid Police Act, 1861 was passed, the Code of Criminal Procedure, 1861 was also passed. Section 139 of that Code

dealt with registration of FIR and this Section is also referred to the word "diary", as can be seen from the language of this Section, as reproduced below:

139. Every complaint or information preferred to an officer in charge of a Police Station, shall be reduced into writing, and the substance thereof shall be entered in a diary to be kept by such officer, in such form as shall be prescribed by the local government.

Thus, Police Act, 1861 and the Code of Criminal Procedure, 1861, both of which were passed in the same year, used the same word "diary".

50. However, in the year 1872, a new Code came to be passed which was called the Code of Criminal Procedure, 1872. Section 112 of the Code dealt with the issue of registration of FIR and is reproduced below:

112. Every complaint preferred to an officer in charge of a Police station shall be reduced into writing, and shall be signed, sealed, or marked by the person making it; and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the Local Government.

51. It is, thus, clear that in the Code of Criminal Procedure, 1872, a departure was made and the word 'book' was used in place of 'diary'. The word 'book' clearly referred to FIR book to be maintained under the Code for registration of FIRs.

52. The question that whether the FIR is to be recorded in the FIR Book or in General Diary, is no more res integra. This issue has already been decided authoritatively by this Court.

53. In MadhuBala v. Suresh Kumar MANU/SC/0806/1997 : (1997) 8 SCC 476, this Court has held that FIR must be registered in the FIR Register which shall be a book consisting of 200 pages. It is true that the substance of the information is also to be mentioned in the Daily diary (or the general diary). But, the basic requirement is to register the FIR in the FIR Book or Register. Even in BhajanLal (supra), this Court held that FIR has to be entered in a book in a form which is commonly called the First Information Report.

54. It is thus clear that registration of FIR is to be done in a book called FIR book or FIR Register. of course, in addition, the gist of the FIR or the substance of the FIR may also be mentioned simultaneously in the General Diary as mandated in the respective Police Act or Rules, as the case may be, under the relevant State provisions.

55. The General Diary is a record of all important transactions/events taking place in a police station, including departure and arrival of police staff, handing over or taking over of charge, arrest of a person, details of law and order duties, visit of senior officers etc. It is in this context that gist or substance of each FIR being registered in the police station is also mentioned in the General Diary since registration of FIR also happens to be a very important event in the police station. Since General Diary is a record that is maintained chronologically on day-today basis (on each day, starting with new number 1), the General Diary entry reference is also mentioned simultaneously in the FIR Book, while FIR number is mentioned in the General Diary entry since both of these are prepared simultaneously.

56. It is relevant to point out that FIR Book is maintained with its number given on an annual basis. This means that each FIR has a unique annual number given to it. This is on similar lines as the Case Numbers given in courts. Due to this reason, it is possible to keep a strict control and track over the registration of FIRs by the supervisory police officers and by the courts, wherever necessary. Copy of each FIR is sent to the superior officers and to the concerned Judicial Magistrate.

57. On the other hand, General Diary contains a huge number of other details of the proceedings of each day. Copy of General Diary is not sent to the Judicial Magistrate having jurisdiction over

the police station, though its copy is sent to a superior police officer. Thus, it is not possible to keep strict control of each and every FIR recorded in the General Diary by superior police officers and/or the court in view of enormous amount of other details mentioned therein and the numbers changing every day.

58. The signature of the complainant is obtained in the FIR Book as and when the complaint is given to the police station. On the other hand, there is no such requirement of obtaining signature of the complainant in the general diary. Moreover, at times, the complaint given may consist of large number of pages, in which case it is only the gist of the complaint which is to be recorded in the General Diary and not the full complaint. This does not fit in with the suggestion that what is recorded in General Diary should be considered to be the fulfillment/compliance of the requirement of Section 154 of registration of FIR. In fact, the usual practice is to record the complete complaint in the FIR book (or annex it with the FIR form) but record only about one or two paragraphs (gist of the information) in the General Diary.

59. In view of the above, it is useful to point out that the Code was enacted under Entry 2 of the Concurrent List of the Seventh Schedule to the Constitution which is reproduced below:

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

On the other hand, Police Act, 1861 (or other similar Acts in respective States) were enacted under Entry 2 of the State List of the Seventh Schedule to the Constitution, which is reproduced below:

2. Police (including railway and village police) subject to the provisions of Entry 2A of List I.

60. Now, at this juncture, it is pertinent to refer Article 254(1) of the Constitution, which lays down the provisions relating to inconsistencies between the laws made by the Parliament and the State Legislatures. Article 254(1) is reproduced as under:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

Thus it is clear from the mandate of Article 254(1) of the Constitution that if there is any inconsistency between the provisions of the Code and the Police Act, 1861, the provisions of the Code will prevail and the provisions of the Police Act would be void to the extent of the repugnancy.

61. If at all, there is any inconsistency in the provisions of Section 154 of the Code and Section 44 of the Police Act, 1861, with regard to the fact as to whether the FIR is to be registered in the FIR book or in the General Diary, the provisions of Section 154 of the Code will prevail and the provisions of Section 44 of the Police Act, 1861 (or similar provisions of the respective corresponding Police Act or Rules in other respective States) shall be void to the extent of the repugnancy. Thus, FIR is to be recorded in the FIR Book, as mandated under Section 154 of the Code, and it is not correct to state that information will be first recorded in the General

Diary and only after preliminary inquiry, if required, the information will be registered as FIR.

62. However, this Court in Tapan Kumar Singh (supra), held that a GD entry may be treated as First information in an appropriate case, where it discloses the commission of a cognizable offence. It was held as under:

15. It is the correctness of this finding which is assailed before us by the Appellants. They contend that the information recorded in the GD entry does disclose the commission of a cognizable offence. They submitted that even if their contention, that after recording the GD entry only a preliminary inquiry was made, is not accepted, they are still entitled to sustain the legality of the investigation on the basis that the GD entry may be treated as a first information report, since it disclosed the commission of a cognizable offence.

16. The parties before us did not dispute the legal position that a GD entry may be treated as a first information report in an appropriate case, where it discloses the commission of a cognizable offence. If the contention of the Appellants is upheld, the order of the High Court must be set aside because if there was in law a first information report disclosing the commission of a cognizable offence, the police had the power and jurisdiction to investigate, and in the process of investigation to conduct search and seizure. It is, therefore, not necessary for us to consider the authorities cited at the Bar on the question of validity of the preliminary inquiry and the validity of the search and seizure.

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19. The High Court fell into an error in thinking that the information received by the police could not be treated as a first information report since the allegation was vague inasmuch as it was not stated from whom the sum of rupees one lakh was demanded and accepted. Nor was it stated that such demand or acceptance was made as motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show in exercise of his official function, favour or disfavour to any person or for rendering, attempting to render any service or disservice to any person. Thus there was no basis for a police officer to suspect the commission of an offence which he was empowered under Section 156 of the Code to investigate.

63. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR Book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

'Information'

64. The legislature has consciously used the expression "information" in Section 154(1) of the Code as against the expression used in Section 41(1)(a) and (g) where the expression used for arresting a person without warrant is "reasonable complaint" or "credible information". The expression under Section 154(1) of the Code is not qualified by the prefix "reasonable" or "credible". The non qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code is for the reason that the police officer should not refuse to record any information relating to the commission of a cognizable offence on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, reasonableness or credibility of the said information is not a condition precedent for the registration of a case.

65. The above view has been expressed by this Court in BhajanLal (supra) which is as under:

32...in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word.

66. In Parkash Singh Badal (supra), this Court held as under:

65. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" [as defined under Section 2(c) of the Code] if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" [within the meaning of Section 2(o) of the Code] and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "first information report" and which act of entering the information in the said form is known as registration of a crime or a case.

66. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an inquiry as to whether the information laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157 thereof. In case an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

67. It has to be noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Sections 41(1)(a) or (g) of the Code wherein the expressions "reasonable complaint" and "credible information" are used. Evidently, the non qualification of the word "information" in Section 154(1) unlike in Sections 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, "reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that

"every complaint or information" preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that "every complaint" preferred to an officer in charge of a police station shall be reduced in writing. The word "complaint" which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word "information" was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the Code. An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.

68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

67. In Ramesh Kumari (supra), this Court held as under:

4. That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more res integra. The point of law has been set at rest by this Court in State of Haryana v. BhajanLal. This Court after examining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 and 32 of the judgment as under:

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression 'information' without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, 'reasonable complaint' and 'credible information' are used. Evidently, the non qualification of the word 'information' in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word 'information' without

qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that 'every complaint or information' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.

(Emphasis in original)

Finally, this Court in para 33 said:

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

5. The views expressed by this Court in paras 31, 32 and 33 as quoted above leave no manner of doubt that the provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of such information disclosing cognizable offence.

68. In Ram LalNarang (supra), this Court held as under:

14. Under the Code of Criminal Procedure, 1898, whenever an officer in charge of the police station received information relating to the commission of a cognizable offence, he was required to enter the substance thereof in a book kept by him, for that purpose, in the prescribed form (Section 154 Code of Criminal Procedure). Section 156 of the Code of Criminal Procedure invested the Police with the power to investigate into cognizable offences without the order of a Court. If, from the information received or otherwise, the officer in charge of a police station suspected the commission of a cognizable offence, he was required to send forthwith a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and then to proceed in person or depute one of his subordinate officers to proceed to the spot, to investigate the facts and circumstances of the case and to take measures for the discovery and arrest of the offender (Section 157 Code of Criminal Procedure). He was required to complete the investigation without unnecessary delay, and, as soon as it was completed, to forward to a Magistrate empowered to take cognizance of the offence upon a police report, a report in the prescribed form, setting forth the names of the parties, the nature of the information and the names of the persons who appeared to be acquainted with the circumstances of the case [Section 173(1) Code of Criminal Procedure]. He was also required to state whether the accused had been forwarded in custody or had been released on bail. Upon receipt of the report submitted under Section 173(1) Code of Criminal Procedure by the officer in charge of the police station, the Magistrate empowered to take cognizance of an offence upon a police report might take cognizance of the offence [Section 190(1)(b) Code of Criminal Procedure]. Thereafter, if, in the opinion of the Magistrate taking cognizance of the offence, there was sufficient ground for proceeding, the Magistrate was required to issue the necessary process to secure the attendance of the accused (Section 204 Code of Criminal Procedure). The scheme of the Code thus was that the FIR was followed by investigation, the investigation led to the submission of a report to

the Magistrate, the Magistrate took cognizance of the offence on receipt of the police report and, finally, the Magistrate taking cognizance issued process to the accused.

15. The police thus had the statutory right and duty to "register" every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report. These statutory rights and duties of the police were not circumscribed by any power of superintendence or interference in the Magistrate; nor was any sanction required from a Magistrate to empower the Police to investigate into a cognizable offence. This position in law was well-established. In King Emperor v. KhwajaNazir Ahmad the Privy Council observed as follows:

Just as it is essential that everyone accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rules by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Courts to intervene in an appropriate case when moved under Section 491 of the Code of Criminal Procedure to give directions in the nature of Habeas Corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then... In the present case, the police have under Sections 154 and 156 of the Code of Criminal Procedure, a statutory right to investigate a cognizable offence without requiring the sanction of the Court....

Ordinarily, the right and duty of the police would end with the submission of a report under Section 173(1) Code of Criminal Procedure upon receipt of which it was up to the Magistrate to take or not to take cognizance of the offence. There was no provision in the 1898 Code prescribing the procedure to be followed by the police, where, after the submission of a report under Section 173(1) Code of Criminal Procedure and after the Magistrate had taken cognizance of the offence, fresh facts came to light which required further investigation. There was, of course, no express provision prohibiting the police from launching upon an investigation into the fresh facts coming to light after the submission of the report under Section 173(1) or after the Magistrate had taken cognizance of the offence. As we shall presently point out, it was generally thought by many High Courts, though doubted by a few, that the police were not barred from further investigation by the circumstance that a report under Section 173(1) had already been submitted and a Magistrate had already taken cognizance of the offence. The Law Commission in its 41st report recognized the position and recommended that the right of the police to make further investigation should be statutorily affirmed. The Law Commission said:

14.23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re-open the

investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused.

Accordingly, in the Code of Criminal Procedure, 1973, a new provision, Section 173(8), was introduced and it says:

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2).

69. In LallanChaudhary (supra), this Court held as under:

8. Section 154 of the Code thus casts a statutory duty upon the police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.

9. In Ramesh Kumari v. State (NCT of Delhi) this Court has held that the provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case.

10. The mandate of Section 154 of the Code is that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. In other words, reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154 of the Code.

A perusal of the above-referred judgments clarify that the reasonableness or creditability of the information is not a condition precedent for the registration of a case.

Preliminary Inquiry

70. Mr. Naphade relied on the following decisions in support of his arguments that if the police officer has a doubt about the veracity of the accusation, he has to conduct preliminary inquiry, viz., E.P. Royappa v. State of Tamil Nadu MANU/SC/0380/1973 : (1974) 4 SCC 3, Maneka Gandhi (supra), S.M.D. Kiran Pasha v. Government of Andhra Pradesh MANU/SC/0473/1989 : (1990) 1 SCC 328, D.K. Basu v. State of W.B. MANU/SC/0157/1997 : (1997) 1 SCC 416, Uma Shankar Sitani v. Commissioner of Police, Delhi and Ors. : (1996) 11 SCC 714, Preeti Gupta (supra), Francis Coralie Mullin v. Administrator, Union Territory of Delhi MANU/SC/0517/1981 : (1981) 1 SCC 608, Common Cause, A Registered Society v. Union of India MANU/SC/0437/1999 : (1999) 6 SCC 667, District Registrar and Collector, Hyderabad v. Canara Bank MANU/SC/0935/2004 : (2005) 1 SCC 496 andRanjitsingBrahmajeetsing Sharma v. State of Maharashtra MANU/SC/0268/2005 : (2005) 5 SCC 294.

71. Learned senior counsel for the State further vehemently contended that in appropriate cases, it would be proper for a police officer, on receipt of a complaint of a cognizable offence, to satisfy himself that prima facie the allegations levelled against the accused in the complaint are credible. In this regard, Mr. Naphade cited the following decisions, viz. Tapan Kumar Singh (supra), Bhagwant Kishore Joshi (supra), P. Sirajuddin (supra), Sevi (supra), Shashikant (supra), Rajinder Singh Katoch (supra), VineetNarain v. Union of India MANU/SC/0827/1998 : (1998) 1 SCC 226, Elumalai v. State of Tamil Nadu MANU/TN/0610/1983 : 1983 LW (CRL) 121, A. Lakshmanarao v. Judicial Magistrate, Parvatipuram MANU/SC/0076/1970 : AIR 1971 SC 186, State of Uttar Pradesh v. Ram SagarYadav and Ors. MANU/SC/0118/1985 : (1985) 1 SCC 552, Mona Panwar v. High Court of Judicature of Allahabad MANU/SC/0087/2011 : (2011) 3 SCC 496, Apren Joseph v. State of Kerala MANU/SC/0078/1972 : (1973) 3 SCC 114, King Emperor v. KhwajaNazir Ahmad MANU/PR/0007/1944 : AIR 1945 PC 18 and SarangdharsinghShivdassinghChavan (supra).

72. He further pointed out that the provisions have to be read in the light of the principle of malicious prosecution and the fundamental rights guaranteed under Articles 14, 19 and 21. It is the stand of learned senior counsel that every citizen has a right not to be subjected to malicious prosecution and every police officer has an in-built duty under Section 154 to ensure that an innocent person is not falsely implicated in a criminal case. If despite the fact that the police officer is not prima facie satisfied, as regards commission of a cognizable offence and proceeds to register an FIR and carries out an investigation, it would result in putting the liberty of a citizen in jeopardy. Therefore, learned senior counsel vehemently pleaded for a preliminary inquiry before registration of FIR.

73. In terms of the language used in Section 154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. FIR) about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an FIR when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under Section 154 of the Code about the commission of a cognizable offence must be registered as an FIR so as to initiate an offence. The requirement of Section 154 of the Code is only that the report must disclose the commission of a cognizable offence and that is sufficient to set the investigating machinery into action.

74. The insertion of Sub-section (3) of Section 154, by way of an amendment, reveals the intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused.

75. The maxim expression uniusest exclusion alterius (expression of one thing is the exclusion of another) applies in the interpretation of Section 154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register.

76. Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law.

77. The term inquiry as per Section 2(g) of the Code reads as under:

2(g) - "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

Hence, it is clear that inquiry under the Code is relatable to a judicial act and not to the steps taken by the Police which are either investigation after the stage of Section 154 of the Code or termed as 'Preliminary Inquiry' and which are prior to the registration of FIR, even though, no entry in the General Diary/Station Diary/Daily Diary has been made.

78. Though there is reference to the term 'preliminary inquiry' and 'inquiry' under Sections 159 and Sections 202 and 340 of the Code, that is a judicial exercise undertaken by the Court and not by the Police and is not relevant for the purpose of the present reference.

79. Besides, learned senior counsel relied on the special procedures prescribed under the CBI manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of the CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that the CBI is constituted under a Special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derive its power to investigate from this Act.

80. It may be submitted that Sections 4(2) and 5 of the Code permit special procedures to be followed for special Acts. Section 4 of the Code lays down as under:

Section 4.Trial of offences under the Indian Penal Code and other laws. (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

It is thus clear that for offences under laws other than Indian Penal Code, different provisions can be laid down under a special Act to regulate the investigation, inquiry, trial etc., of those offences. Section 4(2) of the Code protects such special provisions.

81. Moreover, Section 5 of the Code lays down as under:

Section 5. Saving-Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

Thus, special provisions contained in the DSPE Act relating to the powers of the CBI are protected also by Section 5 of the Code.

82. In view of the above specific provisions in the Code, the powers of the CBI under the DSPE Act, cannot be equated with the powers of the regular State Police under the Code.

Significance and Compelling reasons for registration of FIR at the earliest

83. The object sought to be achieved by registering the earliest information as FIR is inter alia two fold: one, that the criminal process is set into motion and is well documented from the

very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc., later.

84. Principles of democracy and liberty demand a regular and efficient check on police powers. One way of keeping check on authorities with such powers is by documenting every action of theirs. Accordingly, under the Code, actions of the police etc., are provided to be written and documented. For example, in case of arrest under Section 41(1)(b) of the Code, arrest memo along with the grounds has to be in writing mandatorily; under Section 55 of the Code, if an officer is deputed to make an arrest, then the superior officer has to write down and record the offence etc., for which the person is to be arrested; under Section 91 of the Code, a written order has to be passed by the concerned officer to seek documents; under Section 160 of the Code, a written notice has to be issued to the witness so that he can be called for recording of his/her statement, seizure memo/panchnama has to be drawn for every article seized etc.

85. The police is required to maintain several records including Case Diary as provided under Section 172 of the Code, General Diary as provided under Section 44 of the Police Act etc., which helps in documenting every information collected, spot visited and all the actions of the police officers so that their activities can be documented. Moreover, every information received relating to commission of a non-cognizable offence also has to be registered under Section 155 of the Code.

86. The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also to ensure 'judicial oversight'. Section 157(1) deploys the word 'forthwith'. Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.

87. The Code contemplates two kinds of FIRs. The duly signed FIR under Section 154(1) is by the informant to the concerned officer at the police station. The second kind of FIR could be which is registered by the police itself on any information received or other than by way of an informant [Section 157(1)] and even this information has to be duly recorded and the copy should be sent to the Magistrate forthwith.

88. The registration of FIR either on the basis of the information furnished by the informant under Section 154(1) of the Code or otherwise under Section 157(1) of the Code is obligatory. The obligation to register FIR has inherent advantages:

a) It is the first step to 'access to justice' for a victim.

b) It upholds the 'Rule of Law' inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.

c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.

d) It leads to less manipulation in criminal cases and lessens incidents of 'ante-dates' FIR or deliberately delayed FIR.

89. In Thulia Kali v. State of Tamil Nadu MANU/SC/0276/1972 : (1972) 3 SCC 393, this Court held as under:

12...First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect

of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained....

90. In Tapan Kumar Singh (supra), it was held as under:

20. It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can.

91. In MadhuBala (supra), this Court held:

6. Coming first to the relevant provisions of the Code, Section 2(d) defines "complaint" to mean any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Under Section 2(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which a police officer may in accordance with the First Schedule (of the Code) or under any other law for the time being in force, arrest without a warrant. Under Section 2(r) "police report" means a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173 of the Code. Chapter XII of the Code comprising Sections 154 to 176 relates to information to the police and

their powers to investigate. Section 154 provides, inter alia, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information if given in writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Section 156 of the Code with which we are primarily concerned in these appeals reads as under....

9. The mode and manner of registration of such cases are laid down in the Rules framed by the different State Governments under the Indian Police Act, 1861. As in the instant case we are concerned with Punjab Police Rules, 1934 (which are applicable to Punjab, Haryana, Himachal Pradesh and Delhi) framed under the said Act we may now refer to the relevant provisions of those Rules. Chapter XXIV of the said Rules lays down the procedure an officer in charge of a police station has to follow on receipt of information of commission of crime. Under Rule 24.1 appearing in the Chapter every information covered by Section 154 of the Code must be entered in the First Information Report Register and the substance thereof in the daily diary. Rule 24.5 says that the First Information Report Register shall be a printed book in Form 24.5(1) consisting of 200 pages and shall be completely filled before a new one is commenced. It further requires that the cases shall bear an annual serial number in each police station for each calendar year. The other requirements of the said Rules need not be detailed as they have no relevance to the point at issue.

10. From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a "complaint" the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to "register a case" makes an order of investigation under Section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable "case" and the Rules framed under the Indian Police Act, 1861 it (the police) is duty-bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same.

92. According to the Statement of Objects and Reasons, protection of the interests of the poor is clearly one of the main objects of the Code. Making registration of information relating to commission of a cognizable offence mandatory would help the society, especially, the poor in rural and remote areas of the country.

93. The Committee on Reforms of Criminal Justice System headed by Dr. Justice V.S. Malimath also noticed the plight faced by several people due to non-registration of FIRs and recommended that action should be taken against police officers who refuse to register such information. The Committee observed:

7.19.1 According to the Section 154 of the Code of Criminal Procedure, the office incharge of a police station is mandated to register every information oral or written relating to the commission of a cognizable offence. Non-registration of cases is a serious complaint against the police. The National Police Commission in its 4th report lamented that the police "evade registering cases for taking up investigation where specific complaints are lodged at the police stations". It referred to a study conducted by the Indian Institute of Public Opinion, New Delhi regarding "Image of the Police in India" which observed that over 50%

of the Respondents mention non-registration of complaints as a common practice in police stations.

7.19.2 The Committee recommends that all complaints should be registered promptly, failing which appropriate action should be taken. This would necessitate change in the mind - set of the political executive and that of senior officers.

7.19.4 There are two more aspects relating to registration. The first is minimization of offences by the police by way of not invoking appropriate sections of law. We disapprove of this tendency. Appropriate sections of law should be invoked in each case unmindful of the gravity of offences involved. The second issue is relating to the registration of written complaints. There is an increasing tendency amongst the police station officers to advise the informants, who come to give oral complaints, to bring written complaints. This is wrong. Registration is delayed resulting in valuable loss of time in launching the investigation and apprehension of criminals. Besides, the complainant gets an opportunity to consult his friends, relatives and sometimes even lawyers and often tends to exaggerate the crime and implicate innocent persons. This eventually has adverse effect at the trial. The information should be reduced in writing by the SH, if given orally, without any loss of time so that the first version of the alleged crime comes on record.

7.20.11 It has come to the notice of the Committee that even in cognizable cases quite often the Police officers do not entertain the complaint and send the complainant away saying that the offence is not cognizable. Sometimes the police twist facts to bring the case within the cognizable category even though it is non-cognizable, due to political or other pressures or corruption. This menace can be stopped by making it obligatory on the police officer to register every complaint received by him. Breach of this duty should become an offence punishable in law to prevent misuse of the power by the police officer.

94. It means that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered. Keeping in view the NCRB figures that show that about 60 lakh cognizable offences were registered in India during the year 2012, the burking of crime may itself be in the range of about 60 lakh every year. Thus, it is seen that such a large number of FIRs are not registered every year, which is a clear violation of the rights of the victims of such a large number of crimes.

95. Burking of crime leads to dilution of the rule of law in the short run; and also has a very negative impact on the rule of law in the long run since people stop having respect for rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in the society.

96. Therefore, reading Section 154 in any other form would not only be detrimental to the Scheme of the Code but also to the society as a whole. It is thus seen that this Court has repeatedly held in various decided cases that registration of FIR is mandatory if the information given to the police under Section 154 of the Code discloses the commission of a cognizable offence.

Is there a likelihood of misuse of the provision?

97. Another, stimulating argument raised in support of preliminary inquiry is that mandatory registration of FIRs will lead to arbitrary arrest, which will directly be in contravention of Article 21 of the Constitution.

98. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has

a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the Court.

99. It is also relevant to note that in Joginder Kumar v. State of U.P. and Ors. MANU/SC/0311/1994 : (1994) 4 SCC 260, this Court has held that arrest cannot be made by police in a routine manner. Some important observations are reproduced as under:

> 20...No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

100. The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately. It is the imaginary fear that "merely because FIR has been registered, it would require arrest of the accused and thereby leading to loss of his reputation" and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence.

101. This can also be seen from the fact that Section 151 of the Code allows a police officer to arrest a person, even before the commission of a cognizable offence, in order to prevent the commission of that offence, if it cannot be prevented otherwise. Such preventive arrests can be valid for 24 hours. However, a Maharashtra State amendment to Section 151 allows the custody of a person in that State even for up to a period of 30 days (with the order of the Judicial Magistrate) even before a cognizable offence is committed in order to prevent commission of such offence. Thus, the arrest of a person and registration of FIR are not directly and/or irreversibly linked and they are entirely different concepts operating under entirely different parameters. On the other hand, if a police officer misuses his power of arrest, he can be tried and punished under Section 166.

102. Besides, the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The Section itself states that a police officer can start investigation when he has a 'reason to suspect the commission of an offence'. Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

103. Likewise, giving power to the police to close an investigation, Section 157 of the Code also acts like a check on the police to make sure that it is dispensing its function of investigating cognizable offences. This has been recorded in the 41st Report of the Law Commission of India on the Code of Criminal Procedure, 1898 as follows:

> 14.1...If the offence does not appear to be serious and if the station-house officer thinks there is no sufficient ground for starting an investigation, he need not investigate but, here again, he has to send a report to the Magistrate who can direct the police to investigate, or if the Magistrate thinks fit, hold an inquiry himself.
>
> 14.2. A noticeable feature of the scheme as outlined above is that a Magistrate is kept in the picture at all stages of the police investigation, but he is not authorized to interfere with the actual investigation or to direct the police how that investigation is to be conducted.
>
> Therefore, the Scheme of the Code not only ensures that the time of the police should not be wasted on false and frivolous information but also that the police should not intentionally refrain from doing their duty of investigating cognizable offences. As a result, the apprehension of misuse of the provision of mandatory registration of FIR is unfounded and speculative in nature.

104. It is the stand of Mr. Naphade, learned senior Counsel for the State of Maharashtra that when an innocent person is falsely implicated, he not only suffers from loss of reputation but also from mental tension and his personal liberty is seriously impaired. He relied on the Maneka Gandhi (supra), which held the proposition that the law which deprives a person of his personal liberty must be reasonable both from the stand point of substantive as well as procedural aspect is now firmly established in our Constitutional law. Therefore, he pleaded for a fresh look at Section 154 of the Code, which interprets Section 154 of the Code in conformity with the mandate of Article 21.

105. It is true that a delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel.

Exceptions:

106. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offence, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

107. In the context of medical negligence cases, in Jacob Mathew (supra), it was held by this Court as under:

> 51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for

extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

108. In the context of offences relating to corruption, this Court in P. Sirajuddin (supra) expressed the need for a preliminary inquiry before proceeding against public servants.

109. Similarly, in Tapan Kumar Singh (supra), this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that at the time the first information is received, the same does not disclose a cognizable offence.

110. Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

Conclusion/Directions:

111. In view of the aforesaid discussion, we hold:

(i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

112. With the above directions, we dispose of the reference made to us. List all the matters before the appropriate Bench for disposal on merits.

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IN THE SUPREME COURT OF INDIA

Arnesh Kumar Vs. Respondent: State of Bihar

Criminal Appeal No. 1277 of 2014
(Arising out of Special Leave Petition (Crl.) No. 9127 of 2013)

Decided On: 02.07.2014

Equivalent Citation: 2014(3)ACR2670(SC), 2014vii AD (S.C.) 697, AIR2014SC2756, 2014 (86) ALLCC 568, 2014 (2) ALT (Crl.) 457 (SC), 2014(3)BomCR(Cri)362, III(2014)CCR144(SC), (SCSuppl)2014(4)CHN73, 2014CriLJ3707, 2014(3)Crimes40(SC), 2014(3)Crimes206(SC), 210(2014)DLT599(SC), II(2014)DMC546SC, 2014GLH(2)547, (2014)2GLR1848, 2014(3) GLT(SC)102, ILR 2014 5507, ILR2014(3)Kerala165, 2014(3)J.L.J.R.313, 2014(3)JCC1529, JT2014(7)SC527, 2014(4) KarLJ 177 (SC), 2014 (3) KCCR 1977 (SC), 2014 (3) KHC 69 , 2014(3)KLJ330, 2014(3)KLT143(SC), 2015-1-LW(Crl)318, (2014) 3 MLJ(Crl) 353 (SC), 2014(4)MPHT81(SC), 2014(IV)MPJR(SC)55, 2014(II)OLR(SC)562, 2014(3)PLJR314, 2014(3) RCR(Criminal)527, 2014(3)RLW2171(SC), 2014(8)SCALE250, (2014)8SCC273, 2014 (6) SCJ 219, 2014 (3) WLN 28 (SC)

Appellants: Arnesh Kumar Vs. Respondent: State of Bihar

Hon'ble Judges/Coram: C.K. Prasad and Pinaki Chandra Ghose, JJ.

Counsels: For Appellant/Petitioner/Plaintiff: Rakesh Kumar and KaushalYadav, Advs. For Respondents/Defendant: Rudreshwar Singh, Samir Ali Khan, AparnaJha, Braj K. Mishra and AbhishekYadav, Advs.

Subject: Criminal

Relevant Section: Indian Penal Code, 1860 - Section 498A; Code of Criminal Procedure, 1973 - Section 41; Dowry Prohibition Act, 1961 - Section 4

Acts/Rules/Orders: Dowry Prohibition Act, 1961 - Section 4; Indian Penal Code 1860, (IPC) - Section 498A; Code of Criminal Procedure (CrPC) (Amendment) Act, 2008 - Section 6; Code of Criminal Procedure (CrPC) - Section 41, Code of Criminal Procedure (CrPC) - Section 41A, Code of Criminal Procedure (CrPC) - Section 41(1), Code of Criminal Procedure (CrPC) - Section 57, Code of Criminal Procedure (CrPC) - Section 167; Constitution of India - Article 22(2)

Prior History: From the Judgment and Order dated 08.10.2013 in CRLM No. 30041/2013 of the High Court of Patna

Disposition: Appeal Allowed

Case Note: Code of Criminal Procedure, 1973 (Central Act 2 of 1974) - Section 41--Power of police to arrest without warrant--Police Officer has to record reasons in writing which led him to conclude that the accused is liable to be arrested without warrant--Directions issued to ensure that Police Officer do not arrest the accused unnecessarily and Magistrate do not authorize detention of citizen, casually and mechanically.

Petitioner, apprehending arrest in a case under Section 498A of the Penal Code and Section 4 of the Dowry Prohibition Act, 1961, moved for anticipatory bail, which was rejected. He approached the Supreme Court seeking anticipatory bail. The court expressed dismay at the casual manner in which husband and his relatives are arrayed as accused in an indictment under Section 498A and Section 4 of the Dowry Prohibition Act, 1961. Apex Court pointed out that the casual manner in which accused in such cases are arrested and remanded to judicial custody. Emphasizing that the

Police and the Magistrates should be more circumspect in arresting the accused without warrant and in committing them to judicial custody, Apex Court issued a series of directions and;

Held:

Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

(1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498 A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C.;

(2) All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

(3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for Further detention;

(4) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

(5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

(6) Notice of appearance in terms of Section 41A of Cr.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

(7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction;

(8) Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498 A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

Subject Category : CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO BAIL/INTERIM BAIL/ANTICIPARY BAIL AND AGAINST SUSPENSION OF SENTENCE

JUDGMENT

C.K. Prasad, J.

1. The Petitioner apprehends his arrest in a case Under Section 498-A of the Indian Penal Code, 1860 (hereinafter called as Indian Penal Code) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided Under Section 498-A Indian Penal Code is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided Under Section 4 of the Dowry Prohibition Act is two years and with fine.

2. Petitioner happens to be the husband of Respondent No. 2 SwetaKiran. The marriage between them was solemnized on 1st July, 2007. His attempt to secure anticipatory bail has failed and hence he has knocked the door of this Court by way of this Special Leave Petition.

3. Leave granted.

4. In sum and substance, allegation levelled by the wife against the Appellant is that demand of Rupees eight lacs, a maruti car, an air-conditioner, television set etc. was made by her mother-in-law and father-in-law and when this fact was brought to the Appellant's notice, he supported his mother and threatened to marry another woman. It has been alleged that she was driven out of the matrimonial home due to non-fulfilment of the demand of dowry.

5. Denying these allegations, the Appellant preferred an application for anticipatory bail which was earlier rejected by the learned Sessions Judge and thereafter by the High Court.

6. There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the Indian Penal Code was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested. "Crime in India 2012 Statistics" published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence Under Section 498-A of the Indian Penal Code, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases Under Section 498A, Indian Penal Code is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal.

7. Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Code of Criminal Procedure. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

8. Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so.

The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Code of Criminal Procedure), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1)(b), Code of Criminal Procedure which is relevant for the purpose reads as follows:

41. When police may arrest without warrant.-(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person -

(a) xxxxxx

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:

(i) xxxxx

(ii) the police officer is satisfied that such arrest is necessary -

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this Sub-section, record the reasons in writing for not making the arrest.

x xxxxx

From a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from

committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police office before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by Sub-clauses (a) to (e) of Clause (1) of Section 41 of Code of Criminal Procedure.

9. An accused arrested without warrant by the police has the constitutional right Under Article 22(2) of the Constitution of India and Section 57, Code of Criminal Procedure to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power Under Section 167 Code of Criminal Procedure. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention Under Section 167, Code of Criminal Procedure, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest Under Section 41 Code of Criminal Procedure has been satisfied and it is only thereafter that he will authorise the detention of an accused. The Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement etc., the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording its satisfaction in writing that the Magistrate will authorise the detention of the accused. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

10. Another provision i.e. Section 41A Code of Criminal Procedure aimed to avoid unnecessary arrest or threat of arrest looming large on accused requires to be vitalised. Section 41A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009), which is relevant in the context reads as follows:

41A. Notice of appearance before police officer.-(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of Sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

11. Aforesaid provision makes it clear that in all cases where the arrest of a person is not required Under Section 41(1), Code of Criminal Procedure, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police office is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged Under Section 41 Code of Criminal Procedure has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

12. We are of the opinion that if the provisions of Section 41, Code of Criminal Procedure which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Code of Criminal Procedure for effecting arrest be discouraged and discontinued.

13. Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

(1) All the State Governments to instruct its police officers not to automatically arrest when a case Under Section 498-A of the Indian Penal Code is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Code of Criminal Procedure;

(2) All police officers be provided with a check list containing specified sub-clauses Under Section 41(1)(b)(ii);

(3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

(4) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

(5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

(6) Notice of appearance in terms of Section 41A of Code of Criminal Procedure be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

(7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

(8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

14. We hasten to add that the directions aforesaid shall not only apply to the cases Under Section 498-A of the Indian Penal Code or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

15. We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance.

16. By order dated 31st of October, 2013, this Court had granted provisional bail to the Appellant on certain conditions. We make this order absolute.

17. In the result, we allow this appeal, making our aforesaid order dated 31st October, 2013 absolute; with the directions aforesaid.

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IN THE SUPREME COURT OF INDIA

Apparel Export Promotion Council Vs. A.K. Chopra

C.A. Nos. 226-227 of 1999

Decided On: 20.01.1999

Equivalent Citation: AIR1999SC625, 1999(1)CTC316, [1999(81)FLR462], (1999)2GLR951, JT1999(1)SC61, (1999)ILLJ962SC, 1999-2-LW691, 1999(1)SCALE57, (1999)1SCC759, [1999]1SCR117, 2000(1)SLJ65(SC), 1999(1)UJ508, (1999)1UPLBEC551

Appellants : Apparel Export Promotion Council Vs. Respondent : A.K. Chopra

Hon'ble Judges/Coram: Dr. A.S. Anand, CJI., V.N. Khare, J.

Counsels: For Appellant/Petitioner/Plaintiff: P.P. Rao, A.P. Dhamija, Sushil Jain and A. Mishra, Advs For Respondents/Defendant: K.T.S.Tulsi and V.C. Mahajan, D.K. Garg, Vikas Pahwa and R.C. Kaushik, Advs.

Subject: Media and Communication

Subject: Constitution

Acts/Rules/Orders: Constitution of India - Article 309, Constitution of India - Article 7

Cases Referred: Chief Constable of the North Wales Police v. Evans 1982 (3) All ER 141; Vishaka v. State of Rajasthan MANU/SC/0786/1997; Union of India v. Sardar Bahadur MANU/SC/0700/1971; Union of India v. Parma Nanda MANU/SC/0636/1989; B.C. Chaturvedi v. Union of India MANU/SC/0118/1996; Prem Sankar v. Delhi Administration MANU/SC/0084/1980; Mackninnon Mackenzie and Co. v. Audrey D' Costa MANU/SC/0446/1987; Sheela Barse v. Secretary, Children's Aid Society MANU/SC/0118/1986; People's Union for Civil Liberties v. Union of India & Anr.MANU/SC/0274/1997 ; People's Union for Civil Liberties v. Union of India & Anr. MANU/SC/0274/1997; Government of Tamil Nadu and Anr. v. A. Rajapandian MANU/SC/0113/1995; D.K. Basu and Anr. v. State of West Bengal and Anr. MANU/SC/0157/1997; Vishaka and Ors. v. State of Rajasthan and Ors. MANU/SC/0786/1997

Cases Overruled/Reversed: A.K. Chopra Vs. Apparel Export Promotion Council and Ors., MANU/DE/0985/1997; Apparel Export Promotion Council & Another Vs. A.K. Chopra & Others, MANU/DE/0168/1997

Citing Reference:

Discussed

Mentioned

Case Note: Constitution - sexual harassment at working place - Articles 7 and 309 of Constitution of India - whether act of superior against female employee that is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment - act of respondent was not of good conduct and not expected behavior from superior officer - act of respondent undoubtedly amounted to sexual harassment of miss 'X' - punishment imposed by appellant commensurate with gravity of his objectionable behavior and did not warrant interference by High Court - any lenient action in such case is bound to have demoralizing effect on working women - sympathy in such cases is not called for - punishment imposed by disciplinary authority upheld - held, such act of superior is against of moral character.

Subject Category : SERVICE MATTERS - CONDITION OF SERVICE

ORDER

A.S. Anand, C.J.

1. Special Leave granted.

2. Does an action of the superior against a female employee which is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment? Is physical contact with the female employee an essential ingredient of such a charge? Does the allegation that the superior 'tried to molest' a female employee at the "place of work", not constitute an act unbecoming of good conduct and behavior expected from the superior? These are some of the questions beside the nature of approach expected from the law courts to cases involving sexual harassment which come to the forefront and require our consideration.

3. Reference to the facts giving rise to the filing of the present Appeal by Special Leave at this stage is appropriate :

4. The respondent was working as a Private Secretary to the Chairman a of the Apparel Export Promotion Council, the appellant herein. It was alleged that on 12.8.1988, he tried to molest a woman employee of the Council, Miss X (name withheld by us) who was at the relevant, time working as a Clerk-cum-Typist. She was not competent or trained to take dictations. The respondent, however insisted that she go with him to the [Business center at Taj Palace Hotel for taking dictation from the Chairman and type out the matter. Under the pressure of the respondent, she went to take the dictation from the Chairman. While Miss X was waiting for the Director in the room, the respondent tried to sit too dose to her and despite her objection did not give up his objectionable behavior. She later on took dictation from the Director. The respondent told her to type it at the Business center of the Taj Palace Hotel, which is located in the Basement of the Hotel. He offered to help her so that her typing was not found fault with by the Director. He volunteered to show her the Business center for getting the matter typed and taking advantage of the isolated place, again tried to sit close to her and touch her despite her objections. The draft typed matter was corrected by Director (Finance) who asked Miss X to retype the same. The respondent again went her to the Business center and repeated his overtures. Miss X told the respondent that she would "leave the place if he continued to behave like that". The respondent did not stop. Though he went out from the Business center for a while, he again came back and resumed his objectionable acts. According to Miss X, the respondent had tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency button, which made the door of the lift to open. On the next day, that is on 16th August, 1988 Miss X was unable to meet the Director (Personnel) for lodging her complaint against the respondent as he was busy. She succeeded in meeting him only on 17th August, 1988 and apart from narrating the whole incident to him orally submitted a written complaint also. The respondent was placed under suspension vide an order dated 18th August, 1988. A charge-sheet was served on him to which he gave a reply denying the allegations and asserting that "the allegations were imaginary and motivated". Shri J.D, Giri, a Director of the Council, was appointed as an Enquiry Officer to enquire into the charges framed against the respondent. On behalf of the management with a view to prove the charges as many as six witnesses were examined including Miss X. The respondent also examined seven witnesses. The Enquiry Officer after considering the documentary and oral evidence and the circumstances of the case arrived at the conclusion that the respondent had acted against moral sanctions and that his acts against Miss X did not withstand the test of decency and modesty. He, therefore, held the charges leveled against the respondent as proved.

5. The Enquiry Officer in his report recorded the following, amongst other, findings:

8.1. Intentions of Shri A.K. Chopra were ostensibly manifested in his actions and behavior; Despite reprimands from Miss X he continued to act against moral sanctions;

8.2. Dictation and subsequent typing of the matter provided Shri A.K. Chopra necessary opportunity to take Miss X to the Business center a secluded place. Privacy in the Business center room made his ulterior motive explicit and clear;

8.3. Any other conclusion on technical niceties which Shri A.K. Chopra tried to purport did not withstand the test of decency and modesty.

6. The Enquiry Officer concluded that Miss X was molested by the respondent at Taj Palace Hotel on 12th August, 1988 and that the respondent had tried to touch her person in the Business center with ulterior motives despite reprimands by her. The Disciplinary Authority agreeing with the report of the Enquiry Officer, imposed the penalty of removing him from service with immediate effect on 28th June, 1989.

7. Aggrieved, by an order of removal from service, the respondent filed a departmental appeal before the Staff Committee of the appellant. It appears that there was some difference of opinion between the Members of the Staff Committee and the Chairman of the Staff Committee during the hearing, but before any decision could be arrived at by the Staff Committee, the respondent, on the basis of some unconfirmed minutes of the Staff Committee meeting, filed a Writ Petition in the High Court inter alia challenging his removal from service. On January 30, 1992, the Writ Petition was allowed and respondent Nos. 1 and 3, therein, were directed to act upon the decision of the Staff Committee, assuming as if the decision, as alleged, had been taken at the 34th Meeting of the Staff Committee on 25th July, 1990. The appellant challenged the judgment and order of the High Court dated 30th January, 1992, through Special Leave Petition (Civil) No. 3204 of 1992 in this Court. While setting aside the judgment and order of the High Court dated 30th January, 1992, a Division Bench of this Court opined:

We have been taken through the proceedings of the meeting starting from 33rd meeting upto 38th meeting by both the learned Counsel appearing for the respective parties. Considering the same it appears to us that the alleged decision taken on the said Agenda No. 5 in the 33rd and 34th meeting is in dispute and final decision on the same has not yet been taken and the alleged resolution on the said Item No. 5 still awaits ratification. In that view of the matter, the High Court was wrong in deciding the disputed question of fact in favour of Respondent No. 1. We, therefore set aside the impugned order of the Delhi High Court as according to us the final decision on the resolution taken on the said Agenda No. 5 has not yet been finally ratified. We are not inclined to consider the other questions sought to be raised in this appeal and the said questions sought are kept open. In view of the pendency of the matter for a long time, we direct the appellant-company to convene the meeting of Staff Committee as early as practicable but not exceeding two months from today so that the question of ratification of the resolution on the said Agenda No. 5 taken in the meeting of the Staff Committee is finally decided.

8. Pursuant to the above directions, the Staff Committee met again and considered the entire issue and came to the conclusion that the order passed by the Director General terminating the services of the respondent on 28th June, 1989 was legal, proper and valid. The appeal was dismissed and the removal of the respondent for causing 'sexual harassment' to Miss X was upheld. The respondent, thereupon, filed Writ Petition No. 352 of 1995 in the High Court, challenging his removal from service as well as the decision of the Staff Committee dismissing his departmental appeal.

9. The learned Single Judge allowing the Writ Petition opined "that.... the petitioner tried to molest and not that the petitioner had in fact molested the complainant." The learned

Single Judge, therefore, disposed of the Writ Petition with a direction that 'the respondent be reinstated in service' but that he would not be entitled to receive any back wages. The appellant was directed to consider the period between the date of removal of the respondent from service and the date of reinstatement as the period spent on duty and to give him consequential promotion and all other benefits. It was, however, directed that the respondent be posted in any other office outside Delhi, at least for a period of two years.

10. The appellant being aggrieved by the order of reinstatement filed Letters Patent Appeal No. 27 of 1997 before the Division Bench of the High Court. The respondent also filed Letters Patent Appeal No. 79 of 1997 claiming "back wages and appropriate posting". Some of the lady employees of the appellant on coming to know about the judgment of the learned Single Judge, directing the reinstatement of the respondent, felt agitated and filed an application seeking intervention in the pending L.P.A. The Division Bench vide judgment and order dated 15th July, 1997, dismissed the L.P.A. filed by the appellant against the reinstatement of the respondent. The Division Bench agreed with the findings recorded by the learned Single Judge that the respondent had "tried" to molest and that he had not "actually molested" Miss X and that he had "not managed" to make the slightest physical contact with the lady and went on to hold that such an act of the respondent was not a sufficient ground for his dismissal from service. Commenting upon the evidence, the Division Bench observed :

We have been taken in detail through the evidence/deposition of Miss X. No part of that evidence discloses that A.K. Chopra even managed to make the slightest physical contact with the lady. The entire deposition relates that A.K. Chopra tried to touch her.

As we have said that no attempts made, allegedly by A.K. Chopra, succeeded in making physical contact with Miss X, even in the narrow confines of a Hotel 'lift'.

To our mind, on such evidence as that was produced before the Enquiry Officer, it is not even possible to come to a conclusion that there is an "attempt to molest" as there have been no physical contact. There being no physical contact between A.K. Chopra and Miss X, there cannot be any attempt to "tried to molest" on the part of A.K. Chopra.

(Emphasis ours)

11. Aggrieved by the judgment of the Division Bench, the employer-appellant has filed this appeal by special leave.

12. We have heard learned counsel for the parties and perused the record.

13. The Enquiry Officer has found the charges established against the respondent. He has concluded that the respondent was guilty of molestation and had tried to physically assault Miss X. The findings recorded by the Enquiry Officer and the Disciplinary Authority had been confirmed by the Appellate Authority (the Staff Committee) which admittedly had co-extensive powers to re- appreciate the evidence as regards the guilt as well as about the nature of punishment to be imposed on the respondent. The Staff Committee while dealing with the question of punishment has observed:

Shri Chopra has also mentioned in his appeal that the penalty on him was harsh and disproportionate to the charge leveled against him. On this, the Staff Committee observed that no lenient view would be justified in a case of molestation of a woman employee when the charge was fully proved. Any lenient action in such a case would have a demoralizing effect on the working women. The Staff Committee, therefore, did not accept the plea of Shri Chopra that a lenient view be taken in his case.

14. The learned Single Judge, did not doubt the correctness of the occurrence. He did not disbelieve the complainant. On a re- appreciation of the evidence on the record, the learned

Single Judge, however, drew his own inference and found that the respondent had "tried to molest" but since he had not "actually molested" the complainant, therefore, the action of the respondent did not warrant removal from service. The learned Single Judge whole directing the reinstatement of the respondent observed:

15. In the totality of facts and circumstances, ends of justice would meet if the petitioner is reinstated in service but he would not be entitled to any back wages. The Council shall consider this period as on duty and would give him consequential promotion to the petitioner. He shall be entitled to all benefits except back wages. The petitioner shall be posted in any other office outside Delhi, at least for a period of two years."

(Emphasis ours)

15. The Division Bench of the High Court also while dismissing the L.P.A. filed by the appellant did not doubt the correctness of the occurrence. It also concluded that since the respondent had not actually molested Miss X and had only tried to assault her and had "not managed" to make any physical contact with her, a case of his removal from service was not made out. Both the learned Single Judge and the Division Bench did not doubt the correctness of the following facts:

1. That Miss X was a subordinate employee while the respondent was the superior officer in the organization ;
2. That Miss X was not qualified to take any dictation and had so told the respondent;
3. That the respondent pressurized her to come with him to Taj Palace Hotel to take dictation despite her protestation, with an ulterior design;
4. That the respondent taking advantage of his position, tried to molest Miss X and in spite of her protestation, continued with his activities which were against the moral sanctions and did not withstand the test of decency and modesty;
5. That the respondent tried to sit too close to Miss X with ulterior motives and all along Miss X kept reprimanding him but to no avail;
6. That the respondent was repeating his implicit unwelcome sexual advances and Miss X told him that if he continued to behave in that fashion, she would leave that place;
7. That the respondent acted in a manner which demonstrated unwelcome sexual advances, both directly and by implication;
8. That action of the respondent created an intimidated and hostile working environment in so far as Miss X is concerned.

16. The above facts are borne out from the evidence on the record and on the basis of these facts, the departmental authorities keeping in view the fact that the actions of the respondent were considered to be subversive of good discipline and not conducive to proper working in the appellant Organization where there were a number of female employees, took action against the respondent and removed him from service.

17. The High Court appears to have over-looked the settled position that in departmental proceedings, the Disciplinary Authority is the sole judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power/and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ Jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or

inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an Appellate Authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion and impose some other punishment or penalty. Both the learned Single Judge and the Division Bench of the High Court, it appears, ignored the well-settled principle that even though Judicial Review of administrative action must remain flexible and its dimension not closed, yet the Court in exercise of the power of judicial review is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial Review, it must be remembered, is directed not against the decision, but is confined to the examination of the decision-making process. Lord Hal-tom in Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141, observed :

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.

18. Judicial Review, not being an appeal from a decision, but a review of the manner in which the decision was arrived at, the Court while exercising the power of Judicial Review must remain conscious of the fact that if the decision has been arrived at by the Administrative Authority after following the principles established by law and the rules of natural justice and the individual has received a fair treatment to meet the case against him, the Court cannot substitute its judgment for that of the Administrative Authority on a matter which fell squarely within the sphere of jurisdiction of that authority.

19. It is useful to note the following observations of this Court in Union of India v. Sardar Bahadur MANU/SC/0700/1971 : (1972)ILLJ1SC :

Where there are some relevant materials which the authority has accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Article 226 to review the materials and to arrive at an independent finding on the materials. If the enquiry has been properly held the question of adequacy or reliability of the evidence cannot be canvassed before the High Court.

20. After a detailed review of the law on the subject, this Court while dealing with the jurisdiction of the High Court or Tribunal to interfere with the disciplinary matters and punishment in Union of India v. Parma Nanda MANU/SC/0636/1989 : (1989)IILLJ57SC , opined:

We must unequivocally state that the jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the Enquiry Officer or Competent Authority where they are not arbitrary or utterly perverse. It is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of Legislature or Rule made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is matter of exclusively

within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute it own discretion for that of the authority.

21. In B.C. Chaturvedi v. Union of India MANU/SC/0118/1996 : (1996)ILLJ1231SC , this Court opined:

The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate them evidence or the nature of punishment. In a Disciplinary Enquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal.

22. Further it was held:

A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

(Emphasis supplied)

23. Again in Government of Tamil Nadu and Anr. v. Rajapandian MANU/SC/0113/1995 : (1995) ILLJ953SC , this Court opined:

It has been authoritatively settled by string of authorities of this Court that the Administrative Tribunal cannot sit as a court of appeal over a decision based on the findings of the inquiring authority in disciplinary proceedings. Where there is some relevant material which the disciplinary authority has accepted and which material reasonably supports the conclusion reached by the disciplinary authority, it is not the function of the Administrative Tribunal to review the same and reach different finding than that of the disciplinary authority. The Administrative Tribunal, in this case, has found no fault with the proceedings held by the inquiring authority. It has quashed the dismissal order by re-appreciating the evidence and reaching a finding different than that of the inquiring authority.

(Emphasis ours)

24. In the established facts and circumstances of this case, we have no hesitation to hold, at the outset, that both the learned Single Judge and the Division Bench of the High Court fell into patent error in interfering with findings of fact recorded by the departmental authorities and interfering with the quantum of punishment, as if the High Court was sitting in appellate jurisdiction. From the judgments of the learned Single Judge as well as the Division Bench, it is quite obvious that the findings with regard to an "unbecoming act" committed by the respondent, as found by the Departmental Authorities, were not found fault with even on re-appreciation of evidence. The High Court did not find that the occurrence as alleged by the complainant had not taken place. Neither the learned Single Judge nor the Division Bench found that findings recorded by the Enquiry Officer or the Departmental Appellate Authority were either arbitrary or even perverse. As a matter of fact, the High Court found no fault whatsoever with the conduct of Enquiry. The direction of the learned Single Judge to the

effect that the respondent was not entitled to back wages and was to be posted outside the city for at least two years, which was upheld by the Division Bench, itself demonstrates that the High Court believed the complainant's case fully for otherwise neither the withholding of back wages nor a direction to post the respondent outside the city for at least two years was necessary. The High Court in our opinion fell in error in interfering with the punishment, which could be lawfully imposed by the departmental authorities on the respondent for his proven misconduct. To hold that since the respondent had not "actually molested" Miss X and that he had only "tried to molest" her and had "not managed" to make physical contact with her, the punishment of removal from service was not justified was erroneous. The High court should not have substituted its own discretion for that of the authority. What punishment was required to be imposed, in the facts and circumstances of the case, was a matter which fell exclusively within the jurisdiction of the competent authority and did not warrant any interference by the High Court. The entire approach of the High Court has been faulty. The impugned order of the High Court cannot be sustained on this ground alone. But there is another aspect of the case which is fundamental and goes to the root of the case and concerns the approach of the Court while dealing with cases of sexual harassment at the place of work of female employees.

25. The High Court was examining disciplinary proceedings against the respondent and was not dealing with criminal trial of the respondent. The High Court did not find that there was no evidence at all of any kind of "molestation" or "assault" on the person of Miss X. It appears that the High Court re-appreciated the evidence while exercising power of judicial review and gave meaning to the expression "molestation" as if it was dealing with a finding in a criminal trial. Miss X had used the expression "molestation" in her complaint in a general sense and during her evidence she has explained what she meant. Assuming for the sake of argument that the respondent did not manage to establish any "physical contact" with Miss X, though the statement of management witness Suba Singh shows that the respondent had put his hand on the hand of Miss X when he surprised them in the Business center, it did not mean that the respondent had not made any objectionable overtures with sexual overtones. From the entire tenor of the cross-examination to which Miss X was subjected to by the respondent, running into about 17 typed pages and containing more than one hundred & forty questions and answers in cross-examinations, it appears that the effort of respondent was only to play with the use of the expressions "molestation" and "physical assault" by her and confuse her. It was not the dictionary meaning of the word "molestation" or "physical assault" which was relevant. The statement of Miss X before the Enquiry Officer as well as in her complaint unambiguously conveyed in no uncertain terms as to what her complaint was. The entire episode reveals that the respondent had harassed, pestered and subjected Miss X, by a conduct which is against moral sanctions and which did not withstand the test of decency and modesty and which projected unwelcome sexual advances. Such an action on the part of the respondent would be squarely covered by the term "sexual harassment". The following statement made by Miss X at the enquiry.

When I was there in the Chairman's room I told Mr. Chopra that this was wrong and he should not do such things. He tried to persuade me by talking....I tried to type the material but there were so many mistakes. He helped me in typing. There he tried to blackmail me.... He tried to sit with me. In between he tried to touch me....Mr. Chopra again took me to the business center. Thereafter again he tried. I told him I will go out if he does like this. Then he went out. Again he came back. In between he tried.

(Emphasis supplied)

unmistakably shows that the conduct of the respondent constituted an act unbecoming of good behavior, expected from the superior officer. Repeatedly, did Miss X state before

the Enquiry Officer that the respondent tried to sit close to her and touch her and that she reprimanded him by asking that he 'should not do these things'. The statement of Miss Rama Kanwar, the management witness to the effect that when on 16th August she saw Miss X and asked her the reason for being upset, Miss X kept on weeping and told her "she could not tell being unmarried, she could not explain what had happened to her". The material on the record, thus, clearly establishes an unwelcome sexually determined behavior on the part of the respondent against Miss X which was also an attempt to outrage her modesty. Any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment. The evidence on the record clearly establishes that the respondent caused sexual harassment to Miss X, taking advantage of his superior position in the Council.

26. Against the growing social menace of sexual harassment of women at the work place, a three Judge Bench of this Court by a rather innovative judicial law making process issued certain guidelines in Vishaka v. State of Rajasthan MANU/SC/0786/1997 : AIR1997SC3011 , after taking note of the fact that the present civil and penal laws in the country do not adequately provide for specific protection of woman from sexual harassment at places of work and that enactment of such a legislation would take a considerable time. In Vishaka's case (supra), a definition of sexual harassment was suggested. Verma, J., (as the former Chief Justice then was), speaking for the three-Judge Bench opined:

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as:

(a) physical contact and advance;

(b) a demand or request for sexual favours;

(c) sexually-colored remarks;

(d) showing pornography;

(e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts in committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

27. An analysis of the above definition, shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

28. There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty - the two most precious Fundamental Rights guaranteed by the Constitution of India. As early

as in 1993 at the 1LO Seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of 'gender discrimination against woman'. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Woman, 1979 ("CEDAW") and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women beside taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for woman. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitive its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. (See with advantage - Prem Sankar v. Delhi Administration MANU/SC/0084/1980 : 1980CriLJ930 ; Mackninnon Mackenzie and Co. v. Audrey D' Costa MANU/SC/0446/1987 : (1987)ILLJ536SC ; Sheela Barse v. Secretary, Children's Aid Society MANU/SC/0118/1986 : [1987]1SCR870 ; Vishaka and Ors. v. State of Rajasthan and Ors. MANU/SC/0786/1997 : AIR1997SC3011 ; People's Union for Civil Liberties v. Union of India and Anr. MANU/SC/0274/1997 : AIR1997SC1203 and D.K. Basil and Anr. v. State of West Bengal and Anr. MANU/SC/0157/1997 : 1997CriLJ743 . In cases involving violation of human rights, the Courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case.

29. The observations made by the High Court to the effect that since the respondent did not "actually molest" Miss X but only "tried to molest" her and, therefore, his removal from service was not warranted rebel against realism and lose their sanctity and credibility. In the instant case, the behavior of respondent did not cease to be outrageous for want of an actual assault or touch by the superior officer. In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression "molestation". They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee, Miss X, was wholly against moral sanctions, decency and was offensive to her

modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. Thee was no justification for the High Court to interfere with the punishment imposed by the departmental authorities. The act of the respondent was unbecoming of good conduct and behavior expected from a superior officer and undoubtedly amounted to sexual harassment of Miss X and the punishment imposed by the appellant, was, thus , commensurate with the gravity of his objectionable behavior and did not warrant any interference by the High Court in exercise of its power of judicial review.

30. At the conclusion of the hearing, learned counsel for the respondent submitted that the respondent was repentant of his actions and that he tenders an unqualified apology and that he was willing to also go and to apologize to Miss X. We are afraid, it is too late in the day to show any sympathy to the respondent in such a case. Any lenient action in such a case is bound to have demoralizing effect on working women. Sympathy in such cases is uncalled for and mercy is misplaced.

31. Thus, for what we have said above the impugned order of the High Court is set aside and the punishment as imposed by the Disciplinary Authority and upheld by the Departmental Appellate Authority of removal of the respondent from service is upheld and restored. The, appeals, thus succeed and are allowed. We, however, make no order as to costs.

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