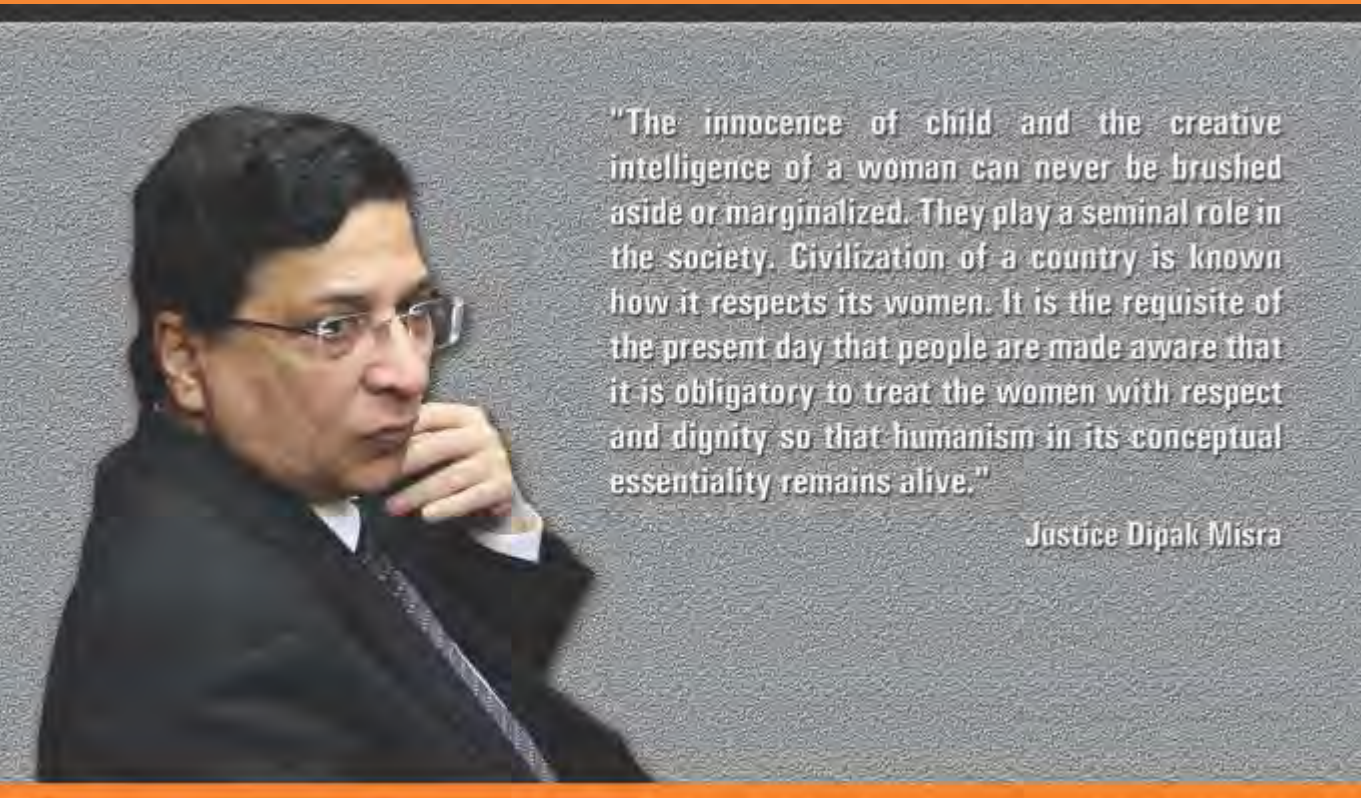
COMPILATION OF
LANDMARK JUDGMENTS
of
Hon'ble Mr. Justice Dipak Misra
Judge, Supreme Court of India
on
INCLUSIVE JUSTICE

FOR THE VULNERABLE GROUPS OF SOCIETY
INCLUDING WOMEN, CHILDREN AND VICTIMS OF UNDESERVED WANT



JHARKHAND STATE LEGAL SERVICE AUHORITY
This Book is also available at the official website of JHALSA (**www.jhalsa.org**)
Year of Publication : **February, 2016**

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FOR THE VULNERABLE GROUPS OF SOCIETY INCLUDING WOMEN, CHILDREN AND VICTIMS OF UNDESERVED WANT

Compiled by :

Jharkhand State Legal Services Authority

Foreword

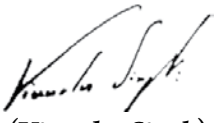
Justice Virender Singh

Chief Justice, High Court of Jharkhand cum
Patron-in-Chief, JHALSA

I am very happy that Jharkhand State Legal Services Authority, working in consonance with its objectives and commitment for ensuring inclusive justice to Women, Children and Victims of undeserved want, is publishing this ***Compilation of Landmark Judgments*** of My Lord ***Hon'ble Mr. Justice Dipak Misra***, Judge, Supreme Court of India. As we all know that judgments rendered by My Lord lay various guidelines and directions on various issues of law concerning Women, Children and Victims of Undeserved Wants, this compilation will be a useful tool and a valuable reference book for the Judges in the High Courts, the Judicial Officers, the members of the Bar as also to the entire fraternity dealing with the issues relating to those people in need.

These Judgments of My Lord, while making the understanding of law very simple, have paved a very smooth and concrete path for proper and effective implementation of Laws relating to vulnerable sections of Society. Thus, it will work as a guide and handbook for all concerned in Legal Fraternity and NGOs working in the field of Women and Child Rights and the victims of undeserved want.

Before parting with, it would be my suggestion to JHALSA to circulate it to all Family Courts and DLSAs.



(Virender Singh)

Preface

Justice D.N. Patel

Judge, High Court of Jharkhand &
Executive Chairman, JHALSA

A society is judged by the treatment it gives to women, children and victims of undeserved want and not by scientific and material progress alone. It gives me pride and satisfaction that Jharkhand State Legal Services Authority is publishing Compilation of landmark judgements of My Lord Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India on ***Inclusive Justice*** for the ***vulnerable groups of society including women, children and victims of undeserved want***. The life and work of His Lordship is an inspiration for all in general and the members of legal fraternity in particular.

The concept of justice in Family Dispute Matters is no longer confined to hear the parties and dispose of a matter, it includes pro-active role of Principal Judges in conflicts of Family Court matters in bringing about resolution of disputes by keeping in view the best interest of children, spouse and parents. Victims of undeserved want deserve our serious attention for implementation of laws and schemes made for their betterment.

I am delighted to place in your hand the ultimate guide of Inclusive Justice for the vulnerable groups of society including women, children and victims of undeserved want.

Let us revisit the resolutions adopted in 13th All India Meet of SLSAs at Ranchi on 21st and 22nd March 2015 with regard to:

- Tribal people
- Children
- Unorganised worker
- Mentally ill persons
- Drug addicts
- Victim of Trafficking and Commercial Sexual Exploitation

Recently the NALSA has launched seven schemes for effectively reaching out to aforesaid section of society.

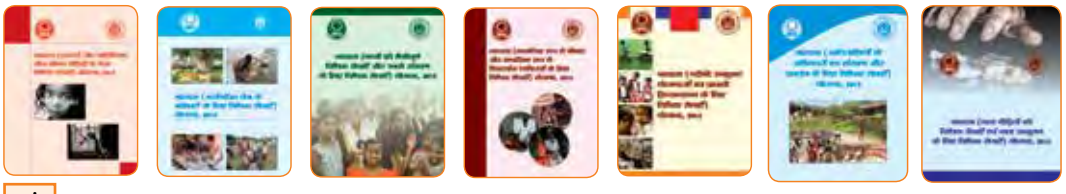
The Jharkhand State Legal Services Authority has in recent past taken several initiatives towards fulfillment of the dream of His Lordship and a brief retrospection shows the work of this Authority relating to Women Empowerment, Enforcement of Child-Rights, Victim Compensation, Constitution of disaster management core group in each DLSA and actualization of NALSA Schemes and a brief detail is as follows :

- **Workshop on Protection of Women from Domestic Violence at Nyaya Sadan, Doranda, Ranchi on** *18th January, 2015.*
- **Opening of Village Legal Care and Support Centre, Sahyog Village Premises, Dugdugia and Special Lok Adalat in Khunti Judgeship on** *24th January, 2015.*
- **Inauguration of Legal Literacy Club at DPS Ranchi and Ranchi Sahidaya School Complex as well as Prize Distribution to Winners of Essay Competition on Fundamental Duties on** *31st January, 2015.*
- **Workshop on Capacity Building of PLV, Strengthening of Legal Aid Clinic and Disaster Management (Quick Response by Legal Services Institutions during Natural or Man-made Disaster) at Nyaya Sadan, Doranda, Ranchi on** *07th February, 2015.*
- **State Level Colloquium on the Role of Legal Services Authorities in Effective Implementation of Government Beneficial Schemes including the Schemes for Workers of Unorganized Sector at Nyaya Sadan, Doranda, Ranchi on** *16th May, 2015.*

- **Orientation & Induction Training Programme for the Para Legal Volunteers of Hazaribagh, Giridih & Koderma under the NALSA Scheme for PLVs (Revised) at Koderma on** *21st to 25th July, 2015.*
- **Colloquium on Commitment of State for Child in Need of Care and Protection on** *23rd August, 2015.*
- **Revolution in Juvenile Justice System : Connected Through Video Conferencing with Juvenile Justice Board on** *28th August, 2015.*

- **State Level Capacity Building Workshop for JJB and Legal-cum-Probation Officers for Effective Implementation of Juvenile Justice Act in Jharkhand at Hotel Lee Lake, Ranchi on** *10th - 11th October, 2015.*
- **Meeting of Stakeholders for develop a Training Module for the Empanelled Layers & Legal Probation Officers attached to Juvenile Justice System at Nyaya Sadan, Ranchi on** *12th October, 2015.*

- **Two Days Training Programme on NALSA 7 Schemes at Ranchi on** *18th - 19th December, 2015.*



- **State Level Colliquium on Victim-Emancipation through Compensation on** *23rd January, 2016.*
- **Training of Legal Aid Lawyers associated with Juvenile Justice Board & Child Welfare Committees on** *12th February, 2016.*

The foremost important task of Legal Services Institution is to live up to the expectation of founding fathers of the constitution of India as also more than one and quarter billion people of India.

The work of My Lord Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India has continuously been guiding our endeavour for fulfilling our responsibilities. We assure His Lordship that JHALSA under the able patronage of NALSA shall leave no stone unturned in achieving the objective of access to justice for all.

(D.N. Patel)

CONTENTS

JUDGMENTS

ARTICLES & LECTURES

JUDGMENTS

(2015) 7 Supreme Court Cases 681

State of M.P. v. Madanlal

(Before Dipak Misra and Prafulla C. Pant, JJ.)

State of M.P. ... Appellant
Versus
Madanlal ... Respondent

Criminal Appeal No. 231 of 2015†
decided on July 1, 2015

A. Penal Code, 1860 — S. 376 r/w S. 511 — Rape or attempt to rape — Compromise — Relevance — Held, in case of rape or attempt to rape, compromise under no circumstances can really be thought of since these are crimes against the body of a woman, which is her own temple — Principles laid down by three-Judge Bench in Shimbhu, (2014) 13 SCC 318, relied on — Courts must beware of this subterfuge to-adopt soft/liberal approach which would be in the realm of error, and is legally impermissible — Such attitude reflects lack of sensibility towards the dignity of woman — Single Judge of High Court erred in being influenced by compromise entered into between accused and parents of victim since victim was a minor, and convicting accused under S. 354 IPC while setting aside his conviction under S. 376(2)(f) r/w S. 511 — Matter remanded for decision afresh.

(Paras 16 to 23)

Held :

As observed by the three-Judge Bench in Shimbhu, (2014) 13 SCC 318, rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurised by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurise her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the court to exercise the discretionary power under the proviso of Section 376(2) IPC.

† Arising out of SLP (Crl) No. 5273 of 2012. From the Judgment and Order dated 1-2-2010 in CRA No. 808 of 2009, passed by the High Court of Madhya Pradesh at Gwalior

In a case of rape or attempt to rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are the offences which suffocate the breath of life and sully the reputation. Reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error. Such an attitude reflects lack of sensibility towards the dignity, the elan vital, of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility. (Paras 18 and 19)

Shimbhu v. State of Haryana, (2014) 13 SCC 318 : (2014) 5 SCC (Cri) 651; *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77 : (2013) 3 SCC (Cri) 1, *relied on*

Baldev Singh v. State of Punjab, (2011) 13 SCC 705 : (2012) 2 SCC (Cri) 706; *Ravindra v. State of M.P.*, (2015) 4 SCC 491 : (2015) 2 SCC (Cri) 679, *distinguished on facts and held limited*

B. Criminal Procedure Code, 1973 — Ss. 374, 378 and 386 — Exercise of power by appellate court — Duties of appellate court — Reiterated — Held, appellate court has duty to make complete and comprehensive appreciation of all vital features of case and scrutinising evidence brought on record with care and caution — Furthermore, reflective attitude of Judge must be demonstrable from judgment itself — In instant case, Single Judge of High Court had failed to refer to evidence adduced during trial and had relied on certain pronouncements which were based on their own facts, laying down no proposition of law — Setting aside impugned judgment, matter remitted to Single Judge of High Court for fresh adjudication — Penal Code, 1860, S. 376 r/w S. 511 (Paras 12 to 15)

Amar Singh v. Balwinder Singh, (2003) 2 SCC 518 : 2003 SCC (Cri) 641; *K. Anbazhagan v. State of Karnataka*, (2015) 5. SCC 158 : (2015) 2 SCC (Cri) 872; *State of M.P. v. Bhura Kunjda*, (2009) 17 SCC 346 : (2011) 1 SCC (Cri) 1025, *relied on*

Madanlal v. State of M.P., Criminal Appeal No. 808 of 2009, decided on 1-2-2010 (MP), *reversed*

State of M.P. v. Madanlal, SLP (Cri) Cri MP No. 13561 of 2012, order dated 9-7-2012 (SC); *Ashok v. State of M.P.*, 2005 SCC OnLine MP 56 : 2005 Cri U 2301 : 2005 Cr U (MP) 471; *Phulki v. State of M.P.*, 2006 Cr U (MP) 157; *Jeevan v. State of M.P.*, 2008 Cr U (MP) 1498, *referred to*

Biswanath Ghosh v. State of W.B., (1987) 2 SCC 55 : 1987 SCC (Cri) 259; *State of U.P. v. Sahai*, (1982) 1 SCC 352 : 1982 SCC (Cri) 223, *cited*

Appeal partly allowed P-D/55126/CR

Advocates who appeared in this case:

CD. Singh, Apoorv Kurup and Shreya Dubey, Advocates, for the Appellant;

Ms Asha Jain Madan (Amicus Curiae), Advocate, for the Respondent.

Chronological list of cases cited on page(s)

1. (2015) 6 SCC 158 : (2015) 2 SCC (Cri) 872, K. Anbazhagan v. State of Karnataka 686f
2. (2015) 4 SCC 491 : (2015) 2 SCC (Cri) 679, Ravindra v. State of M.P. 688f-g, 689b, 689d-e
3. (2014) 13 SCC 318 : (2014) 5 SCC (Cri) 651, Shimbhu v. State of Haryana 687e, 688g, 689d-e
4. (2013) 7 SCC 77 : (2013) 3 SCC (Cri) 1, Shyam Narain v. State (NCT of Delhi) 688d
5. SLP (Cri) Cri MP No. 13561 of 2012, order dated 9-7-2012 (SC), State of M.P. v. Madanlal 684d-e
6. (2011) 13 SCC 705 : (2012) 2 SCC (Cri) 706, Baldev Singh v. State of Punjab 688f-g, 688g, 689a-b, 689b-c, 689d-e
7. Criminal Appeal No. 808 of 2009, decided on 1-2-2010 (MP), Madanlal v. State of M.P. **(reversed)**
   683b-c
8. (2009) 17 SCC 346 : (2011) 1 SCC (Cri) 1025, State of M.P. v. Bhura Kunjda 686e-f
9. 2008 Cr U (MP) 1498, Jeevan v. State of M.P. 685b-c
10. 2006 Cr LJ (MP) 157, Phulki v. State of M.P. 6856-c
11. 2005 SCC OnLine MP 56 : 2005 Cri LJ 2301, Ashok v. State of M.P. 685b-c
12. (2003) 2 SCC 518 : 2003 SCC (Cri) 641, Amar Singh v. Balwinder Singh 685f-g

13. (1987) 2 SCC 55 : 1987 SCC (Cri) 259, Biswanath Ghosh v. State of W.B. 686c

14. (1982) 1 SCC 352 : 1982 SCC (Cri) 223, State of U.P. v. Sahai 686d-e

The Judgment of the Court was delivered by

DIPAK MISRA, J. — In this appeal, by special leave, the State of M.P. calls in question the legal acceptability of the judgment and order passed by the learned Single Judge of the High Court of M.P. in Madanlal v. State of M.P.[1] whereby he has set aside the conviction under Section 376(2)(f) read with Section 511 of the Indian Penal Code (IPC) and the sentence imposed on that score, that is, rigorous imprisonment of five years by the learned Sessions Judge, Guna in ST No. 134/2009 and convicted the respondent-accused herein under Section 354 of the IPC and restricted the sentence to the period already undergone which is slightly more than one year.

2. The factual narration for disposal of the present appeal lies in a narrow compass. The respondent as accused was sent up for trial for the offence punishable under Section 376(2)(f) IPC before the learned Sessions Judge. The case of the prosecution before the Court below was that on 27.12.2008, the victim, aged about 7 years, PW1, was proceeding towards Haar from her home and on the way the accused, Madan Lal, met her and came to know that she was going in search of her mother who had gone to graze the goats. The accused told her that her mother had gone towards the river and accordingly took her near the river Parvati, removed her undergarment and made her sit on his lap, and at that time the prosecutrix shouted. As the prosecution story proceeds, he discharged on her private parts as well as on the stomach and washed the same. Upon hearing the cry of the prosecutrix, her mother, Ramnali Bai, PW2, reached the spot, and then accused took to his heels.

3. The prosecutrix narrated the entire incident to her mother which led to lodging of an FIR by the mother of the prosecutrix. On the basis of the FIR lodged, criminal law was set in motion, and thereafter the investigating agency examined number of witnesses, seized the clothes of the respondent-accused, sent certain articles for examination to the forensic laboratory and eventually after completing the examination, laid the chargesheet before the concerned court, which in turn, committed the matter to the Court of Session.

4. The accused abjured his guilt and pleaded false implication. The learned trial Judge, regard being had to the material brought on record, framed the charge under Section 376(2)(f) read with Section 511 of IPC. The prosecution, in order to bring home the charge leveled against the accused examined the prosecutrix, PW1, Ramnali Bai, PW2, Dr. Smt. Sharda Bhola, PW3, Head Constable Babu Singh, PW4, ASI

1 Criminal Appeal No. 808 of 2009

B.R.S. Raghuwanshi, PW5, and Dr. Milind Bhagat, PW6, and also got marked nine documents as exhibits. The defence chose not to adduce any evidence.

5. The learned trial Judge on the basis of the material brought on record came to hold that the prosecution had been able to establish the charge against the accused and accordingly found him guilty and sentenced him as has been stated hereinbefore.

6. The said judgment of conviction and order of sentence was in assail before the High Court; and it was contended by the learned counsel for the appellant therein that the trial court had failed to appreciate the evidence in proper perspective and had not considered the material contradictions in the testimony of prosecution witnesses and, therefore, the judgment of conviction and sentence, being vulnerable, deserved to be annulled. The learned Judge also noted the alternative submission which was to the effect that the parties had entered into a compromise and a petition seeking leave to compromise though was filed before the learned trial Judge, it did not find favour with him on the ground that the offence in question was non-compoundable and, therefore, regard being had to the said factum the sentence should be reduced to the period already undergone, which was slightly more than one year.

7. The High Court, as is manifest, has converted the offence to one under 354 IPC and confined the sentence to the period of custody already undergone.

8. We have heard Mr. C.D. Singh, learned counsel for the appellant-State and Ms. Asha Jain Madan, learned counsel who was engaged by the Court to represent the respondent. Be it stated, this Court had appointed a counsel to argue on behalf of the respondent, as despite service of notice[2], the respondent chose not to appear.

9. It is contended by the learned counsel for the State that the High Court has not kept in mind the jurisdiction of the appellate court and dislodged the conviction and converted the conviction to one under Section 354 IPC in an extremely laconic manner and, therefore, the judgment deserves to be dislodged. It is urged by him that it is the bounden duty of the appellate court to reappreciate the evidence in proper perspective and thereafter arrive at appropriate conclusion and that exercise having not been done, the impugned judgment does not commend acceptation. He has also seriously criticized the quantum of sentence imposed by the High Court.

10. Ms. Asha Jain Madan, learned counsel appearing for the respondent, per contra, would contend that the learned Single Judge, regard being had to the evidence on record, has come to hold that the prosecution had failed to prove the offence under

2 State of M.P. v. Madanlal, SLP (Cri) Crl MP No. 13561 of 2012, order dated 9-7-2012 (SC), wherein it was directed :
"Delay condoned. Issue notice."

Section 376(2)(f) read with Section 511 IPC, and hence, the impugned judgment is absolutely impeccable. She would contend with immense vehemence that when the prosecutrix was a seven year old girl and the ingredients of the offence had not been established the conversion of the offence to one under Section 354 IPC by the High Court cannot be found fault with. It is urged by her that once the view of the High Court is found defensible, the imposition of sentence under Section 354 IPC cannot be regarded as perverse.

11. To appreciate the rivalised submissions advanced at the Bar, we have anxiously perused the judgment of the learned trial Judge as well as that of the High Court. As we notice, the trial court has scanned the evidence and arrived at the conclusion that the prosecution had been able to bring home the charge on the base of credible evidence. The High Court, as is demonstrable, has noted the submissions of the learned counsel for the appellant therein to the effect that the trial court had failed to appreciate the evidence in proper perspective, and had totally ignored the material contradictions in the testimony of the prosecution witnesses, and thereafter abruptly referred to the decisions in ***Ashok @ Pappu v. State of M.P.***[3], ***Phulki @ Santosh @ Makhan v. State of M.P.***[4] and ***Jeevan v. State of M.P.***[5] and the factual matrix in the said cases, and concluded thus:-

> *"Keeping in view the aforesaid position of law and the statement of prosecutrix who was aged 7 years only at the time of incident and the medical evidence on record, this Court is of the opinion that the learned Court below committed error in convicting the appellant under Section 376 of IPC. After going through the evidence, it can be said that at the most appellant can be held guilty of the offence punishable under Section 354 of IPC. In view of this, the appeal filed by the appellant is allowed in part and the conviction of appellant under Section 376 is set aside and appellant is convicted under Section 354 of IPC. So far as sentence is concerned, keeping in view the aforesaid position of law and also the fact that appellant is in jail since last more than one year the purpose would be served in case the jail sentence is reduced to the period already undergone. Thus, the same is reduced to the period already undergone. Respondent/State is directed to release the appellant forthwith, if not required in any other case."*

12. In the instant appeal, as a reminder, though repetitive, first we shall dwell upon, in a painful manner, how some of the appellate Judges, contrary to the precedents and

3 2005 Cr.L.J. (M.P.) 471

4 2006 Cr.L.J. (M.P.) 157

5 2008 Cr.L.J. (M.P.) 1498

against the normative mandate of law, assuming a presumptuous role have paved the path of unbelievable laconicity to deal with criminal appeals which, if we permit ourselves to say, ruptures the sense of justice and punctures the criminal justice dispensation system.

13. In this regard, reference to certain authorities of this Court would be apposite. In ***Amar Singh v. Balwinder Singh and Others***[6] while dealing with the role of the appellate Court, a two-Judge Bench has observed thus:- (SCC pp. 525-26, para 7)

> *"7. The learned Sessions Judge after placing reliance on the testimony of the eyewitnesses and the medical evidence on record was of the opinion that the case of the prosecution was fully established. Surprisingly, the High Court did not at all consider the testimony of the eyewitnesses and completely ignored the same. Section 384 CrPC empowers the appellate court to dismiss the appeal summarily if it considers that there is no sufficient ground for interference. Section 385 CrPC lays down the procedure for hearing appeal not dismissed summarily and sub-section (2) thereof casts an obligation to send for the records of the case and to hear the parties. Section 386 CrPC lays down that after perusing such record and hearing the appellant or his pleader and the Public Prosecutor, the appellate court may, in an appeal from conviction, reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction. It is, therefore, mandatory for the appellate court to peruse the record which will necessarily mean the statement of the witnesses. In a case based upon direct eyewitness account, the testimony of the eyewitnesses is of paramount importance and if the appellate court reverses the finding recorded by the trial court and acquits the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 CrPC. In* ***Biswanath Ghosh v. State of W.B.***[7] *it was held that where the High Court acquitted the accused in appeal against conviction without waiting for arrival of records from the Sessions Court and without perusing evidence adduced by the prosecution, there was a flagrant miscarriage of justice and the order of acquittal was liable to be set aside. It was further held that the fact that the Public Prosecutor conceded that there was no evidence, was not enough and the High Court had to satisfy itself upon perusal of the records that there was no reliable and credible evidence to warrant the*

6 (2003) 2 SCC 518

7 (1987) 2 SCC 55

conviction of the accused. In ***State of U.P. v. Sahai***[8] *it was observed that where the High Court has not cared to examine the details of the intrinsic merits of the evidence of the eyewitnesses and has rejected their evidence on general grounds, the order of acquittal passed by the High Court resulted in a gross and substantial miscarriage of justice so as to invoke extraordinary jurisdiction of the Supreme Court under Article 136 of the Constitution."*

The said view was reiterated by a three-Judge Bench in the ***State of Madhya Pradesh v. Bhura Kunjda***[9].

14. Recently, in ***K. Anbazhagan v. State of Karnataka and Others***[10], a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal has ruled that(SCC p. 183, para 39):-

"39...The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, solely because there might not have been proper assistance by the counsel appearing for the parties. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasonings in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

15. In the case at hand, the learned Single Judge has not at all referred to the evidence that has been adduced during the trial. We have, in fact, reproduced the entire analysis made by the learned Single Judge. Prior to that, as is manifest, he has referred to some authorities which are based on their own facts. The said pronouncements, in fact, lay down no proposition of law. As is noticeable, the learned Single Judge in his judgment has only stated that the prosecution has examined so many witnesses

8 (1982) 1 SCC 352

9 (2009) 17 SCC 346

10 Criminal Appeal No. 637 of 2015

and filed nine documents. The said approach, we are afraid to say, does not satisfy the requirement of exercise of the appellate jurisdiction. That being the obtaining situation, we are inclined to set aside the judgment of the High Court and remit the matter to it for appropriate adjudication.

16. Having stated the aforesaid, ordinarily we would have proceeded to record our formal conclusion, but, an extremely pertinent and pregnant one, another aspect in the context of this case warrants to be addressed. As it seems to us the learned Single Judge has been influenced by the compromise that has been entered into between the accused and the parents of the victim as the victim was a minor. The learned trial Judge had rejected the said application on the ground that the offence was not compoundable.

17. In this context, it is profitable to reproduce a passage from ***Shimbhu and Another v. State of Haryana***[11] wherein, a three-Judge Bench has ruled thus: (SCC pp. 328-29, para 20)

> *"20. Further, a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurised by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurise her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) IPC."*

18. The aforesaid view was expressed while dealing with the imposition of sentence. We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity

11 (2014) 13 SCC 318

of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error.

19. We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the elan vital, of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility. It has to be kept in mind, as has been held in ***Shyam Narain v. State (NCT of Delhi)***[12] that: (SCC pp. 88-89, para 27)

> *"27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men."*

20. At this juncture, we are obliged to refer to two authorities, namely, ***Baldev Singh v. State of Punjab***[13] and ***Ravindra v. State of Madhya Pradesh***[14]. *Baldev Singh*[13] was considered by the three-Judge Bench in ***Shimbhu***[11] and in that case it has been stated that: (*Shimbhu case*[11], SCC pp. 327-28, para 18)

> *"18.1. In Baldev Singh v. State of Punjab, though the courts below awarded a sentence of ten years, taking note of the facts that the occurrence was 14 years old, the appellants therein had undergone about 3½ years of imprisonment,*

12 (2013) 7 SCC 77

13 (2011) 13 SCC 705

14 (2015) 4 SCC 491

the prosecutrix and the appellants married (not to each other) and entered into a compromise, this Court, while considering peculiar circumstances, reduced the sentence to the period already undergone, but enhanced the fine from Rs. 1000 to Rs. 50,000. In the light of series of decisions, taking contrary view, we hold that the said decision in ***Baldev Singh v. State of Punjab*** *cannot be cited as a precedent and it should be confined to that case."*

21. Recently, in *Ravindra*[14], a two-Judge Bench taking note of the fact that there was a compromise has opined thus: (SCC p. 497, paras 17-18)

"17. This Court has in Baldev Singh v. State of Punjab[13]*, invoked the proviso to Section 376(2) IPC on the consideration that the case was an old one. The facts of the above case also state that there was compromise entered into between the parties.*

18. In the light of the discussion in the foregoing paragraphs, we are of the opinion that the case of the appellant is a fit case for invoking the proviso to Section 376(2) IPC for awarding lesser sentence, as the incident is 20 years old and the fact that the parties are married and have entered into a compromise, are the adequate and special reasons. Therefore, although we uphold the conviction of the appellant but reduce the sentence to the period already undergone by the appellant. The appeal is disposed of accordingly."

22. Placing reliance on *Shimbhu*[11], we also say that the judgments in *Baldev Singh*[13] and *Ravindra*[14] have to be confined to the facts of the said cases and are not to be regarded as binding precedents.

23. We have already opined that matter has to be remitted to the High Court for a reappraisal of the evidence and for a fresh decision and, therefore, we have not referred to the evidence of any of the witnesses. The consequence of such remand is that the order of the High Court stands lancinated and as the respondent was in custody at the time of the pronouncement of the judgment by the trial Court, he shall be taken into custody forthwith by the concerned Superintendent of Police and thereafter the appeal before the High Court be heard afresh. A copy of judgment be sent to the High Court of Madhya Pradesh, Bench at Gwalior.

24. The appeal stands allowed to the extent indicated hereinabove.

❑❑❑

(2015) 1 Supreme Court Cases 192

Charu Kurana v. Union of India

(Before Dipak Misra and UDAY Umesh LALIT, JJ)

Charu Khurana & Others ... Petitioner(s)
Versus
Union of India & Others ... Respondent(s)

Writ Petition (C) No. 78 of 2013†,
decided on November 10, 2014

A. **Constitution of India — Preamble and Art. 14 — Equality — Attainment of — Equality of opportunity, held, essential to attainment of equality**

B. **Constitution of India — Arts. 14, 19(1)(g), 21 & 32, 243(d) and 243(t) — Gender justice — Provisions for, under the Constitution, discussed — Equal opportunity for women, held, essential to attainment of equality**

C. **Constitution of India — Art. 51-A — Extension of duties of citizen to a collective duty of State — Postulated**

D. **Constitution of India — Arts. 39-A(d) and 51-A(e) & (j) — Directive principles and fundamental duties — Duty of State to direct its policies towards securing that all citizens, men and women equally, have the right to adequate means of livelihood — Dignity of women, gender equality and justice — Attainment of — Duty of citizens and collective duty of State E. International Law — Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 — Art. 11(1) — Rights of women — Elimination of discrimination against women in employment — CEDAW advocates the application of same criteria for selection in matters of employment and all steps to be taken to eliminate discrimination against women in the field of employment in order to ensure equality among man and woman — Regarded as the Bill of Rights for women — Equality principles reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995 — India is a party to this Convention and other declarations and is committed to actualise them — Constitution of India, Arts. 15 and 50**

F. **Constitution of India — Arts. 14, 15, 19(1)(g), 21 and 32 — Gender discrimination in film industry — Cine Costume Make-up Artists and Hair Dressers Association in Maharashtra, registered under Trade Unions Act, 1926 making bye-**

† Under Article 32 of the Constitution of India

laws contrary to constitutional mandate — Refusal of Cine Costume Make-up Artists and Hair Dressers Association in Maharashtra to allow women to work as make-up artists, only permitting them to work as hair dressers — Impermissibility

— Petitioner trained make-up artist and hair stylist applying to R-5 Association to issue her a membership card as a make-up artist and hair stylist, denied the card and compelled to delete the words "make-up artist" from her application and when found working as a make-up artist fined Rs 26,500 — Held, such action of the Association is violative of constitutional values and norms — Gender equality is recognised as a fundamental right — Classification done by the Association, a trade union registered under the 1926 Act, whose rules have been accepted, cannot take the route of discrimination solely on basis of sex — Registrar of Trade Unions directed to ensure that the Association deletes the said bye-laws and to ensure that petitioners are registered as make-up artists and if the Association creates any hurdles, it will be obligatory on the part of the police administration to see that the female make-up artists are not harassed in any manner — Trade Unions Act, 1926, Ss. 5, 6, 10, 21 and 21-A

G. **Constitution of India — Art. 21 — Right to life and livelihood — Scope — Cine Costume Make-up Artists and Hair Dressers Association, a registered trade union in Maharashtra — Bye-laws prescribing membership of Association shall comprise of make-up men, costume men, and hair dressers (both men and women) — Women not permitted to work as make-up artists — Held, offends Art. 21, dealing with right to livelihood and, is against fundamental human rights — Such discrimination in access to employment and to be considered for employment unless some justifiable riders are attached to it, cannot withstand scrutiny — A clause in the bye-laws of a trade union, which calls itself an association, which is accepted by the statutory authority, cannot play foul of Art. 21 — Cl. 4 of bye-laws also violates S. 21 ,of the Trade Unions Act, 1926 which has not made any distinction between men and women — Trade Unions Act, 1926, Ss. 5, 6,10, 21 and 21-A**

H. **Constitution of India — Arts. 14, 15,19(l)(e) and 21 — Equal access to employment — Cine Costume Make-up Artists and Hair Dressers Association, a trade union in Maharashtra — Bye-laws of — Eligibility criteria for membership — Domicile requirement — Bye-laws concerned prescribing that member must be a resident of Maharashtra for five years — Refusal to issue membership card to work as make-up artists to petitioners on ground of not being resident in the State of Maharashtra — Quashed — Concept of domicile, as stipulated, has no rationale — It is against Arts. 14, 15 and 21 of the Constitution — Registrar of Trade Unions**

directed to ensure that the Association deletes the said bye-laws — Trade Unions Act, 1926, Ss. 21 and 21-A

I. **Constitution of India — Arts. 32, 226 and 12 — Writ jurisdiction — Amenability to — Association, a trade union registered under Trade Unions Act, 1926 — Bye-laws, accepted/ratified by the Registrar of Trade Unions, in violation of mandate of the Trade Unions Act and Constitution — Held, a trade union, registered under statutory provisions, cannot make a rule/ regulation/bye-law contrary to the constitutional mandate — Directions issued to Association by Supreme Court for violating mandate of the Act and constitutional mandate, and offending bye-laws, quashed**

Petitioner 1 is a Hollywood trained make-up artist and hair stylist. She submitted an application to R-5 Association to issue her a membership card as a make-up artist and hair stylist. She was not allowed to have a card and she was compelled to delete the word make-up artist from her application and to apply only as a hair dresser. Under this situation, she sent a complaint to many authorities that she was being deprived to work as a make-up artist and in her complaint she mentioned that when she was found working as a make-up artist, she was fined Rs 26,500. Being aggrieved by the action, Petitioner 1 filed a complaint with R-6. Federation of Western India Cine Employees. R-6, in its turn, sent a communication requiring R-5 to explain the reasons for refusal of membership of Petitioner 1 as a make-up artist. The other female make-up artists also sent similar complaints to R-6. On receipt of their reply, R-6 sent a communication to R-5 stating that they were giving permission to the appellant to work as a make-up artist in films/TV serials/music albums/ad films till she gets regular membership of R-5 Association. In view of the aforesaid communication, R-6 granted permission to Petitioner 1 to work as make-up artist in cine films/TV serials, etc. till she gets regular membership and this permission was valid for all the regions affiliated to the All India Film Employees Confederation. Thereafter, R-5 intimated the Federation that the decision taken by it was not binding on the Association as it was the rule of the Association to disallow female members to work as make-up artists.

The appellant had thus filed the present writ petition.

Allowing the petition, the Supreme Court

Held:

Though there has been formal removal of institutionalised discrimination, yet the mind-set and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of discrimination and prejudice. The days of yore when women were treated as

fragile, feeble, dependent and subordinate to men, should have been a matter of history, but it has not been so. (Para 1)

The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights. India is a party to this Convention and other declarations and is committed to actualise them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. On a perusal of the articles of CEDAW, it is clear as crystal that apart from right to work being an inalienable right of all human beings, it has commended the right to same employment opportunity, including the application of same criteria for selection in matters of employment and all steps to be taken to eliminate discrimination against women in the field of employment in order to ensure equality among man and woman. It is founded on social security and many other facets. (Paras 7 to 9)

Valsamma Paul v. Cochin University, (1996) 3 SCC 545 : 1996 SCC (L&S) 772 : (1996) 33 ATC 713; *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125; *Voluntary Health Assn. of Punjab v. Union of India*, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287, *relied on*

John Stuart Mill: *Subjection of Women*; Mary Wollstonecraft: *A Vindication of the Rights of Women*; Lord Denning: *Due Process of Law, referred to*

Article 39-A in Part IV of the Constitution that deals with the directive principles of State policy, provides that the State shall direct its policies towards securing that the citizens, men and women equally, have the right to adequate means of livelihood. Clause (*d*) of the said Article provides for equal pay for equal work for both men and women and clause(*t*) stipulates that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter into avocations unsuiled to their age or strength. The fundamental rights and the directive principles are the two wheels of the chariot in establishing the egalitarian social order. The puipose of referring to the same is to understand and appreciate how the directive principles of State policy and the fundamental duties enshrined under Article 51-A have been elevated by the interpretative process of the Supreme Court. The directive principles have been regarded as the soul of the Constitution as India is a welfare State. On a condign understanding of clause (e), it is clear that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is die quintessential quality of a personality for it is a highly cherished value. Clause (J) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to all citizens and see that they are not deprived of opportunities by

reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. From the aforesaid enunciation of law, it is clear that the duty of a citizen has been extended to the collective duty'of the State, To elaborate, it becomes the duty of the State to provide for opportunities and not to curtail the opportunities. (Paras 30 to 35)

Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625; *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1 : 4 SCEC 453; *Pramati Educational and Cultural Trust v. Union of India*, (2014) 8 SCC 1; *Ramlila Maidan Incident, In re,* (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810; *Ashoka Smokeless Coal India (P) Ltd. v. Union of India*, (2007) 2 SCC 640; *AIIMS Students' Union v. AIIMS*, (2002) 1 SCC 428 : 1 SCEC 886, *relied on*

There cannot be any discrimination solely on the ground of gender. Reservation of seats for women in panchayats and municipalities have been provided under Articles 243(d) and 243(t) of the Constitution of India. The purpose of the constitutional amendment is that the women in India are required to participate more in a democratic set-up especially at the grass root level. This is an affirmative step in the realm of women empowerment. The 73rd and 74th Amendments of the Constitution which deal with the reservation of women has the avowed purpose, that is, the women should become parties in the decision-making process in a democracy that is governed by the rule of law. Their active participation in the decision-making process has been accentuated upon and die secondary role which was historically given to women has been sought to be metamorphosed to the primary one. The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at die threshold to enter into the sphere of profession for which she is eligible and qualified, it is well nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity. (Paras 37 and 41)

Neera Maihur v. LIC, (1992) 1 SCC 286 : 1992 SCC (L&S) 259 : (1992) 19 ATC 31; *Maya Devi*, (1986) 1 SCR 743; *Mackinnon Mackenzie and Co. Ltd. v. Audrey D'Costa*, (1987) 2 SCC 469 : 1987 SCC (L&S) 100, *relied on*

R-5 Association is not a part of the "State" under Article 12 of the Constitution. However, it is the duty of the Registrar of the Trade Unions to see that no rule is framed by any trade union which is inconsistent with the Act.

These bye-laws of R-5 which have been impugned herein, have been certified by the Registrar of Trade Unions in exercise of the statutory power. Clause 4, of the bye-laws of R-5 which bars female make-up artists as is demonstrable, violates Section 21 of the

Act, for the Act has not made any distinction between men and women. Had it made a bald distinction it would have been indubitably unconstitutional. The legislature, by way of amendment in Section 21-A, has only fixed the age. It is clear that die said Clause 4, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied. Article 21 of the Constitution which deals with livelihood is offended. It also works against fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood. A clause in the bye-laws of a trade union, which calls itself an Association, which is accepted by the statutory authority, cannot play foul of Article 21. The discrimination done by the Association, a trade union registered under the Act, whose rules have been accepted, cannot take the route of the discrimination solely on the basis of sex. It really plays foul of the statutory provisions. Gender equality is recognised as a fundamental right. It is absolutely violative of constitutional values and norms. If a female artist does not get an opportunity to enter into the arena of being a member of R-5 Association, she cannot work as a female make-up artist. It is inconceivable. The likes of the petitioners are given membership as hair dressers, but not as make-up artist. There is no fathomable reason for die same. It is gender bias writ large. It is totally impermissible and wholly unacceptable. (Paras 44 to 46, 51 and 52)

Vishaka v. State of Rajasthan, (1997) 6 SCC 241 : 1997 SCC (Cri) 932; *Francis Coralie Mullin v. VT of Delhi.* (1981) 1 SCC 608 : 1981 SCC (Cri) 212; *Olga Tellis v. Bombay Municipal Corpn.,* (1985) 3 SCC 545; *Centre, for Environment & Food Security v. Union of India,* (2011) 5 SCC 676 : (2011) 2 SCC (L&S) 62, *relied on*

Chant Khurana v. Union of India, (2015) 1 SCC 219, *referred to*

Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 128 ALR 353 : (1995) 183 CLR 273 (Aust), *cited*

The denial of the issue of card to work as make-up artists on the ground that one is not a resident in the State of Maharashtra does not relate to reservation but relates to having access to employment. Here, the concept of domicile, as stipulated, has no rationale. It invites the umbrage of Articles 14, 15 and 21 of the Constitution of India. Unless a special provision is made, a trade union, which is registered under the statutory provision, cannot make a rule/regulation/bye-law contrary to the constitutional mandate and the statutory authority cannot accept the same. Be it stated, realising this, the Registrar of Trade Unions had directed R-5 to delete the said rules. Despite the said direction, R-5 has not done so. (Paras 56 and 57)

Pradeep Jain, v. Union of India, (1984) 3 SCC 654; *Nikhil Himthani v. State of Uttarakhand,* (2013) 10 SCC 237, *relied on*

Saurabh Chaudri v. Union of India, (2003) 11 SCC 146, *explained and distinguished*

Magan Mehrotra v. Union of India, (2003) 11 SCC 186, *cited*

B-D/54181/CL

Advocates who appeared in this case :

Ms Jyotika Kalra, Advocate, for the Petitioners;

L. Nageswara Rao and Maninder Singh, Additional Solicitors General (Sridhar Potaraju, S.A. Haseeb, Ms Anil Katiyar, Ms Binu Tamta, B.V. Balaram Das, Ms Sushma Suri, Ms Asha G. Nair, Arvind S. Avhad, K.H. Holambe Patil, Ms T.S. Shanthi, Pravesh Thakur, Narendra Kumar, Sajith P., Dr Pooja Jha, Vishwa Pal Singh, Ms Mridula Ray Bharadwaj and Ms Poli Kataki, Advocates) for the Respondents.

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2. (2014) 8 SCC 1, *Pramati Educational and Cultural Trust v. Union of India* 206h

3. (2013) 10 SCC 237, *Nikhil Himthani v. State of Uttarakhand* 216b-c, 217b-c

4. (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287, *Voluntary Health Assn. of Punjab v. Union of India* 201d-e

5. (2012) 6 SCC 1 : 4 SCEC 453, *Society for Unaided Private Schools of Rajasthan v. Union of India* 206g

6. (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810, *Ramlila Maidan Incident, In re* 207a

7. (2011) 5 SCC 676 : (2011) 2 SCC (L&S) 62, *Centre for Environment & Food Security v. Union of India* 214c-d

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12. (1997) 6 SCC 241 : 1997 SCC (Cri) 932, Vishaka v. State of Rajasthan 205b, 205b-c, 210a, 214f, 215b,215c

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15. (1995) 128 ALR 353 : (1995) 183 CLR 273 (Aust), *Minister for Immigration and Ethnic Affairs v. Teoh* 215a

16.	(1992) 1 SCC 286 : 1992 SCC (L&S) 259 : (1992) 19 ATC 31, *Neera Mathur v. LIC*	210b
17.	(1987) 2 SCC 469 : 1987 SCC (L&S) 100, *Mackinnon Mackenzie and Co. Ltd.. v. Audrey D'Costa*	210c-d
18.	(1986) 1 SCR 743, *Maya Devi*	210c
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20.	(1984) 3 SCC 654, *Pradeep Jain v. Union of India*	215e-g, 217d, 217f, 217g-h
21.	(1981) 1 SCC 608 : 1981 SCC (Cri) 212, *Francis Coralie Mullin v. UT of Delhi*	213f-g
22.	(1980) 3 SCC 625, Miner\-a Mills Ltd. v. Union of India	206f-g

The Judgement of the Court was delivered by

Dipak Misra, J. — The present writ petition preferred under Article 32 of the Constitution of India, exposes with luminosity the prevalence of gender inequality in the film industry, which compels one to contemplate whether the fundamental conception of gender empowerment and gender justice have been actualised despite number of legislations and progressive outlook in society or behind the liberal exterior, there is a façade which gets uncurtained on apposite discernment. The stubbornness of the 5th respondent, Cine Costume Make-up Artists and Hair Dressers Association (for short, "Association") of Mumbai, as is manifest, thought it appropriate to maintain its pertinacity, possibly being determined not to give an inch to the petitioners who are qualified make-up artists by allowing them to become make- up artists as members of the Association on two grounds, namely, they are women and have not remained in the State of Maharashtra for a span of five years. The first ground indubitably offends the concept of gender justice. As it appears though there has been formal removal of institutionalized discrimination, yet the mindset and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of discrimination and prejudice. The days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should have been a matter of history, but it has not been so, as it seems.

2. Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the rights of women and claiming equal treatment. Initially, in the West, it was a fight to get the right to vote and the debate was absolutely ineffective and, in a way, sterile. In 1792, in England, Mary Wollstonecraft in "*A Vindication of the Rights of Women*" advanced a spirited plea for claiming equality for, "the Oppressed half of the Species". In 1869, "*In Subjection of Women*" John Stuart Mill stated, "the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no

power or privilege on the one side, nor disability on the other". On March 18, 1869 Susan B. Anthony proclaimed "Join the union girls, and together say, "Equal pay, for Equal work". The same personality again spoke in July 1871: "Women must not depend upon the protection of man but must be taught to protect themselves".

3. Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American Man of Letters, stated "A sufficient measure of civilization is the influence of the good women". Speaking about the democracy in America, Alexa De Tocqueville wrote thus: "If I were asked .... to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women". One of the greatest Germans has said: "The Eternal Feminine draws us upwards".

4. Lord Denning in his book *Due Process of Law* has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom - develop her personality to the full – as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

5. At one point, the U.N. Secretary General, Kofi Annan, had stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

6. Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."

7. At this juncture, we may refer to some international conventions and treaties on gender equality. The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights.

8. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this Convention and other Declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus: -

"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The World Conference on Human Rights urges governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection of human rights of women and the girl child." (Emphasis supplied)

9. The other relevant International Instruments on Women are : (i) Universal Declaration of Human Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

10. In ***Valsamma Paul (Mrs) v. Cochin University***[1], a two-Judge Bench observed thus: (SCC pp. 562-63, para 26)

"Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth — cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the UNO on 18-12-1979 and the Government of India had ratified as an active participant on 19-6-1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers

1 (1996) 3 SCC 545 : 1996 SCC (L&S) 772: (1996) ATC 713

the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity."

11. Article 1 of CEDAW reads as follows:

"1. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

12. Sub Article (1) of Article 11 of the Convention, which has its own signification, is as follows:

"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;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

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

13. On a perusal of the Articles of the aforesaid Convention, it is clear as crystal that apart from right to work being an inalienable right of all human beings, it has commended the right to same employment opportunity, including the application of same criteria for selection in matters of employment and all steps to be taken to eliminate discrimination against women in the field of employment in order to ensure equality among man and woman. It is founded on social security and many other facets.

14. In ***Madhu Kishwar v. State of Bihar***[2], this Court had stated that Indian women have suffered and are suffering discrimination in silence. A poignant line reads thus: (SCC p.148, Para 28)

> *"28. … Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination." (SCC p. 148, para 28)*

15. In ***Voluntary Health Assn. of Punjab v. Union of India***[3], it has been observed that: (SCC p. 10 para 20)

> *"20. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilised. In the first part of the last century Swami Vivekanand had said:*
>
> > *"Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."*

16. In the aforesaid backdrop, we are required to scrutinise the factual exposition and the relief sought. The petitioner no.1 is a Hollywood trained Make-up Artist and Hair Stylist and on 10.01.2009, she submitted an application to the respondent no.5-Association to issue her a membership card as a Make-up Artist and Hair Stylist. She was not allowed to have a card and she was compelled to delete the word Make-up Artist from her application and to apply only as a Hair Dresser. Under this situation, she sent a complaint on 09.07.2009 to many authorities that she was being deprived to work as a make-up artist and in her complaint she mentioned that when she was found working as a make-up artist, she was slapped with a fine of Rs.26,500/-. Being aggrieved by the action, the petitioner no.1 filed a complaint with the 6th respondent, Federation of Western India Cine Employees (for short, "the Federation"). The respondent no.6, in its turn, sent a communication on 10.07.2009 requiring the 5th respondent to explain the reasons for refusal of membership of

2 (1996) 5 SCC 125

3 (2013) 4 SCC 1

the petitioner no.1 as a make-up artist. The other female artists also sent similar complaints to the 6th respondent.

17. As the facts would unfurl, on receipt of the letter dated 10.7.2009 from the respondent no.6, the 5th respondent sent a reply on 01.08.2009. It reads as follows:

"To
Hon'ble General Secretary, Federation of Western India Cine Employees,
Andheri (West),
Mumbai.

Sir,

Ref:- Your letter bearing Ref. No.FWICE/CCMA/670/2009 Date 10/7/2009.

We are in receipt of your aforesaid letter and in response hereto, we would like to write to you as under:-

1. The complaint made by Charu Khurana is totally incorrect. She had desired to have two cards, viz. Make-up artist Card and Hair-dresser's card. She was duly informed that there was no system of issuing two cards simultaneously. On being appraised of the said position, she of her own deleted the words "Make-up artist" in her application and counter-signed the same and had agreed to apply and take only hair Dresser's card. This is evident from the copy of the application made by Charu Khurana. A copy of the said application is enclosed herewith for your immediate reference.

2. Insofar as the allegations of alleged discrimination and not issuing of cards to female members as make-up artist, are concerned, it is stated that make-up artist cards are issued only to male members from the date of formation of the Association, no make-up artist card has been issued to female members till date. This is done to ensure that male members are not deprived of working as make-up artists. If the female members are given make-up artist card then it will become impossible for the male members to get work as in make-up artists and they will lose their sources of livelihood and will be deprived of their earnings to support themselves and their families because no one would be interest to engage the services of a male make-up artist if the female make-up artists are available, looking to the human tendency. It would be appropriate to writ to you that so far as hair dressers cards are concerned, that is exclusively given to females and never not issued to male members at all.

There is absolutely no question of discrimination practiced by us and everybody is given equal opportunity to earn their livelihood by exploiting their best talents."

18. After the receipt of the said letter, the 6th respondent sent a communication dated 12.08.2009 to respondent no.5 stating, inter alia, as follows:

"Here we would like to remind you that the FWICE is non-political organisation which does not allow any discrimination on the basis of religion, caste, community, gender etc. As such, the Gender Discrimination Policy followed by your association against Female Make-up Artistes as mentioned above, is in direct conflict with the basis Aims and Objects of the FWICE, and is a clear act of violation of the Constitution of India and several other laws in force, and also of the FWICE Constitution, and is against the interests of FWICE. Consequently, please be informed that in view of innumerable earlier directives and resolutions from FWICE and AIFCE in the said matter of membership to female make-up artist, we have no other option but to give our permission to Ms. Charu Khurana to work as a make-up artist in Films/TV Serials/Music Albums/ad films till she gets regular membership of your Association.

Please note that our said permission shall be valid for all regions affiliated to the All India Film Employees Confederation (AIFEC)"

19. In view of the aforesaid communication, the respondent no.6 vide letter dated 4.9.2009 granted permission to petitioner no.1 to work as Make-up artist in Cine Films/ TV serials etc. till she gets regular membership and this permission was valid for all the regions affiliated to the All India Film Employees Confederation. Thereafter, the 5th respondent intimated the Federation that the decision taken by it was not binding on the Association. In that context, it is stated thus:

"Ms. Charu Khurana had specifically made an application for Hair Dressers Category. It is the rule of association to disallow the female members to work as Make-up Artists. It is further to note here that Ms. Charu Khurana is also not exception to that the said rule was introduced for the betterment of the association and not to discriminate on the basis of gender. Ms. Charu Khurana has been called for the interview on 11/09/2009. She did not made herself available for the interview. Her application to the association is still pending with the association. However it's clarifies here

that she is not a member of association and hence not allowed to work as a Make-up Artist in any field.

Hence your permission to Ms. Charu Khurana to work as Make-up Artist in Film/TV serials/Music Album/Ad films is illegal and I do hereby request you to kindly withdraw the said letter at your earliest and intimate the same to Ms. Charu Khurana immediately.

Needless to state here that even if you have chosen to allow her to continue with the work, than the appropriate and strict action will be initiated against her of which please take note of."

20. The petitioners in the petition have referred to certain conferences held and how the petitioner no. 1 has been treated at other places, but to deal with the lis, it is not necessary to advert to the same. The Association, as has been asseverated, is registered under the Trade Unions Act, 1926 (for brevity, 'the Act').

21. After notices were issued to the parties, the Registrar of Trade Unions, Maharashtra, respondent no.4 herein, through its counsel submitted that after receiving the complaint from the petitioners, it had taken up the issue with the respondent No.5 and issued directions to delete the clause that has given rise to discrimination, which is not constitutionally permissible, but the Association has not taken any steps.

22. When the matter was taken up on 4th July, 2014[4], certain aspects were noted, which are as follows:

It is submitted by Ms. Kalra that the two grounds which are being taken up by this kind of trade unions are that women cannot get the status of make-up persons and they can only practice as hair dressers. It is very fairly put forth by her that the petitioners have no objection if the male artists are called hair dressers as well as make-up men. In essence, the submission of learned counsel is that this differentiation which has been made by the association despite the directions made by the Registrar of Trade Unions have not only let them feel humiliated but also affected their constitutional rights to be treated with equality, apart from the various affirmative provisions contained in the Constitution of India."

23. To put the controversy to rest, as far as the film industry in Mumbai in the State of Maharashtra is concerned, we have heard Ms. Jyotika Kalra, learned counsel for the petitioners, Mr. L.N. Rao, learned Additional Solicitor General, and Mr. Maninder Singh, learned Additional Solicitor General for Union of India, Mrs. Meenakshi

4 Charu Khurana v. Union of India, (2015) 1 SCC 219

Arora, learned senior counsel for National Commission for Women, Mrs. Asha G. Nair, learned counsel for the State of Maharashtra and Mr. K.H. Holambe Patil, learned counsel for the respondent No.5, the Association.

24. It is submitted by learned counsel for the petitioners that the 5th respondent has incorporated the discriminatory clause as a consequence of which their rights to carry on their avocation is absolutely hampered and there is no such justification for the classification, for the petitioners are qualified to work as make-up artist. It is urged by her unless they have the membership card, they would not be engaged as make-up artist and this has created a hazard in earning their livelihood. It is urged by her that the Association has obstinately been making a distinction between the male and female by categorising them as make-up artists and hair dressers respectively, as a result of which, the women, who are eligible and qualified to become make-up artist, never become make-up artist and only function as hair dressers. The learned counsel would also contend that the women have been harassed at the workplace whenever they get an engagement as a make-up artist. It is also canvassed by Ms. Kalra that the eligibility criteria that he/she must be a resident of Maharashtra for five years is absolutely unconstitutional and despite the direction of the Registrar of Trade Unions, the said clauses are not deleted and hence interference of this Court is called for. It is further put forth by her that similar situation has been prevalent in Tamil Nadu, Andhra Pradesh, Karnataka, Kerala and many other parts of the country.

25. Mr. L.N. Rao, learned Additional Solicitor General submitted that this Court in the case of ***Vishaka vs. State of Rajasthan***[5], has referred to the 1993 Convention and framed certain guidelines regard being had to the sexual harassment at work places. It is contended by him that in ***Vishaka***[5] case, a three-Judge Bench has observed that with the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations and in the present case the discrimination which is founded on the basis of gender deserves to be lancinated. It is canvassed by him that the clauses relating to discrimination and the action taken by the Association are squarely hit by Articles 14, 19(1)(g) and 21 of the Constitution of India. It is submitted by the learned Additional Solicitor General that when a trade union is brought into existence, it has to function only after they get a licence from the Registrar of trade union and when the clauses in the constitution of trade union are constitutionally unacceptable, they are under legal obligation to be deleted and it is an unfortunate case that where the Association, the respondent No.5 herein has expressed its adamantine propensity not to delete the same. Mr. Rao has also

5 (1997) 6 SCC 241 : 1997 SCC (Cri) 932

contended that the spirit of Article 39A of the Constitution of India should also be taken into consideration while dealing with the controversy.

26. Ms. Meenakshi Arora, learned senior counsel appearing for the Commission has submitted that this Court while acting as a protector of the rights, should never permit such an Association to perpetuate such kind of illegality, by which the women artists are deprived of employment and that too not for any acceptable or normative reasons, but solely because of some kind of obsessive gender bias.

27. Learned counsel appearing for the respondent No.5 has submitted that the application was not rejected because she was a woman, but on the other grounds. He has drawn our attention to the communication dated 14th December, 2009, to which we shall advert to at a later stage.

28. The sixty-four thousand dollar question that emanates for consideration in this writ petition whether the female artists, who are eligible, can be deprived to work in the film industry as make-up man and only be permitted to work as hair dressers, solely because the Association, the respondent No.5 herein, which is controlled by the Trade Unions Act, 1926, has incorporated a clause relating to this kind of classification and also further stipulated that a person to work must be a resident of Maharashtra for a period of five years and nonchalantly stood embedded on its stand.

29. The unconcerned and insouciant stand is depicted from the communication dated 14.12.2009. The relevant part is as follows:

> *"We are pleased to inform you that you had applied for the membership as a Hair Dresser on 10 January, 2009. All the Certificates are from Delhi and courses certificates are from Mumbai & Delhi. You had not provided any original documents of Ration card, Telephone Bills or any other proof of been in Maharashtra for 5 years or more than that. You had provided the Xerox Copy of HP Gas Bill, but it is issued on yours mother named, as Mrs. Neelam Khurana. You have Election Card, Passport from Delhi itself.*
>
> *You have provided the bank certificate as a proof of been in Maharashtra for 9 years but Bank can be operated from any part of India. And Bank itself had specifically said that "This certificate is issued at the party's own request without any risk & responsibility on the part of the bank or any of its signing officials."*

We are sorry to inform you, as per our Constitution Rules you don't have any residential proof for being in Maharashtra for 5 years. Therefore, your application for membership has been rejected."

The aforesaid letter read in conjunction with the communication made on 01.10.2009 which we have reproduced hereinbefore, have created an impediment on the part of the petitioners to become members of the Association as make-up artists, which has deprived them the access to have employment, despite being qualified, in the films industry/TV serials/ music albums/ad films. Their entry at the threshold is banned. The barriers, as is perceivable, are two-fold, first, the petitioners are women, and second, they have not produced the domicile certificates to the effect that they have resided in the State of Maharashtra for five years.

30. First, we shall take up the issue of discrimination on the ground of gender. Article 39A in Part IV of the Constitution that deals with Directive Principles of State Policy, provides that the State shall direct its policies towards securing that the citizens, men and women equally, have the right to adequate means of livelihood. Clause (d) of the said Article provides for equal pay for equal work for both men and women and Clause (e) stipulates that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter into avocations unsuited to their age or strength. In ***Minerva Mills Ltd. V. Union of India***[6], the Constitution Bench has found that the Fundamental Rights and the Directive Principles are the two quilts of the chariot in establishing the egalitarian social order. In ***Society for Unaided Private Schools of Rajasthan V. Union of India***[7], it has been held that the Court is required to interpret the Fundamental Rights in the light of the Directive Principles. The said principle was reiterated by the Constitution Bench in ***Paramati Educational and Cultural Trust (Registered) and Others V. Union of India and others***[8].

31. In this regard, it is apposite to refer to two passages from ***Ramlila Maidan Incident, In Re***[9], wherein it has been observed thus: (SCC pp. 33-34, Paras 19-22)

"19. While these are the guaranteed fundamental rights, Article 38, under the directive principles of State policy contained in Part IV of the Constitution, places a constitutional obligation upon the State to strive to

6 (1980) 3 SCC 625

7 (2012) 6 SCC 1 ; 4 SCEC 453

8 (2014) 8 SCC 1

9 (2012) 5 SCC 1 ; (2012) 2 SCC (Civ) 820 ; (2012) 2 SCC (Cri) 241 ; (2012) 1 SCC (L&S) 810 10 (2007) 2 SCC 640

promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice—social, economic and political—shall inform all the institutions of the national life. Article 37 makes the directive principles of State policy fundamental in the governance of the country and provides that it shall be the duty of the State to apply these principles in making laws.

20. With the development of law, even certain matters covered under this Part relating to directive principles have been uplifted to the status of fundamental rights, for instance, the right to education. Though this right forms part of the directive principles of State policy, compulsory and primary education has been treated as a part of Article 21 of the Constitution of India by the courts, which consequently led to the enactment of the Right of Children to Free and Compulsory Education Act, 2009.

21. Article 51-A deals with the fundamental duties of the citizens. It, inter alia, postulates that it shall be the duty of every citizen of India to abide by the Constitution, to promote harmony and the spirit of common brotherhood, to safeguard public property and to abjure violence.

22. Thus, a common thread runs through Parts III, IV and IV-A of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts."

32. The purpose of referring to the same is to understand and appreciate how the Directive Principles of State Policy and the Fundamental Duties enshrined under Article 51A have been elevated by the interpretative process of this Court. The Directive Principles have been regarded as soul of the Constitution as India is a welfare State. At this juncture, it is apt to notice the view expressed by a two- Judge Bench of this Court in ***Ashoka Smokeless Coal India (P) Ltd. V. Union of India***[10] wherein it has been laid down that : (SCC p 683, para 106)

"106. ... the Directive Principles of State Policy provide for a guidance to interpretation of fundamental rights of a citizen as also the statutory rights."

10 (2007) 2 SCC 640

33. In this context, a reference may be made to Article 51-A. Clauses (e) and (j) and provide as follows:

> *"**51-A. (e)** 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;*
>
> * * *
>
> *(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;"*

On a condign understanding of Clause (e), it is clear as a cloudless sky that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is the quintessential quality of a personality and a human frames always desires to live in the mansion of dignity, for it is a highly cherished value. Clause (j) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to see that all citizens and they are not deprived of by reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

34. In ***AIIMS Students' Union V. AIIMS and others***[11], a three-Judge Bench, while dealing with the reservation in All India Institute of Medical Sciences, observed: (SCC pp. 458 para 58)

> *"58. ... Pushing the protection of reservation beyond the primary level betrays the bigwigs' desire to keep the crippled crippled for ever. Rabindra Nath Tagore's vision of a free India cannot be complete unless "knowledge is free" and "tireless striving stretches its arms towards perfection". Almost a quarter century after the people of India have given the Constitution unto themselves, a chapter on fundamental duties came to be incorporated in the Constitution. Fundamental duties, as defined in Article 51-A, are not made enforceable by a writ of court just as the fundamental rights are, but it cannot be lost sight of that "duties" in Part IV-A Article 51-A are prefixed by the same word "fundamental" which was prefixed by the founding fathers of the*

11 (2002) 1 SCC 428 ; 1 SCEC 886

Constitution to "rights" in Part III. Every citizen of India is fundamentally obligated to develop a scientific temper and humanism. He is fundamentally duty-bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. State is, all the citizens placed together and hence though Article 51-A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State."

And, thereafter opined: (SCC p. 459, para 58)

"58. ... Fundamental duties, though not enforceable by a writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51-A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by courts as a tool to tab, even a taboo, on State action drifting away from constitutional values."

35. From the aforesaid enunciation of law, it is clear as day that the duty of a citizen has been extended to the collective duty of the State. To elaborate, it becomes the duty of the State to provide for opportunities and not to curtail the opportunities.

36. At this juncture, we must appreciably note that Mr. Rao, learned Additional Solicitor General has submitted with all fairness at his command that State is making all efforts to frame such policies so that men and women are treated equally and they can have the rights and means of livelihood and no room is allowed to conceive any gender bias. Learned Additional Solicitor General would submit that the policies are framed by the State to fulfil the goals of the Constitution.

37. Having referred to the aforesaid provisions of the Constitution, and taking note of the submissions, we may presently refer to Articles 14, 19(1)(g) and 21 of the Constitution of India. Article 14 provides that the State shall not deny to any person equality before the law, or the equal protection of laws within the territory of India. Article 19(1)(g) provides that all citizens have the right to practise any profession or to carry on any occupation, trade or business. Needless to emphasise the said right is subject to reasonable restrictions to be imposed, as permissible under Article 19(6) of the Constitution. Article 21 deals with the concept of life, which has been extended to a great extent by this Court.

38. At this stage, it is seemly to note that the Association is not a State under Article 12 of the Constitution of India. It is submitted by Ms. Meenakshi Arora, learned senior counsel appearing for National Commission for Women, that the Association is not a State or may not be amenable to writ jurisdiction under Article 226 of the Constitution of India, but its constitution and the bye-laws which have been accepted/ratified by the Registrar of Trade Unions, who have been authorised by the competent Government cannot violate the mandate of the Act or any of the constitutional commands. In essence, the submission of the learned senior counsel is, it has to be in consonance with the statutory framework and the Association, by incorporating certain stipulations, cannot create a discrimination for women which is contrary to the international treaty, that has been ratified by India and further debar all qualified and eligible women to enter into the film industry to carry their profession as make-up artists, which in the ultimate eventuate, stifle and smother their sources of livelihood. Mr. Rao, learned Additional Solicitor General, supporting the said submission, would further contend that this Court in *Vishaka*[5] has clearly observed that violation of Fundamental Rights of gender equality "Right to Life and Liberty" and "right to practise profession", attract the remedy under Article 32 for enforcement of these fundamental rights of women.

39. Before we dwell upon the relevant provisions of the Act, we may profitably delve into the concept of equality in the backdrop of gender justice. In ***Mrs. Neera Mathur V. Life Insurance Corporation of India and Anr.***[12], a female candidate was required to furnish information about her menstrual period, last date of menstruation, pregnancy and miscarriage. The Court declared that calling of such information are indeed embarrassing if not humiliating. The Court directed that the employer i.e. Life Insurance Corporation would do well to delete such columns in the declaration. In ***Maya Devi***[13], the requirement that a married woman should obtain her husband's consent before applying for public employment was held invalid and unconstitutional. The Court observed that such a requirement is an anachronistic obstacle to women's equality.

40. In ***Mackinnon Mackenzie and Co. Ltd. V. Audrey D'Costa***[14], the Court was deliberating the issue of equal pay for equal work in the context of female stenographers and male stenographers. Dealing with the aspect of discrimination, the Court opined: (SCC pp. 479-80, para 9)

12 (1992) 1 SCC 286

13 (1986) 1 SCR 743

14 (1987) 2 SCC 469

"9. ... It may be that the management was not employing any male as a Confidential Stenographer attached to the senior executives in its establishment and that there was no transfer of Confidential Lady Stenographers to the general pool of Stenographers where males were working. It, however, ought not to make any difference for purposes of the application of the Act when once it is established that the lady Stenographers were doing practically the same kind of work which the male Stenographers were discharging. The employer is bound to pay the same remuneration to both of them irrespective of the place where they were working unless it is shown that the women are not fit to do the work of the male Stenographers. Nor can the management deliberately create such conditions of work only with the object of driving away women from a particular type of work which they can otherwise perform with the object of paying them less remuneration elsewhere in its establishment".

41. The aforesaid pronouncement clearly spells out that there cannot be any discrimination solely on the ground of gender. It is apt to note here that reservation of seats for women in Panchayats and Municipalities have been provided under Articles 243(d) and 243(t) of the Constitution of India. The purpose of the constitutional amendment is that the women in India are required to participate more in a democratic set-up especially at the grass root level. This is an affirmative step in the realm of women empowerment. The 73rd and 74th amendment of the Constitution which deals with the reservation of women has the avowed purpose, that is, the women should become parties in the decision making process in a democracy that is governed by rule of law. Their active participation in the decision making process has been accentuated upon and the secondary rule which was historically given to women has been sought to be metamorphosed to the primary one. The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the sphere of profession for which she is eligible and qualified, it is well nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity.

42. Having regard to the aforesaid legal exposition and factually exposé, the legal provisions of the Act are to be scanned. Section 5 of the Act provides for application for registration. It stipulates that every application for registration of a trade union shall be made to the Registrar, and shall be accompanied by a copy of the Rules of the trade unions. It is the duty of the Registrar of the Trade Unions to see that no rule is framed by any trade union which is inconsistent with the Act. Section

6 stipulates that a trade union shall not be entitled to registration under the Act, unless the executive thereof is constituted in accordance with the provisions of the Act and the rules thereof. It also provides for certain aspects some of which are, the whole of the objects for which the trade union has been established and the whole of the purposes for which the general funds of the Trade Union shall be applicable. Section 10 deals with the cancellation of registration. It provides that the certificate of registration of a Trade Union can be withdrawn or cancelled by the Registrar if the certificate has been obtained by fraud or mistake or Trade Union has ceased to exist or wilfully and after notice from the Registrar contravened any provision of the Act or allowed any rule to continue in force inconsistent with the provision or rescinded any rule providing for any manner as required by Section 6.

43. At this juncture, it is apt to refer to Sections 21 and 21A, which read as under:-

> ***21. Rights of minors to membership of trade union.*** *— Any person who has attained the age of fifteen years may be a member of a registered Trade Union subject to any rules of the Trade Union to the contrary, and may, subject as aforesaid, enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules:*
>
> ***21- A. Disqualifications of office-bearers of Trade Unions*** *— (1) A person shall be disqualified for being chosen as, and for being member of the executive or any other office-bearer of a registered Trade Union if-*
>
> *(i) he has not attained the age of eighteen years;*
>
> *(ii) he has been convicted by a Court in India of any offence involving moral turpitude and sentenced to imprisonment, unless a period of five years has elapsed since his release.*
>
> *(2) Any member of the executive or other office- bearer of a registered Trade Union who, before the commencement of the Indian Trade Unions (Amendment) Act, 1964, has been convicted of any offence involving moral turpitude and sentenced to imprisonment, shall on the date of such commencement cease to be such member or office-bearer unless a period of five years has elapsed since his release before that date.]*
>
> *(3) In its application to the State of Jammu and Kashmir, reference in subsection (2) to the commencement of the Indian Trade Unions*

(Amendment) Act, 1964, shall be construed as reference to the commencement of this Act in the said State."

The aforesaid provisions make it graphically clear that Section 21-A only prescribes the age and certain other qualifications. The aforesaid statutory provisions do not make a distinction between a man and woman, and rightly so.

44. As is evincible, the respondent no.5-Association has been registered under the Trade Unions Act having registration No.1871. Its aims and objects are as follows:

a) To organize and unite the Motion Picture Costume Artist's Make-Up Artist's and Hair Dressers and their Assistants with a view to protect their interests.

b) To secure to the members fair conditions of life and services and to protect them from unfair labour practice in the Trade, keeping the relations with other Trade Unions in the Film Industry.

c) To try to standardize minimum wages and contractual remuneration, as devised from time to time.

d) To try by all legal means to redress their grievances.

e) To endeavour to regulate the relations of the members among themselves as and for their employers, and to secure them fair conditions of life service and career.

f) To endeavour to secure compensation for members in case of accidents under the Workmen's Compensation Act.

g) To provide the members against unemployment, sickness, infantry, old age if funds permit.

h) To provide legal assistants to members in respect of matters arising out of or incidental to their employment if in the opinion of the Executive Committee it is found necessary and expedient.

i) To endeavour to render aid to the members during any strike or lockout brought accident with the sanction of the Association.

j) To co-operate and federate with other Organisations in India and abroad having similar object.

k) To help in accordance with Indian Trade Unions Act, working classes in India and outside in the promotion of the objects mentioned in this clause.

45. The Association has its own bye-laws. Clause 4 of the bye-laws reads as follows:

*"4. **Membership:** Membership of the Association shall comprise of Make-up men, Costume men, and Hair Dressers who were admitted as members by the Association & who continue to be members 14.4.85 and all those who shall be admitted hereafter under clauses 6 & 7 of the constitution of the Association including the membership in Family Relief fund, provided he/she agrees & abide by the rules & sub- rules that may form by the Association from time to time."*

Clause 6 deals with admission of new members. *It reads as follows:*

*"6. **Admission of new members:**— Any person desiring to become the member of the Association who has attained the age of majority of 18 and who possess a good moral character shall send an application in prescribed form and duly recommended by two members with its prescribed fees.*

A. Applicant should have been a resident of Maharashtra at least for 5 years.

B. Son or Daughter of members who have completed 15 years of membership shall be eligible to be enrolled as members of the Association, provided they fulfil other conditions relating to age and domicile status of 5 years in the State of Maharashtra.

46. These bye-laws have been certified by the Registrar of Trade Unions in exercise of the statutory power. Clause 4, as is demonstrable, violates Section 21 of the Act, for the Act has not made any distinction between men and women. Had it made a bald distinction it would have been indubitably unconstitutional. The legislature, by way of amendment in Section 21A, has only fixed the age. It is clear to us that the clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, Article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood.

47. In this regard, we may refer to certain authorities. In ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi***[15], it has been held thus: (SCC p. 618, para 6)

15 (1981) 1 SCC 608

> *"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person".*

48. In ***Olga Tellis v. Bombay Municipal Corpn.***[16], the Constitution Bench speaking through Chandrachud, C.J., observed thus: (SCC p. 572, para 32)

> *"An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life".*

49. Recently, in ***Centre for Environment & Food Security v. Union of India***[17], a three-Judge Bench had opined as follows: (SCC p. 677, para 1)

> *"1. ... The Framers of the Constitution, in the Preamble to the Constitution, guaranteed to secure to its citizens justice social, economic and political as well as equality of status and opportunity but the "right to employment" was not incorporated in Part III of the Constitution as a fundamental right. By judicial pronouncements, the Courts expanded the scope of Article 21 of the Constitution of India and included various facets of life as rights protected under the said article despite the fact that they had not been incorporated by specific language in Part III by the Framers of the Constitution".*

The said views were expressed in the context of the scheme of National Rural Employment Guarantee Act, 2005.

50. From the aforesaid enunciation of law, the signification of right to livelihood gets clearly spelt out. A clause in the bye-laws of a trade union, which calls itself an

16 (1985) 3 SCC 545

17 (2011) 5 SCC 676

Association, which is accepted by the statutory authority, cannot play foul of Article 21.

51. Presently, we shall advert to the law laid down in *Vishaka case*[5]. The Court referred to the 1993 Treaty and opined that the meaning and content of Fundamental Rights in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. In that context, the Court observed thus: (SCC p. 251, para 14)

> *"14. ... The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields 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 fro 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 vs. Teoh.***[18] *has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia".*

The three-Judge Bench[5], while noting the increasing awareness on gender justice, took note of the increase in the effort to guard against such violations. The Court observed that when there is violation of gender justice and working woman is sexually harassed, there is violation of the fundamental rights of gender justice and it is clear violation of the rights under Articles 14, 15 and 21 of the Constitution.

52. Thus, the aforesaid decision in *Vishaka case*[5] unequivocally recognises gender equality as a fundamental right. The discrimination done by the Association, a trade union registered under the Act, whose rules have been accepted, cannot take the route of the discrimination solely on the basis of sex. It really plays foul of the statutory provisions.

It is absolutely violative of constitutional values and norms. If a female artist does not get an opportunity to enter into the arena of being a member of the Association, she cannot work as a female artist. It is inconceivable. The likes of the petitioners are given membership as hair dressers, but not as make-up artist. There is no fathomable reason for the same. It is gender bias writ large. It is totally impermissible and wholly unacceptable.

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18 (1995) *128 ALR 535 ; (1995) 183 CLR 273 (Aust)*

53. Having dealt with the concept of discrimination, now we shall dwell upon the second facet, that is, denial of the issue of card to work as make-up artists on the ground that one is not a resident in the State of Mahrashtra. In ***Pradeep Jain v. Union of India***[19], it has been held thus: (SCC pp. 672-73, para 10)

> *"10. ... What is fundamental, as an enduring value of our polity, is guarantee to each of equal opportunity to unfold the full potential of his personality. Anyone anywhere, humble or high, agrestic or urban, man or woman, whatever be his language or religion, place of birth or residence, is entitled to be afforded equal chance for admission to any secular educational course for cultural growth, training facility, speciality or employment. It would run counter to the basic principle of equality before the law and equal protection of the law if a citizen by reason of his residence in State A, which ordinarily in the commonality of cases, would be the result of his birth in a place situate within that State, should have opportunity for education or advancement which is denied to another citizen because he happens to be resident in State B. It is axiomatic that talent is not the monopoly of the residents of any particular State; it is more or less evenly distributed and given proper opportunity and environment, everyone has a prospect of rising to the peak. What is necessary is equality of opportunity and that cannot be made dependent upon where a citizen resides. If every citizen is afforded equal opportunity, genetically and environmentally, to develop his potential, he will be able in his own way to manifest his faculties fully leading to all round improvement in excellence. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of our founding faith and constitutional creed".*

54. Recently, in ***Nikhil Himthani v. State of Uttarakhand***[20], the Court, while dealing with eligibility criteria for appointment to the post-graduate medical/dental course, fixed by the Department of Medical Education, Government of Uttrakhand, Dehradun, adverted to clause 2 and 3 which basically related to domicile of Uttrakhand. In the said context, the Court, placing reliance on ***Saurabh Chaudri V. Union of India***[21] and in that backdrop, decided the constitutional validity of clauses 1, 2 and 3 of the eligibility criteria in the information bulletin. Clause 5 of the bulletin prescribed that eligible candidates who get selected through NEET-PG 2013/NEET (MDS)-2013 will be given admission on available seats in postgraduate courses according

19 (1984) 3 SCC 654

20 (2013) 10 SCC 237

21 (2003) 11 SCC 146

to their rank in State merit list, made available by NBE/MCI/DCI/AIIMS and the seats available at that time. Clause 6 stipulated that having name in the State merit list o eligible candidates provided by MCI/DCI/NBE/AIIMS will not confer the right on the candidate for getting PG seats unless he/she fulfils all the eligibility criteria regarding domicile, reservation policy, provisions of bond, etc mentioned in the information bulletin and/or amendments made thereafter till the time of counselling. Clause 1 of the eligibility criteria stipulated that a candidate must have passed an MBBS examination from Uttrakhand in any of the colleges named therein and must have been admitted through the competitive examination, namely, Uttrakhand State PMT. The petitioner in the said case was not admitted through the Uttrakhand State PMT to the medical college and, therefore, did not fulfil the eligibility criteria for admission to the medical post graduate course under clause 1 of the eligibility criteria. Clause 2 of the eligibility criteria stipulated that the candidates who were domicile of Uttrakhand and passed MBBS examination from medical colleges from other States and were admitted through 15% All India quota, were also eligible for admission to the post graduate medical courses. But as the petitioner was not a domicile of Uttrakhand and passed MBBS examination from a medical college of other States, was not eligible for admission to the post-graduate course. Under Clause 3 of the eligibility criteria, who were domicile of Uttrakhand and had passed MBBS from medical colleges of other States in India, were admitted through pre-medical test conducted by the State Government as they were eligible for admission. While dealing with these clauses, the Court noted the submission of learned counsel for the State of Uttrakhand that as per the Constitution Bench decision in ***Saurabh Chaudri*** (supra) institutional preference is a matter of State Policy which alone can be invalidated in the event of being violative of Article 14 of the Constitution of India and as the State of Uttrakhand was entitled to make its own Policy with regard to institutional preference, the clauses could not be invalidated.

55. The Court posed the question whether the clauses 1, 2 and 3 of the eligibility criteria in the information bulletin are ultra vires of Article 14 of the Constitution of India. In that context, the Court held: (*Nikhil Himthani case*[20], SCC pp. 246-47, paras 15-16 and 19)

> *"15. ... We are thus of the considered opinion that to exclude the petitioner from consideration on the basis of his merit only on the ground that he was not admitted to the MBBS course through the Uttarakhand PMT would be to deny him equality of opportunity in matter of admission to the postgraduate medical course and to violate his right to equality under*

Article 14 of the Constitution as explained by this Court in Pradeep Jain v. Union of India[19].

16. We now come to Clauses 2 and 3 of the eligibility criteria in the Information Bulletin. Under Clauses 2 and 3, a domicile of Uttarakhand who has passed MBBS from a medical college of some other State having been admitted either through the 15% all-India quota or through the pre-medical test conducted by the State Government concerned has been made eligible for admission to a postgraduate medical course in the State quota. Obviously, a candidate who is not a domicile of Uttarakhand State is not eligible for admission to the postgraduate course under Clauses 2 and 3 of the eligibility criteria. Preference, therefore is given only on the basis of residence or domicile in the State of Uttarakhand under Clauses 2 and 3 of the eligibility criteria and such preference on the basis of residence or domicile within a State has been held to be violative of Article 14 of the Constitution in ***Pradeep Jain v. Union of India[19]*** *and* ***Magan Mehrotra v. Union of India[22]****.*

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19. Thus, it will be clear from what has been held by the three-Judge Bench of this Court in ***Magan Mehrotra v. Union of India[22]*** *that no preference can be given to the candidates on the basis of domicile to compete for the institutional quota of the State if such candidates have done their MBBS course in colleges outside the State in view of the decisions of this Court in Pradeep Jain v. Union of India[19]. Hence, Clauses 2 and 3 of the eligibility criteria in the Information Bulletin are also violative of Article 14 of the Constitution".*

56. In the case at hand, it does not relate to reservation but relates to having access to employment. Here, as we find the concept of domicile, as stipulated, has no rationale. It invites the frown of Articles 14, 15 and 21 of the Constitution of India. At this juncture, we must note with profit, as submitted by Mr. Rao, learned Additional Solicitor General that in the matter of public employment there has to be special provision. He has drawn our attention to Article 371D(1) of the Constitution. It reads as follows:

*"**371D. Special provisions with respect to the State of Andhra Pradesh.**— (1) The President may, by order made with respect to the State of Andhra Pradesh, provide, having regard to the requirements of the State as a whole, for equitable opportunities and facilities for the people belonging*

22 (2003) 11 SCC 186

to different parts of the State, in the matter of public employment and in the matter of education, and different provisions may be made for various parts of the State".

It is submitted by him that the State is extremely careful to see that equitable opportunities and facilities are provided to all the citizens of the country. Unless the special provision is made, a trade union, which is registered under the statutory provision, cannot make a rule/regulation/bye-law contrary to the constitutional mandate and the statutory authority cannot accept the same. Be it stated, realising this, the Registrar of Trade Unions had directed the 5th respondent to delete the said rules. Despite the said direction, the 5th respondent has not done so.

57. It is really shocking that the respondent no.5 has maintained such an adamantine attitude. In ordinary circumstances, the Registrar would have been directed to cancel the registration but we do not intend to do so. As the clauses relating to the membership and the domicile, namely, clause 4 and 6, are violative of the statutory provisions and the constitutional mandate and taking further note of the fact that the Registrar would have been, in normal circumstances, directed by us requiring the trade union to delete the clauses, we quash the said clauses and further direct that the petitioners shall be registered as members of the 5th respondent within four weeks. It will be the obligation of the Registrar of Trade Unions to see that they are registered as make-up artists. If the Association would create any hurdle, it will be obligatory on the part of the police administration to see that the female make-up artists are not harassed in any manner whatsoever, for harassment of a woman is absolutely unconscionable, unacceptable and intolerable. Our directions close the matter as far as the State of Maharashtra is concerned.

58. Let the matter be listed in the first week of January, 2015, in respect of other States.

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(2014) 7 Supreme Court Cases 640

Malathi Ravi v. B.V. Ravi

(Before S. J. Mukhopadhaya and Dipak Misra, JJ.)

Malathi Ravi, M.D. ... Appellant
Versus
B. V. Ravi, M.D. ...Respondent

Civil Appeal No.5862 of 2014†
decided on June 30, 2014

A. **Hindu Marriage Act, 1955 — S. 13(1)(i-b) — Desertion — Essential elements — Inference of desertion, how can be drawn — Words and Phrases — "Desertion"**

B. **Hindu Marriage Act, 1955 — S. 13(1)(i-b) — Desertion for continuous period of 2 yrs — Husband admitted to have once stayed with wife at wife's place for 2 days within period of 2 yrs immediately preceding presentation of divorce petition by him — Held, desertion not established**

C. **Hindu Marriage Act, 1955 — S. 13(1)(i-a) — Mental cruelty — Events subsequent to one spouse leaving marital home and/or subsequent to filing of divorce petition, if can be basis for — Such subsequent events established on undisputed material brought on record, can be considered — Mental cruelty and its effect varies according to individual differences, differences in social status, differences between societies, etc. — Inference can be drawn from attending circumstances — Considering material on record from social perspective, subsequent events and kind of attitude and treatment of wife towards husband, held on facts, husband (respondent) entitled to decree of divorce against wife on ground of mental cruelty — Words and Phrases — "Cruelty", "mental cruelty"**

D. **Hindu Marriage Act, 1955 — S. 13(1)(i-a) — Mental cruelty — False and vexatious criminal proceedings under Ss. 498-A/506/34 IPC against husband and his family, by wife after filing of divorce petition, held, can be considered — Penal Code, 1860, Ss. 498-A, 506 and 34**

E. **Hindu Marriage Act, 1955 — S. 13(1)(i-a) — Mental cruelty as a ground for divorce — Relief clause — Appeal before Supreme Court — Ground of mental cruelty not taken in relief clause but discernible from undisputed material brought**

† Arising out of S.L.P. (C) No. 17 of 2010. From the Judgment and Order dated 11-9-2009 in MFA No. 9164 of 2004 of the High Court of Karnataka at Bangalore

on record — Supreme Court, held, would consider the ground in exercise of its power under Art. 142 of the Constitution to do complete justice, instead of requiring party concerned to amend petition and sending matter back to Family Court — Constitution of India — Arts. 136 and 142 — Civil Procedure Code, 1908 — Or. 7 R. 7 and Or. 41 R. 24 — Relief not claimed in prayer clause, but clearly discernible from materials on record

F. **Constitution of India — Arts. 136 and 142 — Relief — Appeal — Minor technical fetters can be ignored to do complete justice in exercise of power under Art. 142 — Relief, not expressly prayed for in relief clause but perceptible from material on record and also statutorily permissible — Held, Supreme Court has power and duty under Art. 142 to consider question of grant of such relief on basis of undisputed material on record — Civil Procedure Code, 1908 — Or. 7 R. 7 and Or. 41 R. 24 — Relief not claimed in prayer clause, but clearly discernible from materials on record**

G. **Hindu Marriage Act, 1955 — S. 13(1) — Divorce — Ground of marriage being irretrievably broken down — Invoked by Supreme Court in certain cases, but in present case, since ground of mental cruelty was fully made out, not necessary to invoke the same**

H. **Constitution of India — Art. 136 — Grounds stated in memorandum of appeal — If not established by evidence, cannot be considered — Practice and Procedure — Appeal — Civil Procedure Code, 1908, Or. 41 Rr. 2 and 24**

I. **Hindu Marriage Act, 1955 — S. 25 — Maintenance — Minor son's education and comfort — Social status and strata of parties and concept of availing effective education, to be considered**

— Even if High Court failed to address this aspect, while granting divorce decree sought by husband, Supreme Court while affirming the decree, has duty to see that the son (aged 16 yrs) born in the wedlock gets acceptable comfort and financial support for proper modern education — Fact that wife (appellant) is earning would not absolve husband (respondent) from his bounden duty to provide maintenance and education for his minor son — Having regard to totality of circumstances, status and strata of parties, husband directed to pay Rs 25 lakhs for this purpose — Constitution of India — Arts. 136 and 142 — Maintenance — Granted by Supreme Court to minor son after affirming decree of divorce when High Court failed to address that aspect

The respondent husband, an Associate Professor in a Government Medical College in Bangalore, filed a petition in 2001 under Section 13(l)(i-b) of the Hindu Marriage Act, 1955 (the Act) seeking dissolution of marriage by way of divorce. In the petition filed before the Family Court, it was averred by true respondent husband that the marriage between the parties was solemnised in accordance with Hindu rites and customs on 23-11-1994. After the marriage the husband and wife stayed together for one-and-a-half years in the house of the father of the husband but from the very first day the appellant wife was non-cooperative, arrogant and her behaviour towards the family members of the husband was unacceptable. Despite the misunderstanding, a male child was born in the wedlock and thereafter, the wife took the child and left the house and chose not to come back to the husband or his family for a period of three years. It was pleaded that there had been a marital discord and total non-compatibility, and she had deserted him severing all ties. It was also alleged that she had left the tender child in the custody of her parents and joined a postgraduate course in the medical college of Gulbarga. All the efforts by the husband to bring her back became an exercise in futility inasmuch as the letters written by him were never replied to. Despite the non-responsive attitude of the wife, he, without abandoning the hope for reconciliation for leading a normal married life, went to the house of his in-laws, but her parents ill-treated him by forcibly throwing him out of the house. It was further asserted by the husband that after she completed her course, she started staying with her parents along with the child at Bangalore and neither he nor his family members were invited for the name giving ceremony of the child. As set forth, the conduct of the wife caused immense mental hurt and trauma, and he suffered unbearable mental agony when the family members of his wife abused and ill-treated him while he had gone to pacify her and bring her back to the matrimonial home. All his solicitations and beseechments through letters to have normalcy went in vain which compelled him to issue a notice through his counsel but she chose not to respond to the same. Under these circumstances, the petition was filed for judicial separation and thereafter, prayer was amended seeking dissolution of marriage on the ground of desertion since she had deliberately withdrawn from his society.

The Principal Judge of the Family Court, appreciating the oral and documentary evidence on record, inter alia held that assuming there was desertion yet the same was not for a continuous period of two years immediately preceding the presentation of the petition. The Family Judge dismissed the application for divorce and allowed the application of the wife filed under Section 23(a) read with Section 9 of the Act for restitution of conjugal rights.

After the said judgment and decree was passed by the Family Judge, the respondent did not prefer an appeal immediately. He waited for the wife to join and for the said purpose

he wrote letters to her and as there was no response, he sent a notice through his counsel. The wife, eventually, joined on 22-8-2004 at the matrimonial house being accompanied by her relative who was working in the Police Department. The wife lodged an FIR alleging demand of dowry against the husband, mother and sister as a consequence of which the husband was arrested being an accused for the offences under Sections 498-A and 506 read with Section 34 IPC and also under the provisions of the Dowry Prohibition Act. He remained in custody for a day until he was enlarged on bail. His parents were compelled to hide themselves and moved an application under Section 438 CrPC and ultimately, availed the benefit of the said provision.

After all these events took place, the husband preferred an appeal along with application for condonation of delay before the High Court. The High Court condoned the delay, took note of the grounds urged in the memorandum of appeal, appreciated the subsequent events that reflected the conduct of the wife and opined that the attitude of the wife confirmed that she never had the intention of leading a normal married life with the husband and, in fact, she wanted to stay separately with the husband and dictate terms which had hurt his feelings. The High Court further came to the conclusion that the husband had made efforts to go to Gulbarga on many an occasion, tried to convince the wife to come back to the matrimonial home, but all his diligent efforts met with miserable failure. The High Court took the view that the behaviour of the wife established that she deliberately stayed away from the marital home and intentionally caused mental agony by putting the husband and his family to go through a criminal litigation. That apart, the High Court took the long separation into account and, accordingly, set aside the judgment and decree for restitution of conjugal rights and passed a decree for dissolution of marriage between the parties.

In the present appeal before the Supreme Court, it was submitted on behalf of the appellant that when the petition for divorce was founded solely on the ground of desertion and a finding was returned by the Family Court that the ingredients stipulated under Section 13(l)(i-b) of the Act were not satisfied making out a case of desertion on the part of the wife, the High Court should have concurred with the same and not proceeded to make out a case for the respondent husband on the foundation of mental cruelty. It was urged by him that the High Court had taken note of subsequent events into consideration without affording an opportunity to the appellant to controvert the said material and that alone made the decision vulnerable in law.

Affirming the decree for divorce passed by the High Court and disposing of the appeal, the Supreme Court

Held :

For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. (Para 20)

Savitri Pandey v. Prem Chandra Pandey, (2002) 2 SCC 73, relied on

Lachman Utamchand Kirpalani v. Meena, AIR 1964 SC 40, considered

Bipinchandra Jaisinghbhai Shah v. Prabhavati, AIR 1957 SC 176, cited

However, in the present case, it is not established that the appellant wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. It is because the petition was presented in the year 2001 and during the cross-examination of the husband it has been admitted by him that he had gone to Gulbarga in May 1999 for two days. The Family Court, on the basis of material brought on record, has opined that there is no sufficient evidence to come to a definite conclusion that the wife deserted him with the intention to bring the matrimonial relationship to an end and further the period of two years was not completed. The High Court has not dealt with this aspect in an appropriate manner and opined that the wife had no intention to lead a normal married life with the husband. Therefore, the allegation of desertion, as enshrined under Section 13(l)(i-b) has not been established. The finding on that score as recorded by the Principal Judge, Family Court, deserves to be affirmed. (Para 21)

Thus the petition was filed under Section 13(l)(i-b) of the Act but the ground of desertion could not be established. However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband. The High Court has referred to certain grounds stated in the memorandum of appeal and taken note of certain subsequent facts. But the grounds stated in the memorandum of appeal which were not established by way of evidence could not have been pressed into service or taken aid of. (Paras 22 and 24)

However, subsequent events which are established on the basis of non-disputed material brought on record can be taken into consideration. (Para 27)

A. *Jayachandra v. Aneel Kaur*, (2005) 2 SCC 22; *Suman Kapurv. Sudhir Kapur*, (2009) 1 SCC 422 : (2009) 1 SCC (Civ) 204, *relied on*

Having not accepted the ground of desertion, the two issues that remain for consideration are whether the issue of mental cruelty deserves to be accepted in the obtaining factual matrix in the absence of a prayer in the relief clause, and further whether the situation has become such that it can be held that under the existing factual scenario it would not be proper to keep the marriage ties alive. Further question would arise whether in the present case, the Court should require the respondent husband to amend the petition and direct the Family Judge to consider the issue of mental cruelty or should it ignore the fetter of technicality and consider the pleadings and evidence brought on record as well as the subsequent facts which are incontrovertible so that the lis is put to rest. (Paras 27 and 28)

Mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be mental cruelty in the life of two individuals belonging to a particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society. The agonised feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances. Having regard to the facts and the circumstances of the present case, it must be held that the decree of divorce granted by the High Court deserves to be affirmed singularly on the ground of mental cruelty. (Paras 42 and 44)

Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778; *Samar Ghosh v. Jaya Ghosh,* (2007) 4 SCC 511; *Vishwanath Agrawal v. Sarla Vishwanath Agrawal,* (2012) 7 SCC 288 : (2012) 4 SCC (Civ) 224 : (2012) 3 SCC (Cri) 347; U. *Sree v. U. Srinivas,* (2013) 2 SCC 114 : (2013) 1 SCC (Civ) 1002 : (2013) 1 SCC (Cri) 858; *K. Srinivas Rao v. D.A. Deepa,* (2013) 5 SCC 226 : (2013) 2 SCC (Civ) 775 : (2013) 2 SCC (Cri) 963, *relied on*

The issue of mental cruelty should be addressed in the present case by the Supreme Court for the sake of doing complete justice. It is the bounden duty of the Supreme Court to do so and not to leave the partiesto fight the battle afresh after expiry of thirteen years of litigation. Dealing with the plea of mental cruelty which is perceptible from the material on record would not affect any substantive right of the appellant. It would be only condoning a minor technical aspect. Administration of justice provokes the Court's judicial conscience that it is a fit case where the plenitude of power conferred on the Supreme Court under Article 142 of the Constitution deserves to be invoked, more so, when the ground is statutorily permissible. By such exercise it would neither be supplanting the substantive law nor would it be building a structure which does not exist. It would be logical to do so and illogical to refrain from doing so. (Para 28)

In the present case, the wife's allegations that the sister and brother-in-law of the husband used to interfere in the day-to-day affairs of the husband and that the sister and brother-in-law of the husband were pressurising him not to allow the wife to prosecute higher studies and to keep her as an unpaid servant in the house were not proven. The allegation that the husband was instigated to keep her at home as an unpaid servant is quite a disturbing allegation when viewed from the spectrum of gender sensitivity and any sensitive person would be hurt when his behaviour has remotely not reflected that attitude. As the evidence would show, the husband despite all his cooperation as a father, when had gone to the hospital to bring the wife and child to his house, she along with the child had gone to her parental house. This aspect of the evidence has gone totally unchallenged. Perceived from a social point of view, it reflects the egocentric attitude of the wife and her non-concern how such an act is likely to hurt the father of the child. The next thing that has come in evidence is that the respondent was not invited at the time of naming ceremony of the child. A suggestion has been given that they did not attend the ceremony as in the invitation card the names of the parents of the husband had not been printed. It has been asserted by the husband that the said incident had caused him tremendous mental pain. Viewed from a different angle, it tantamounts to totally ignoring the family of the husband. Further, it appears that the wife went to Gulbarga to join her studies and the husband was not aware of it and only came to know when one professor told about it. Thereafter he went to Gulbarga and stayed in a hotel and met the wife in the hostel on both the days. Despite his request to come to the house she showed disinclination. When he enquired about the child, he was told that the child was in her mother's house. These are the incidents which are antecedent to the filing of the petition. (Paras 36 and 37)

Thus the husband has reasons to feel that he has been humiliated, for allegations have been made against him which are not correct; his relatives have been dragged into the matrimonial controversy, the assertions in the written statement depict him as if he had tacitly conceded to have harboured notions of gender insensitivity or some kind of male chauvinism, his parents and he are ignored in the naming ceremony of the son, and he comes to learn from others that the wife had gone to Gulbarga to prosecute her studies. That apart, the communications, after the decree for restitution of conjugal rights, indicate the attitude of the wife as if she is playing a game of chess. The launching of criminal prosecution can be perceived from the spectrum of conduct. The Magistrate has recorded the judgment of acquittal. The wife had preferred an appeal before the High Court after obtaining leave. After the State Government prefers an appeal in the Court of Session, she chooses to withdraw the appeal. But she intends, as the pleadings would show, that the case should reach the logical conclusion. This conduct manifestly shows the widening of the rift between the parties. It has only increased the bitterness. In such a situation, the

husband is likely to lament in every breath and the vibrancy of life melts to give way to sad story of life. (Para 43)

From this kind of attitude and treatment it can be inferred that the husband has been treated with mental cruelty and definitely he has faced ignominy being an Associate Professor in a Government Medical College. When one enjoys social status working in a government hospital, this humiliation affects the reputation. That apart, it can be well imagined the slight he might be facing. In fact, the chain of events might have compelled him to go through the whole gamut of emotions. It certainly must have hurt his self-respect and human sensibility. The sanguine concept of marriage presumably has become illusory and it would not be inapposite to say that the wife has shown anaemic emotional disposition to the husband. (Para 44)

That apart, the High Court has returned a finding that the marriage has irretrievably been broken down. Of course, such an observation has been made on the ground of conduct. The Supreme Court in certain cases, has invoked the principle of irretrievably breaking down of marriage. (Para 41)

Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511; *G.V.N. Kameswara Rao v. G. Jabilli,* (2002) 2 SCC 296; *Parveen Mehta v. Inderjit Mehta,* (2002) 5 SCC 706; *Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate,* (2003) 6 SCC 334; *Durga Prasanna Tripathy v. Arundhati Tripathy,* (2005) 7 SCC 353; *Naveen Kohli v. Neelu Kohli,* (2006) 4 SCC 558, *considered*

Lachman Utamchand Kirpalani v. Meena, AIR 1964 SC 40; *K. Narayanan v. K. Sreedevi,* AIR 1990 Ker 151; *Mohinder Singh v. Harbans Kaur,* AIR 1992 P&H 8; *Indira Gangele v. Shailendra Kumar Gangele,* AIR 1993 MP 59, referred to

Both the appellant and the respondent are doctors and have their respective jobs.

The son is hardly sixteen years old and definitely would require financial support for education and other supportive things to lead a life befitting his social status. Duty of the Supreme Court is to see that the young son born in the wedlock must get acceptable comfort as well as proper education. It is the duty of the Court also to see that a minor son should not live in discomfort or should be deprived of requisite modern education. The High Court, while granting a decree for divorce should have adverted to it. However, it would not be appropriate to keep anything alive in this regard between the parties. The controversy is to be put to rest on this score also. (Paras 45 and 47)

Although the appellant is earning but that does not necessarily mean that the father should be absolved of his liability. Considering the totality of circumstances, the status the appellant enjoys and the strata to which the parties belong, it becomes the bounden duty of the respondent to provide for maintenance and education for the son who is sixteen years old. Regard being had to the social status and strata and the concept of effective

availing of education, a sum of Rs 25 lakhs is fixed excluding the amount already paid towards the maintenance and education of the son. The said amount shall be deposited by the respondent within a period of six months before the Principal Judge, Family Court at Bangalore and the amount shall be kept in a fixed deposit in a nationalised bank in the joint account of the appellant and the minor son so that she can draw quarterly interest and expend on her son. After the son attains majority the joint account shall continue and they would be at liberty to draw the amount for the education or any urgent need of the son. (Paras 45 and 47)

B.V. Ravi v. Malathi Ravi, MFA No. 9164 of 2004, decided on 11-9-2009 (KAR), *affirmed*

R-D/53464/CV

Advocates who appeared in this case:

Shanth Kr. V. Mohale, Harisha S.R., Amith J. and Rajesh Mahale, Advocates, for the Appellant;

Balaji Srinivasan, Mayank Kshirsagar, Ms Vaishali Dixit and Ms Srishti Govil, Advocates, for the Respondent.

Chronological list of cases cited on page(s)

1. (2013) 5 SCC 226 : (2013) 2 SCC (Civ) 775 : (2013) 2 SCC (Cri) 963, K. Srinivas Rao v. D.A. Deepa 658c-d, 658d

2. (2013) 2 SCC 114 : (2013) 1 SCC (Civ) 1002 : (2013) 1 SCC (Cri) 858, U. Sree v. U. Srinivas 658a-b

3. (2012) 7 SCC 288 : (2012) 4 SCC (Civ) 224 : (2012) 3 SCC (Cri) 347, Vishwanath Agrawal v. Sarla Vishwanath Agrawal 657e-f, 657g

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6. (2007) 4 SCC 511, Samar Ghosh v. Jaya Ghosh 656c-d, 657b-c, 658c-d, 660c-d

7. (2006) 4 SCC 558, Naveen Kohli v. Neelu Kohli 660d

8. (2006) 3 SCC 778, Vinita Saxena v. Pankaj Pandit 655g-h

9. (2005) 7 SCC 353, Durga Prasanna Tripathy v. Arundhati Tripathy 660c-d

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11. (2003) 6 SCC 334, Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate 660c-d

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18.	AIR 1964 SC 40, Lachman Utamchand Kirpalani v. Meena	651d-e, 652g-h
19.	AIR 1957 SC 176, Bipinchandra Jaisinghbhai Shah v. Prabhavati	52f-g

The Judgment of the Court was delivered by

Dipak Misra, J.—Leave granted. Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond.

2. The case at hand initiated by the husband for dissolution of marriage was viewed from a different perspective by the learned Family Court Judge who declined to grant divorce as the factum of desertion as requisite in law was not proved but the High Court, considering certain facts and taking note of subsequent events for which the appellant was found responsible, granted divorce. The High Court perceived the acts of the appellant as a reflection of attitude of revenge in marriage or for vengeance after the reunion pursuant to the decree for restitution of marriage. The justifiability of the said analysis within the parameters of Section 13(1) of the Hindu Marriage Act, 1955 (for brevity "the Act") is the subject-matter of assail in this appeal, by special leave, wherein the judgment and decree dated 11.09.2009 passed by the High Court of Karnataka in B.V. Ravi v. Malathi Ravi[1] reversing the decree for restitution of conjugal rights granted in favour of the wife and passing a decree for dissolution of marriage by way of divorce allowing the petition preferred by the respondent-husband, is called in question.

3. The respondent-husband, an Associate Professor in Ambedkar Medical College, Kadugondanahalli, Bangalore, filed a petition, M.S. No. 5 of 2001 under Section 13(1) the Act seeking for a decree for judicial separation and dissolution of marriage.

1 B.V. Ravi v. Malathi Ravi , MFA No. 9164 of 2004 decided on 11-9-2009

However, in course of the proceeding the petition was amended abandoning the prayer for judicial separation and converting the petition to one under Section 13(1)(i-b) of the Act seeking dissolution of marriage by way of divorce.

4. In the petition filed before the Family court, it was averred by the respondent-husband that the marriage between the parties was solemnized in accordance with Hindu Rites and customs on 23.11.1994. After the marriage the husband and wife stayed together for one and a half years in the house of the father of the husband but from the very first day the appellant-wife was non-cooperative, arrogant and her behaviour towards the family members of the husband was unacceptable. Despite the misunderstanding, a male child was born in the wedlock and thereafter, the wife took the child and left the house and chose not to come back to the husband or his family for a period of three years. It was pleaded that there had been a marital discord and total non-compatibility, and she had deserted him severing all ties. It was also alleged that she had left the tender child in the custody of her parents and joined a post graduate course in the Medical College of Gulbarga. All the efforts by the husband to bring her back became an exercise in futility inasmuch as the letters written by him were never replied. Despite the non-responsive attitude of the wife, he, without abandoning the hope for reconciliation for leading a normal married life, went to the house of his in-laws, but her parents ill treated him by forcibly throwing him out of the house.

5. It was the assertion of the husband that after she completed her course, she started staying with her parents along with the child at Bangalore and neither he nor his family members were invited for the naming giving ceremony of the child. As set forth, the conduct of the wife caused immense mental hurt and trauma, and he suffered unbearable mental agony when the family members of his wife abused and ill treated him while he had gone to pacify her and bring her back to the matrimonial home. All his solicitations and beseechments through letters to have normalcy went in vain which compelled him to issue a notice through his counsel but she chose not to respond to the same. Under these circumstances, the petition was filed for judicial separation and thereafter, as has been stated earlier, prayer was amended seeking dissolution of marriage on the ground of desertion since she had deliberately withdrawn from his society.

6. The wife filed objections contending, inter alia, that when she was residing in the matrimonial home, the sister and brother-in-law of the husband, who stayed in the opposite house, were frequent visitors and their interference affected the normal stream of life of the couple. They influenced the husband that he should not allow

his wife to prosecute her studies and be kept at home as an unpaid servant of the house. The husband, as pleaded, was torn in conflict as he could not treat the wife in the manner by his sister and brother-in-law had desired and also could not openly express disagreement. At that juncture, as she was in the family way, as per the customs, she came to her parental home and by the time the child was born the sister and brother-in-law had been successful in poisoning the mind of the husband as a result of which neither he nor his relatives, though properly invited, did not turn up for the naming ceremony. All her attempts to come back to the matrimonial home did not produce any result since the husband was acting under the ill-advice of his sister and brother-in-law. It was put forth that he had without any reasonable cause or excuse refused to perform his marital obligations. The plea of mental hurt and trauma was controverted on the assertion that she had never treated him with cruelty nor was he summarily thrown out of the house of her parents.

7. Be it stated, the wife in the same petition filed an application under Section 9 of the Act for restitution of conjugal rights to which an objection was filed by the husband stating, inter alia, that no case had been made out for restitution of conjugal rights but, on the contrary, vexatious allegations had been made. It was further averred that the wife had deserted him for more than five years and she had been harassing him constantly and consistently.

8. In support of their respective pleas the husband and wife filed evidence by way of affidavit and were crossexamined at length by the other side. On behalf of the husband 12 documents were exhibited as Exts. P-1 to P-12 and the wife examined one witness and exhibited four documents, Exts. R-1 to R-4.

9. The family court formulated the following points for consideration:-

> *"(1) Whether the petitioner proves that respondent assaulted him for a continuous period of not less than 2 years immediately proceeding the presentation of the petition?*
>
> *(2) Whether the respondent proves that the petitioner without reasonable excuse withdrawn from the society?*
>
> *(3) Whether the petitioner is entitled for decree of divorce as prayed for?*
>
> *(4) Whether the respondent is entitled for decree of restitution of conjugal right as prayed for?*
>
> *(5) What order?"*

10. The learned Principal Judge of the family court, appreciating the oral and documentary evidence on record came to hold that the material on record gave an impression that there was no scuffle between the husband and the wife; that even after the birth of the child the husband and his family members used to visit the wife at her parental home to see the child; that there was no material on record to show that when he went to his inlaws house to see the child, he was ill-treated in any manner; that after the child was born he had taken the child along with her for vaccination and spent sometime; that though the husband and his relatives were invited for naming ceremony of the child, they chose not to attend; that the husband was able to recognize his son from the photograph in Ext. R-2; that the plea of the husband that he was not allowed to see the child did not deserve acceptation; that the circumstances did not establish that wife had any intention to bring the conjugal relationship to an end but, on the contrary, she was residing in her parents' house for delivery and then had to remain at Gulbarga for prosecuting her higher studies; that while she was studying at Gulbarga, as is evident from Ext. R-4, the husband stayed there for two days, i.e., 27.5.1999 and 28.5.1999; that from the letters vide Exts. P-3, P-7, P-9 and P-11 nothing was discernible to the effect that the wife went to Gulbarga for her studies without his permission and she had deserted him; that the husband had not disclosed from what date he stopped visiting the house of the wife's parents after the birth of the child; that the letters written by the husband did not reflect the noncooperative conduct of the wife; that there was no sufficient evidence to come to a definite conclusion that the wife had deserted the husband with an intention to bring the matrimonial relationship to an end; that assuming there was desertion yet the same was not for a continuous period of two years immediately preceding the presentation of the petition; that the husband only wrote letters after 15.9.1999 and nothing had been brought on record to show what steps he had taken for resumption of marital ties with the wife if she had deserted him; that the wife was not allowed to come back to the matrimonial home because of intervention of his sister and brother-inlaw; that the explanation given by the wife to her nonresponse to the letters was that when she was thinking to reply the petition had already been filed was acceptable; that as the husband was working at Ambedkar Medical College in the Department of Biochemistry and wife had joined in the Department of Pathology which would show that she was willing to join the husband to lead a normal marital life; and that it was the husband who had withdrawn from the society of the wife without any reasonable cause. Being of this view, the learned Family Judge dismissed the application for divorce and allowed

the application of the wife filed under Section 23(a) read with Section 9 of the Act for restitution of conjugal rights.

11. After the said judgment and decree was passed by the learned Family Judge, the respondent did not prefer an appeal immediately. He waited for the wife to join and for the said purpose he wrote letters to her and as there was no response, he sent a notice through his counsel. The wife, eventually, joined on 22.8.2004 at the matrimonial house being accompanied by her relative who was working in the Police Department. As the turn of events would uncurtain, the wife lodged an FIR No. 401/2004 dated 17.10.2004 at Basaveshwaranagar alleging demand of dowry against the husband, mother and sister as a consequence of which the husband was arrested being an accused for the offences under Section 498A and 506 read with Section 34 of the Indian Penal Code and also under the provisions of Dowry Prohibition Act. He remained in custody for a day until he was enlarged on bail. His parents were compelled to hide themselves and moved an application under Section 438 of the Code of Criminal Procedure and, ultimately, availed the benefit of said provision.

12. After all these events took place, the husband preferred an appeal along with application for condonation of delay before the High Court which formed the subjectmatter of M.F.A. No. 9164/04 (FC). The High Court condoned the delay, took note of the grounds urged in the memorandum of appeal, appreciated the subsequent events that reflected the conduct of the wife and opined that the attitude of the wife confirmed that she never had the intention of leading a normal married life with the husband and, in fact, she wanted to stay separately with the husband and dictate terms which had hurt his feelings. The High Court further came to the conclusion that the husband had made efforts to go to Gulbarga on many an occasion, tried to convince the wife to come back to the matrimonial home, but all his diligent efforts met with miserable failure. As the impugned judgment would reflect, the behaviour of the wife established that she deliberately stayed away from the marital home and intentionally caused mental agony by putting the husband and his family to go through a criminal litigation. That apart, the High Court took the long separation into account and, accordingly, set aside the judgment and decree for restitution of conjugal rights and passed a decree for dissolution of marriage between the parties.

13. We have heard Mr. Shanth Kumar V. Mohale, learned counsel for the appellant and Mr. Balaji Srinivasan, learned counsel for the respondent.

14. Assailing the legal sustainability of the judgment of the High Court, Mr. Shanth Kumar, learned counsel appearing for the appellant, submitted that when the petition for divorce was founded solely on the ground of desertion and a finding was returned by the family court that the ingredients stipulated under Section 13(1)(i-b) of the Act were not satisfied making out a case of desertion on the part of the wife, the High Court should have concurred with the same and not proceeded to make out a case for the respondent-husband on the foundation of mental cruelty. It is urged by him that the High Court has taken note of subsequent events into consideration without affording an opportunity to the appellant to controvert the said material and that alone makes the decision vulnerable in law.

15. The Learned counsel would submit that the High Court has erroneously determined the period of communication of letters and the silence maintained by the wife which is factually incorrect and, in fact, the concept of desertion, as is understood in law, has not been proven by way of adequate evidence but, on the contrary, the analysis of evidence on record by the Family Court goes a long way to show that there was, in fact, no desertion on the part of the wife to make out a case for divorce. It is his further submission that the High Court has opined that the marriage between the parties had irretrievably been broken and, therefore, it was requisite to grant a decree for dissolution of marriage by divorce which cannot be a ground for grant of divorce. Learned counsel has placed reliance on the decisions in ***Lachman Utamchand Kirpalani v. Meena***[2]***, K. Narayanan v. K. Sreedevi***[3]***, Mohinder Singh v. Harbens Kaur***[4] ***and Smt. Indira Gangele v. Shailendra Kumar Gangele***[5].

16. Mr. Balaji Srinivasan, learned counsel for the respondent-husband, has urged that if the petition filed by the husband is read in entirety, it would be clear that the husband had clearly pleaded about the mental hurt and trauma that he had suffered because of the treatment meted out to him by his wife and her family members. He has drawn our attention to the evidence to show that for a long seven and a half years despite the best efforts he could not get marital cooperation from his wife and as the High Court has accepted the same, the impugned judgment[1] is flawless. He has highlighted about the nonresponsive proclivity of the wife when she chose not to reply to the letters of the husband beseeching her to join his company while she was staying at Gulbarga. He has also drawn our attention to the cross-examination of the husband where he has deposed that after the delivery of the son on 12.1.1998 when

2 AIR 1964 SC 40

3 AIR 1990 Ker 151

4 AIR 1992 P&H 8

5 AIR 1993 MP 59

she was discharged, he and his mother had gone to bring the wife and the child to their home but she went to her parental home and further neither he nor his family members were invited for the naming ceremony which was performed in October, 1998.

17. The Learned counsel has drawn our attention to the subsequent events which have been brought on record by way of affidavit as well as the rejoinder filed by the appellant-wife to the counter affidavit to highlight the subsequent conduct for the purpose of demonstrating the cruel treatment of the wife. It is canvassed by him that the subsequent events can be taken note of for the purpose of mental cruelty by this Court and the decree of divorce granted by the High Court should not be disturbed.

18. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the petition and the evidence adduced by the parties and the judgment of the Family Court and that of the High Court. The plea that was raised for grant of divorce was under Section 13(1)(i-b) of the Act. It provides for grant of divorce on the ground of desertion for a continuous period of not less than two year immediately preceding the presentation of the petition. The aforesaid provision stipulates that a husband or wife would be entitled to a dissolution of marriage by decree of divorce if the other party has deserted the party seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition. Desertion, as a ground for divorce, was inserted to Section 13 by Act 68/1976. Prior to the amendment it was only a ground for judicial separation.

19. Dealing with the concept of desertion, this Court in ***Savitri Pandey v. Prem Chandra Pandey***[6] has ruled thus: (SCC pp. 80-81, para 8)

> *"8. 'Desertion', for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous*

6 (2002) 2 SCC 73

course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in ***Bipinchandra Jaisinghbai Shah v. Prabhavati***[7] *held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion.*

20. In the said *Savitri Pandey case*[6], reference was also made to *Lachman Utamchand Kirpalani's case*[2] wherein it has been held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

21. In the case at hand, the Family Court, on the basis of the evidence brought on record, has recorded a finding that there was no desertion for a continuous period of two years. The High Court has reversed it by emphasizing on certain aspects of conduct. Analysing the evidence, we are of the considered opinion that it is not established that the appellant-wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. It is because the petition was presented in the year 2001 and during the cross-examination of the husband it has been admitted by him that he had gone to Gulbarga in May, 1999 for two days. The Family Court, on the basis of material brought on record, has opined that there is no sufficient evidence to come to a definite conclusion that the wife deserted him with intention to bring the matrimonial relationship to an end and further the period of two years was not completed. The High Court, as it seems to us, has not dealt with this aspect in an appropriate manner and opined that the wife had no intention to lead a normal married life with the husband. Therefore, the allegation of desertion, as enshrined under Section 13(1)(i-b) has not been

7 AIR 1957 SC 176

established. The finding on that score as recorded by the learned Principal Judge, Family Court, deserves to be affirmed and we so do.

22. Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1)(i-b). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

23. First we intend to state the subsequent events. As has been narrated earlier, after the application of the wife was allowed granting restitution of conjugal rights, the husband communicated to her to join him, but she chose not to join him immediately and thereafter went to the matrimonial home along with a relative who is a police officer. After she stayed for a brief period at the matrimonial home, she left her husband and thereafter lodged FIR No. 401/2004 on 17.10.2004 for the offences under Sections 498A and 506/34 of the Indian Penal Code and the provisions under Dowry Prohibition Act, 1961 against the husband, his mother and the sister. Because of the FIR the husband was arrested and remained in custody for a day. The ladies availed the benefit of anticipatory bail. The learned trial Magistrate, as we find, recorded a judgment of acquittal. Against the judgment of acquittal, the appellant preferred an appeal before the High Court after obtaining special leave which was ultimately dismissed as withdrawn since in the meantime the State had preferred an appeal before the Court of Session. At this juncture, we make it absolutely clear that we will not advert to the legal tenability of the judgment of acquittal as the appeal, as we have been apprised, is subjudice. However, we take note of certain aspects which have been taken note of by the High Court and also brought on record for a different purpose.

24. The seminal question that has to be addressed is whether under these circumstances the decree for divorce granted by the High Court should be interfered with. We must immediately state that the High Court has referred to certain grounds stated in the memorandum of appeal and taken note of certain subsequent facts. We accept the submission of the learned counsel for the appellant that the grounds stated in the memorandum of appeal which were not established by way of evidence could not have been pressed into service or taken aid of. But, it needs no special emphasis to state that the subsequent conduct of the wife can be taken into consideration. It

settled in law that subsequent facts under certain circumstances can be taken into consideration.

25. In ***A. Jayachandra v. Aneel Kaur***[8] it has been held thus: (SCC p.32, para 16)

> *"16. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct."*

26. In ***Suman Kapur v. Sudhir Kapur***[9] this Court had accepted what the High Court had taken note of despite the fact that it was a subsequent event. It is necessary to reproduce the necessary paragraphs from the said decision to perceive the approach of this Court: (SCC pp 437, paras 46-47)

> *"46. The High Court further noted that the appellant wife sent a notice through her advocate to the respondent husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income tax return, the husband mentioned the social security number of his wife as 476-15-6010, a number which did not belong to the appellant wife, but to some American lady (Sarah Awegtalewis).*
>
> *47. The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving social security number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in social security number, the appellant wife had gone to the extent of making serious allegation that the respondent had married an American woman whose social security number was wrongly typed in the income tax return of the respondent husband."*

27. From the acceptance of the reasons of the High Court by this Court, it is quite clear that subsequent events which are established on the basis of non-disputed material brought on record can be taken into consideration. Having held that, the question would be whether a decree for divorce on the ground of mental cruelty can be granted. We have already opined that the ground of desertion has not been proved. Having not accepted the ground of desertion, the two issues that remain

8 (2005) 2 SCC 22

9 (2009) 1 SCC 422

for consideration whether the issue of mental cruelty deserves to be accepted in the obtaining factual matrix in the absence of a prayer in the relief clause, and further whether the situation has become such that it can be held that under the existing factual scenario it would not be proper to keep the marriage ties alive.

28. The learned counsel for the appellant has urged with vehemence that when dissolution of marriage was sought on the ground of desertion alone, the issue of mental cruelty can neither be raised nor can be addressed to. Regard being had to the said submission, we are constrained to pose the question whether in a case of the present nature we should require the respondent-husband to amend the petition and direct the learned Family Judge to consider the issue of mental cruelty or we should ignore the fetter of technicality and consider the pleadings and evidence brought on record as well as the subsequent facts which are incontrovertible so that the lis is put to rest. In our considered opinion the issue of mental cruelty should be addressed to by this Court for the sake of doing complete justice. We think, it is the bounden duty of this Court to do so and not to leave the parties to fight the battle afresh after expiry of thirteen years of litigation. Dealing with the plea of mental cruelty which is perceptible from the material on record would not affect any substantive right of the appellant. It would be only condoning a minor technical aspect. Administration of justice provokes our judicial conscience that it is a fit case where the plentitude of power conferred on this Court under Article 142 deserves to be invoked, more so, when the ground is statutorily permissible. By such exercise we are certain that it would neither be supplanting the substantive law nor would it be building a structure which does not exist. It would be logical to do so and illogical to refrain from doing so.

29. Before we proceed to deal with the issue of mental cruelty, it is appropriate to state how the said concept has been viewed by this Court. In ***Vinit Saxena v. Pankaj Pandit***[10], while dealing with the issue of mental cruelty, the Court held as follows: (SCC pp. 796-97, paras 31 & 35)

> *"31. It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the*

10 (2006) 3 SCC 778

continued living together of spouses harmful or injurious having regard to the circumstances of the case.

* * *

35. Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered."

30. In ***Samar Ghosh v. Jaya Ghosh***[11], this Court has given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Court itself has observed that they are illustrative and not exhaustive. We think it appropriate to reproduce some of the illustrations: (SCC pp. 546-47, para 101)

"(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.

* * *

(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.

* * *

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

* * *

11 (2007) 4 SCC 511

(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.

xxx xxx xxx

(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."

31. In the said case the Court has also observed thus: (*Samar Ghosh case*[11], SCC pp. 545-46, paras 99-100)

"99. … The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances…."

32. In ***Vishwanath Agrawal v. Sarla Vishwanath Agrawal***[12], while dealing with mental cruelty, it has been opined thus: (SCC p. 298, para 22)

12 (2012) 7 SCC 288

> *"22. The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status."*

33. In the said case, analyzing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows: (*Vishwanath Agrawal case*[12], SCC p. 307, para 54)

> *"54. ... In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."*

34. In ***U. Sree v. U. Srinivas***[13], the Court, taking note of the deposition of the husband that the wife had consistently ill treated him inasmuch as she had shown her immense dislike towards his "sadhna" in music and had exhibited total indifference to him, observed as follows: (SCC p. 127, para 23)

> *"23. ... It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him remarried for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family."*

35. In ***K. Srinivas Rao v. D.A. Deepa***[14], while dealing with the instances of mental cruelty, the court opined that to the illustrations given in the case of Samar Ghosh certain other illustrations could be added. We think it seemly to reproduce the observations: (K. Srinivas Rao v. D.A. Deepa[14], SCC p. 234, para 16)

13 (2013) 2 SCC 114

14 (2013) 5 SCC 226

> *"16. ... 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."*

36. Presently, we shall advert to the material on record. It is luminous from it that the wife has made allegations that the sister and brother-in-law of the husband used to interfere in the day-to-day affairs of the husband and he was caught in conflict. The said aspect has really not been proven. It has been brought on record that the sister and brother-in-law are highly educated and nothing has been suggested to the husband in the cross-examination that he was pressurized by his sister in any manner whatsoever. It is her allegation that the sister and brother-in-law of the husband were pressurizing him not to allow the wife to prosecute higher studies and to keep her as an unpaid servant in the house. On a studied evaluation of the evidence and the material brought on record it is demonstrable that the wife herself has admitted that the husband had given his consent for her higher education and, in fact, assisted her. Thus, the aforesaid allegation has not been proven. The allegation that the husband was instigated to keep her at home as an unpaid servant is quite a disturbing allegation when viewed from the spectrum of gender sensitivity and any sensitive person would be hurt when his behavior has remotely not reflected that attitude. The second aspect which has surfaced from the evidence is that the wife had gone to the parental home for delivery and therefrom she went to the hospital where she gave birth to a male child. However, as the evidence would show, the husband despite all his co-operation as a father, when had gone to the hospital to bring the wife and child to his house, she along with the child had gone to her parental house. This aspect of the evidence has gone totally unchallenged. Perceived from a social point of view, it reflects the egocentric attitude of the wife and her non-concern how such an act is likely to hurt the father of the child. The next thing that has come in evidence is that the respondent was not invited at the time of naming ceremony. He has categorically disputed the suggestion that he and his family members were invited to the ceremony. It is interesting to note that a suggestion has been given that they did not attend the ceremony as in the invitation card the names of the parents of the husband had not been printed. It has been asserted by the husband that the said incident had caused him tremendous mental pain. View from a different angle, it tantamounts to totally ignoring the family of the husband.

37. Another incident deserves to be noted. The wife went to Gulbarga to join her studies and the husband was not aware of it and only come to know when one professor told about it. Thereafter he went to Gulbarga and stayed in a hotel and met the wife in the hostel on both the days. Despite his request to come to the house she showed disinclination. When he enquired about the child, he was told that the child was in her mother's house. These are the incidents which are antecedent to the filing of the petition.

38. We have already stated the legal position that subsequent events can be taken note of. After the judgment and decree was passed by the learned Family Judge, the husband sent a notice through his counsel dated 14.7.2004 and intimated her as follows: -

> *"According to the operative portion of the order, my client has to welcome you to join him with the child within three months which please note.*
>
> *My client's address is Dr. B.V. Ravi, M.D., residing in No. 428. 2nd Across, 6th Main, 3rd Stage, 3rd Block, Basaveshwaranagar, Bangalore-79 and his Telephone No. 23229865. In obedience to the Hon'ble Court order, you called upon to join Dr. B.V. Ravi to the above said address any day after 18th of July, 2004, as this period upto 17th is inauspicious because of 'Ashada'."*

39. As it appears, she did not join and the husband was compelled to send a telegram. Thereafter, on 13.8.2004 a reply was sent on her behalf that she would be joining after 15.8.2004 but the exact date was not intimated. Thereafter, on 14.8.2004 a reply was sent to the legal notice dated 14.7.2004 sent by the husband. It is appropriate to reproduce the relevant two paragraphs:-

> *"In this context, we hereby inform you that our client will be coming to join your client in the above said address along with the child on Sunday the 22nd August 2004 as the auspicious NIJASHRAVANA MONTH commences from 16th August 2004.*
>
> *Further our client expects reasonable amount of care and cordiality from your client's side. Please ensure the same."*

40. The purpose of referring to these communications is that despite obtaining decree for restitution of conjugal rights the wife waited till the last day of the expiration of the period as per the decree to join the husband. There may be no legal fallacy, but the attitude gets reflected. The reply also states that there is expectation of reasonable amount of care and cordiality. This reflects both, a sense of doubt and a hidden threat. As the facts unfurl, the wife stays for two months and then leaves

the matrimonial home and lodges the first information report against the husband and his mother and sister for the offences punishable under Sections 498A, 506/34 of the Indian Penal Code and under the provisions of Dowry Prohibition Act. The husband suffers a day's custody and the mother and the sister availed anticipatory bail.

41. The High Court has taken note of all these aspects and held that the wife has no intention to lead a normal marital life. That apart, the High Court has returned a finding that the marriage has irretrievably been broken down. Of course, such an observation has been made on the ground of conduct. This Court in certain cases, namely, ***G.V.N. Kameswara Rao v. G. Jabilli***[15]***, Parveen Mehta v. Inderjit Mehta***[16]***, Vijayakumar R. Bhate v. Neela Vijayakumar Bhate***[17]***, Durga Prasanna Tripathy v. Arundhati Tripathy***[18]***, Naveen Kohli v. Neelu Kohli***[19] and *Samar Ghosh v. Jaya Ghosh*[11], has invoked the principle of irretrievably breaking down of marriage.

42. For the present, we shall restrict our delineation to the issue whether the aforesaid acts would constitute mental cruelty. We have already referred to few authorities to indicate what the concept of mental cruelty means. Mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be a mental cruelty in the life of two individuals belonging to particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society. The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances.

43. As we have enumerated the incidents, we are disposed to think that the husband has reasons to feel that he has been humiliated, for allegations have been made against him which are not correct; his relatives have been dragged into the matrimonial controversy, the assertions in the written statement depict him as if he had tacitly conceded to have harboured notions of gender insensitivity or some kind of male chauvinism, his parents and he are ignored in the naming ceremony of the son, and he comes to learn from others that the wife had gone to Gulbarga to prosecute her studies. That apart, the communications, after the decree for restitution of conjugal rights, indicate the attitude of the wife as if she is playing a game of Chess. The

15 (2002) 2 SCC 296
16 (2002) 5 SCC 706
17 (2003) 6 SCC 334
18 (2005) 7 SCC 353
19 (2006) 4 SCC 558

launching of criminal prosecution can be perceived from the spectrum of conduct. The learned Magistrate has recorded the judgment of acquittal. The wife had preferred an appeal before the High Court after obtaining leave. After the State Government prefers an appeal in the Court of Session, she chooses to withdraw the appeal. But she intends, as the pleadings would show, that the case should reach the logical conclusion. This conduct manifestly shows the widening of the rift between the parties. It has only increased the bitterness. In such a situation, the husband is likely to lament in every breath and the vibrancy of life melts to give way to sad story of life.

44. From this kind of attitude and treatment it can be inferred that the husband has been treated with mental cruelty and definitely he has faced ignominy being an Associate Professor in a Government Medical College. When one enjoys social status working in a Government hospital, this humiliation affects the reputation. That apart, it can be well imagined the slight he might be facing. In fact, the chain of events might have compelled him to go through the whole gamut of emotions. It certainly must have hurt his self-respect and human sensibility. The sanguine concept of marriage presumably has become illusory and it would not be inapposite to say that the wife has shown anaemic emotional disposition to the husband. Therefore, the decree of divorce granted by the High Court deserves to be affirmed singularly on the ground of mental cruelty.

45. Presently, we shall proceed to deal with grant of maintenance. Both the appellant and the respondent are doctors and have their respective jobs. The son is hardly sixteen years old and definitely would require financial support for education and other supportive things to lead a life befitting his social status. The High Court, while granting a decree for divorce should have adverted to it. However, we do not think it appropriate to keep anything alive in this regard between the parties. The controversy is to be put to rest on this score also. Considering the totality of circumstances, the status the appellant enjoys and the strata to which the parties belong, it becomes the bounden duty of the respondent to provide for maintenance and education for the son who is sixteen years old.

46. At this juncture, we may note that a proceeding was initiated before the learned Principal Judge, Family Court, Bangalore and in the said proceeding the learned Principal Judge passed the following order: -

> *"Matter is settled before the mediation centre where in parties have entered into a memorandum of settlement.*

Contents of the Memorandum of Settlement are admitted by the Parties. Court is satisfied that the same is voluntary.

As per the terms of settlement para 5 clause (i) petitioner has deposited Rs.3,00,000/- in the name of minor child in Karnataka Bank, copy of fixed deposit receipt and R.D. Account pass book are filed along with memo. Hence petition is allowed in terms of settlement.

Memorandum of settlement shall be a part of the decree."

47. The learned counsel for the respondent would submit that the amount has been settled. Though there has been a settlement of Rs.3,00,000/- yet that was at a different time and under different circumstances. The present appeal was pending. The duty of this Court is to see that the young son born in the wedlock must get acceptable comfort as well as proper education. It is the duty of the Court also to see that a minor son should not live in discomfort or should be deprived of requisite modern education. We are conscious, the appellant is earning but that does not necessarily mean that the father should be absolved of his liability. Regard being had to the social status and strata and the concept of effective availing of education we fix a sum of Rs.25,00,000/- (twenty five lacs) excluding the amount already paid towards the maintenance and education of the son. The said amount shall be deposited by the respondent within a period of six months before the learned Principal Judge, Family Court at Bangalore and the amount shall be kept in a fixed deposit in a nationalized bank in the joint account of the appellant and the minor son so that she can draw quarterly interest and expend on her son. After the son attains majority the joint account shall continue and they would be at liberty to draw the amount for the education or any urgent need of the son.

48. With the aforesaid directions, we affirm the decree for divorce passed by the High Court. The appeal stands disposed of accordingly but without any order as to costs.

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(2013) 7 Supreme Court Cases 77

Shyam Narain v. The State of NCT of Delhi

(Before Dr. B. S. Chauhan and Dipak Misra JJ)

Shyam Narain ...Appellant
Versus
The State of NCT of Delhi ...Respondent

Criminal Appeal No. 1860 of 2010†,
decided on May 15, 2013

A. **Criminal Trial — Sentence — Particular offences — Rape and other sexual offences — Brutal rape of 8 year old girl — Sentence of RI for life — Justifiability — If may be reduced to minimum sentence (10 yrs) — Mitigating factors — What are — Absence of — Judicial discretion to impose maximal sentence of life imprisonment — Proper exercise of — Sensitivity of trial Judge and High Court in taking cognizance of sheer brutality of appellant and imposing appropriate punishment therefor, lauded**

— Young girl dealt with animal passion and her dignity and purity of physical frame was shattered — With the efflux of time, she would grow up with a traumatic experience, an unforgettable shame — She may not be able to assert the honour of a woman for no fault of hers — When she suffers, collective at large also suffers — Such a singular crime creates an atmosphere of fear which is historically abhorred by society and demands just punishment from the court

— Exercising discretion under S. 376(2)(f) IPC, sentence of RI for life, upheld — Appellant, held, did not deserve any mercy — Hence, plea of appellant-accused that he is a father of 4 children and their lives would be ruined, if sentence of RI for life is affirmed, rejected — Plea of impecuniosity, also rejected — Penal Code, 1860 — S. 376(2)(f) — Discretion of court under, to impose maximal sentence of life imprisonment — Proper exercise of

B. **Penal Code, 1860 — S. 376(2)(f) — Brutal rape of 8 year old girl — Conviction under S. 376£2)(f) and sentence of RI for life, confirmed — Appellant-accused came to the house of victim while her parents were away, gave her some intoxicating drink and raped her — As child was bleeding from her private parts, appellant took her to hospital where she told doctors that injuries were due to fall in**

† From the Judgment and Order dated 12-2-2009 of the High Court of Delhi at New Delhi in Crl. A. No. 772 of 2006

toilet — Later, victim broke down before her mother and told her as to how appellant had brutally raped her and threatened her that if she disclosed this to anyone, her life as well as her parents' lives would be in danger — Testimony of victim remained unimpeachable — As per treating doctors, hymen of victim was torn and evidence of sexual assault on her was positive — No evidence came from defence side — Appellant failed to disclose the reason for his presence in victim's house and under what circumstances he took her to hospital — Held, rape of victim by appellant in a cruel and brutal manner is fully established (Paras 9 to 11)

C. **Criminal Trial — Sentence — Principles for sentencing — Generally — Factors to be considered while imposing sentence for any offence, discussed — Penology — Sentencing policy — Retribution and deterrence — Just punishment alone satisfies the collective cry of society and also serves as a deterrent**

D. **Crimes Against Women and Children — Rape of minor — Need for just punishment to the offenders, highlighted — Held, inadequate punishment/sentence is injustice to both victim and society — Hence, maximal sentence of RI for life, affirmed — Penal Code, 1860, S. 376(2)(f)**

E. **Crimes Against Women and Children — Rape — Held, rape is a monstrous burial of dignity of a woman in the darkness — It is a crime against holy body of a woman and soul of the society — Constitution of India — Art. 21 — Right to life — Dignity of woman — Penal Code, 1860, Ss. 375 and 376**

The trial court and the High Court convicted the appellant-accused under Section 376 (2)(f) IPC for brutally raping an 8 year old girl and sentenced him to RI for life.

The appellant submitted that he is a father of four children and their lives would be ruined if the sentence of imprisonment for life is affirmed, hence the sentence should be reduced to 10 years of RI which is a minimum sentence stipulated in Section 376(2)(f) IPC. The other ground that was urged was an impecunious background.

Rejecting these submissions, and affirming the sentence of RI for life, the Supreme Court

Held :

Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric.

The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim. (Para 14)

Jamee/v. State ofU.P., (2010) 12 SCC 532 : (2011) 1 SCC (Cri) 582; *Shailesh Jasvantbhaiv. State of Gujarat,* (2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499; *State ofM.P. v. Babulal,* (2008) 1 SCC 234 : (2008) 1 SCC (Cri) 188; *Gopal Singh v. State ofUttarakhand,* (2013) 7 SCC 545, *relied on*

Friedman: Law in Changing Society; Halsbury's Laws of England, 4th Edn., Vol. 11, Para 482, cited

The legislature under Section 376(2)(/) IPC while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the court. Almost for the last three decades, the Supreme Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. In the present case, the victim was both physically and psychologically vulnerable. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. In such circumstances, the age-old wise saying that "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. (Paras 19 and 26)

Respect for reputation of women in society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other,

some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. In the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court. (Para 27)

The mitigating factors put forth by the appellant are meant to invite mercy but the factual matrix cannot allow the rainbow of mercy to magistrate. Exercising the judicial discretion, the sentence of rigorous imprisonment for life is maintained and the judgment of conviction and the order of sentence passed by the High Court is confirmed. (Para 28)

Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204 : 1992 SCC (Cri) 598; *State of A. P. v. Bodem Sundara Rao*, (1995) 6 SCC 230 : 1995 SCC (Cri) 1097; *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316; *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 : 2000 SCC (Cri) 755; *Jugendra Singh v. State of U.P.*, (2012) 6 SCC 297 : (2012) 3 SCC (Cri) 129, *followed*

Shyam Narain v. State, Criminal Appeal No. 772 of 2006, decided on 12-2-2009 (Del), affirmed

Shyam Narain v. State of Delhi, SLP (Cri) CRLMP No. 8974 of 2010, order dated 7-5-2010 (SC), referred to

Appeal dismissed 0-D/51845/CR

Advocates who appeared in this case:

Mohan Pandey, Lai Sincjh Thakur, Tabrez Ahmed and Parvez Dabas, Advocates, for the Appellant;

Paras Kuhad, Additional Solicitor General (B.V. Balaram Das, Harsh Prabhakar, Ms Swati Vijaywergiah, Chetan Chawla, Satya Siddiqui, D.S. Mahra and Ms Anil Katiyar, Advocates) for the Respondent.

Chronological list of cases cited on page(s)

1. (2013) 7 SCC 545, Gopal Singh v. State of Uttarakhand 86c

2. (2012) 6 SCC 297 : (2012) 3 SCC (Cri) 129, Jugendra Singh v. State of U.P. 87g

3.	(2010) 12 SCC 532 : (2011) 1 SCC (Cri) 582, Jameelv. State of U.P.	85a-b
4.	SLP (Cri) CRLMP No. 8974 of 2010, order dated 7-5-2010 (SC), Shyam Narain v. State of Delhi	8If
5.	Criminal Appeal No. 772 of 2006, decided on 12-2-2009 (Del), Shyam Narain v. State	8If
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8.	(2000) 4 SCC 75 : 2000 SCC (Cri) 755, Stare of Karnataka v. Krishnappa	87e
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11.	(1992) 3 SCC 204 : 1992 SCC (Cri) 598, Madan Gopal Kakkad v. Naval Dubey	86 f-g

The Judgment of the Court was delivered by

Dipak Misra, J. — The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a 'tsunami' of shock in the mind of the collective, send a chill in the spine of the society, destroy the civilized stems of the milieu and comatose the marrows of sensitive polity. It is brutal rape of an eight year old girl. The sensitive learned trial Judge, after recording conviction under Section 376(2) (f) of the Indian Penal Code (for short "IPC"), had taken note of the brutality meted out to the child and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- failing which to undergo rigorous imprisonment for six months. The Division Bench of the Delhi High Court has equally reflected its anguish over the crime by describing it as "pervaded with brutality" and "trauma which the young child would face all her life" and has concurred[1] with the sentence of imprisonment and the fine.

2. This Court, at the time of issuance of notice[2], had restricted it to the quantum of sentence. However, we shall dwell upon the merits of the case in brief.

3. The horrid episode as unfurled by prosecution is that on 29.10.2003, about 6.30 p.m., an eight year old child, daughter of one Binda Saha, was taken by the appellant to Lal Bahadur Shastri Hospital and from there, being referred, she was admitted in GTB Hospital, Shahdara, at 1.30 a.m. on 30.10.2003. The young girl, as recorded in MLC Ext.PW-10/D, had stated that she had fallen down in the toilet about 2.00 p.m. on 29.10.2003 as a consequence of which she had sustained the injuries. The

1 Shyam Narain v. State, Criminal Appeal No. 772 of 2006, decided on 12-2-2009 (Del)

2 Shyam Narain v. State, SLP (Cri) CRLMP No. 8974 of 2010, order dated 7-5-2010 (SC), wherein it was directed
"Issue notice on the application for delay as well as on the quantum of sentence."

treating doctor, Dr. Anju Yadav, was not convinced with what was being narrated to her. As the factual narration would reflect, the duty constable informed the local police station, i.e., P.S. Kalyanpuri, about the admission of the young girl (hereinafter whom we shall refer to as 'M') and her condition, as recorded in the MLC. The child remained in the hospital for six days and thereafter she was discharged.

4. The anxious mother, unable to digest the story that was told to her by the daughter, asked her to muster courage and tell the truth to her. The young 'M' gained confidence and, eventually, on 10.11.2003, broke down before her mother and told her how the appellant had brutally raped her and threatened her that if she disclosed the said fact to anyone, her life as well as the lives of her parents would be in danger. The disturbed father proceeded to the police station and informed what was told by his daughter and, accordingly, an FIR was registered. After the criminal law was set in motion, the investigating agency arrested the accused and, eventually, the accused-appellant was sent up for trial. The accused pleaded innocence and claimed to be tried.

5. The prosecution, in order to establish the charge levelled against the accused, examined 11 witnesses including the child 'M', her parents, the doctors and other formal witnesses. The accused in his statement under Section 313 of the Code of Criminal Procedure stated that on 28.10.2003, the parents of 'M' had gone to see her maternal uncle and, therefore, he had taken the prosecutrix 'M' to the hospital for medical aid, but as Lal Bahadur Shastri Hospital refused on the ground that the prosecutrix should be taken to some big hospital, he took her to GTB Hospital for medical treatment. It was his further explanation that he took the girl to the hospital for saving her life and he was not aware that she had been raped. The allegation of threat was disputed by the accused. It is also his stand that initially the child had not named him being asked by the doctor and had stated that she had sustained the injuries by fall, and after the discharge of the child, he went to attend his work on 4.11.2003. Be it noted, the defence chose not to adduce any evidence.

6. The learned trial Judge, considering the entire evidence on record and the contentions raised on behalf of the accused, came to hold that the version of the prosecutrix could be relied upon in entirety and by no stretch of imagination it could be said that she was a tutored witness; that the delay in lodging the FIR was not at all fatal to the case of the prosecution as the child was in a tremendous state of panicky; that the factum of rape has been clearly proven from the medical evidence and the testimony of the doctors which have remained unimpeachable despite roving cross-examination; that no plea of any hostility or previous animosity had

been suggested to the child or to her parents; that the presence of the accused in the house had remained unexplained; and that no suggestion had been given to any of the doctors who were cited by the prosecution that the injuries could be caused by fall. Considering the entire evidence in detail, the learned trial Judge found the accused guilty of the offence under Section 376(2)(f) IPC and sentenced him as has been stated hereinbefore.

7. In appeal, the High Court took note of number of factors, narrating the condition of the child, the revelation of the tragic treatment by the accused, the circumstances under which the FIR was lodged, the testimony of the prosecutrix as to how she had been raped in a cruel manner by the accused, the absence of any reason of his going to the house of young 'M' and the circumstances under which he could see the injured child, the credibility and unimpeachability of the evidence of the child 'M', the courage that was gradually gathered by the child after getting out of the state of fear and trauma, the evidence of the doctors which showed the physical condition of the victim and the conduct of the accused in the hospital and, on the said basis, concurred with the view expressed by the learned trial Judge.

8. We have heard learned counsel for the appellant, and Mr. Paras Kuhad, learned Additional Solicitor General, and Mr. B.V. Balram Dass, learned counsel appearing for the NCT of Delhi.

9. To consider the defensibility of the judgment of conviction rendered by the learned trial Judge and affirmed by the Division Bench, it is necessary to appreciate the nature of injuries suffered by the victim. True it is, the young child had told the doctors that she had suffered a fall but the same was not given credence to by the treating doctors. The MLC where the condition of the young child was recorded is as follows:

> *"O/E-Apprehensive look, G.C. fair, pallor mild, P-96/m, BP 110/80, heart NAD. No bruises seen on the body. Breasts and secondary sexual characters not developed. P/A Soft, lever spleen not palpable. No shifting dullness, no area of tenderness.*
>
> *L/E – On separation of labia, a tear of 1.5 approx. to 2 cm. seen from posterior fourchette towards anus just 1 cm. short of anal opening and same tear extending upto hymen. Clot was seen in her vagina, anal opening was intact, no area of bruise seen on perineum. Bleeding per vagina was present. Decision for examination under anaesthesia and repair of vaginal perennial tear taken. Patient was admitted in septic labour room and shifted to gynae*

emergency operation theatre. On examination under anaesthesia, showed same findings as above but in addition a tear of 3 cm approximately was seen in left vaginal wall from hymen into the vagina. Bleeding was positive. Apex of tear seen, tear stitched in layers, cervix seen healthy, no bleeding through OS. In view of EUA, findings under anaesthesia high index of suspicion of sexual assault was made although the child and her uncle were denying of any such episode."

Dr. Sapna Verma, PW-4, who examined the victim, found that the hymen of the child 'M' was torn.

10. The victim has deposed that about 1.00 p.m. in the afternoon, on the date of the incident, the accused appellant came to the house and gave her an intoxicating drink and took her into a room. He raped her and also gave threat that if she would tell her parents or any other person, he would inflict knife blows upon her and her family members. He had further told her that she should tell her parents that she received the injuries when she slipped in the toilet. It has also come in her evidence that the accused took her to the hospital while she was bleeding from her private parts. She has truthfully spoken that initially she told her parents that she had sustained injuries as a result of a fall in the toilet because she was terribly scared and thereafter she spoke out how she sustained the injuries. In her cross-examination, she has stood embedded in her version.

11. The time gap between the occurrence and the accused taking the child to the hospital has its own significance. The child was bleeding from her private parts. Had the child been left to herself, she would have bled to death. The accused took her to the hospital to avoid a situation when somebody might have come hearing her cry and saved her life and she might have ultimately spoken the truth. The totality of the circumstances would show that he was with the child. It is interesting to note that the accused had not disclosed why he had gone to the house of the child 'M' and under what circumstances he took the child to the hospital. The unimpeachable evidence of the child 'M', the testimony of the treating physicians, the medical evidence and the conduct of the accused go a long way to show that the accused had raped the child 'M' in a cruel and brutal manner and the conviction recorded on that score by the learned trial Judge which has been given stamp of approval by the High Court cannot be faulted.

12. Presently, we shall proceed to deal with the justification of the sentence. Learned counsel for the appellant, would submit that though Section 376(2) provides that sentence can be rigorous imprisonment for life, yet as a minimum of sentence of ten

years is stipulated, this Court should reduce the punishment to ten years of rigorous imprisonment. It is urged by him that the appellant is a father of four children and their lives would be ruined if the sentence of imprisonment for life is affirmed.

13 Mr. Paras Kuhad, and Mr. B.V. Balram Dass, counsel for the State, submitted that the crime being heinous, the sentence imposed on the accused is absolutely justified and does not warrant interference. It is also canvassed by them that reduction of sentence in such a case would be an anathema to the concept of just punishment.

14. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

15. In this context, we may refer with profit to the pronouncement in ***Jameel v. State of Uttar Pradesh***[3], wherein this Court, speaking about the concept of sentence, has laid down that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

16. In ***Shailesh Jasvantbhai and another v. State of Gujarat and others***[4], the Court has observed thus: (SCC p. 362, para 7)

> *"7. ... Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be -a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual*

3 (2010) 12 SCC 532

4 (2006) 2 SCC 359

matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration".

17. In ***State of M.P. v. Babulal***[5], two learned Judges, while delineating about the adequacy of sentence, have expressed thus : (SCC pp. 241-42, paras 23-24)

"23. Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefore.

24. The object of punishment has been succinctly stated in Halsbury's Laws of England, (4th Edition: Vol.II: para 482) thus:

'482. Object of punishment. — The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided' ".

(emphasis in original)

5 AIR 2008 SC 582

18. In ***Gopal Singh v. State of Uttarakhand***[6], while dealing with the philosophy of just punishment which is the collective cry of the society, a two-Judge Bench has stated that just punishment would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.

19. The aforesaid authorities deal with sentencing in general. As is seen, various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasized upon. In the case at hand, we are concerned with the justification of life imprisonment in a case of rape committed on an eight year old girl, helpless and vulnerable and, in a way, hapless. The victim was both physically and psychologically vulnerable. It is worthy to note that any kind of sexual assault has always been viewed with seriousness and sensitivity by this Court.

20. In ***Madan Gopal Kakkad v. Naval Dubey and another***[7], it has been observed as follows: (SCC p. 226, para 57)

> *".57. ... though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms."*

21. In ***State of Andhra Pradesh v. Bodem Sundra Rao***[8], this Court noticed that crimes against women are on the rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general. After so observing, the learned Judges had to say this: (SCC p. 232, para 9)

6 2013 (2) SCALE 533

7 (1992) 3 SCC 204

8 AIR 1996 SC 530

> *"9. ... The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's crime for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment."*

22. In ***State of Punjab v. Gurmit Singh and others***[9], this Court stated with anguish that crime against women in general and rape in particular is on the increase. The learned Judges proceeded further to state that it is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection of the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. Thereafter, the Court observed the effect of rape on a victim with anguish: (SCC p. 403, para 21)

> *"21. ... We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."*

23. In ***State of Karnataka v. Krishnappa***[10], a three- Judge Bench opined that the

> *"[c]ourts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court." (SCC pp. 83-84, para 18)*

It was further observed that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

24. In ***Jugendra Singh v. State of Uttar Pradesh***[11], while dwelling upon the gravity of the crime of rape, this Court had expressed thus: (SCC p. 311, para 49)

> *"49. ... Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere.*

9 AIR 1996 SC 1393

10 (2000) 4 SCC 75

11 (2012) 6 SCC 297

The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu."

25. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniousity. In essence, leniency is sought on the base of aforesaid mitigating factors.

26. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended upto life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers.

27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying

the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court.

28. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court.

29. Ex consequenti, the appeal, being sans merit, stands dismissed.

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(2014) 12 Supreme Court Cases 636

Shamim Bano v. Asraf Khan

(Before Dipak Misra and Vikramajit Sen, JJ.)

Shamim Bano … Appellant
Versus
Asraf Khan … Respondent

Criminal Appeal No. 820 of 2014†,
decided on April 16, 2014

Criminal Procedure Code, 1973 — S. 125 — Maintainability of claim under — Muslim wife claiming maintenance under S. 125 CrPC — Subsequently divorce took place — Wife as a consequence of divorce taking recourse to S. 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 for grant of mahr and return of articles and obtaining relief — Application under S. 125 CrPC, held, not to be restricted to the date of divorce and, as arrancillary to it, further held, filing of application under S. 3 of the 1986 Act after divorce for grant of mahr and return of gifts would not disentitle the wife to sustain her application under S. 125 CrPC — Lastly, regard being had to present fact situation, consent under S. 5 of the 1986 Act was not imperative to maintain application under S. 125 CrPC — Thus, having regard to fact that High Court rejected the challenge to dismissal of application under S. 125 CrPC mainly guided by issue as to maintainability of that application, matter remitted to trial Magistrate for re-adjudication of controversy in question keeping in view the principles stated herein — Muslim Women (Protection of Rights on Divorce) Act, 1986, Ss. 3 and 5

The appellant and the respondent were married as per the Muslim Shariyat law. At the instance of the appellant, a criminal case under Section 498-A read with Section 34 IPC was lodged against the respondent husband and his family members. But all the accused in the said case were acquitted. During pendency of the said case, the appellant filed an application under Section 125 CrPC for grant of maintenance on the ground of desertion and cruelty. While the said application was pending, divorce between the appellant and the respondent took place. At that juncture, the appellant filed an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the 1986 Act"). The Magistrate hearing the application preferred under Section 125 CrPC, dismissed the same on the ground that the appellant had not been able to prove her case. But, while dealing with the application preferred under Section 3 of the 1986 Act,

† Arising out of SLP (Crl) No. 4377 of 2012. From the Judgment and Order dated 1-3-2012 in MCRC No. 188 of 2005, passed of the High Court of Chhattisgarh at Bilaspur

the Magistrate allowed that application directing the husband and others to pay a sum of Rs 11,786 towards mahr, return of goods and ornaments and a sum of Rs 1750 towards maintenance during the iddat period.

Being aggrieved with the order not granting maintenance, the appellant approached the Revisional Court, but did not succeed. Thereafter, the appellant approached the High Court by way of a petition under Section 482 CrPC. The High Court, after referring to certain authorities, held that a Muslim woman was entitled to claim maintenance under Section 125 CrPC even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the 1986 Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 CrPC in the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either jointly or separately that they would prefer to be governed by the provisions of the CrPC; that the applicability of Sections 125 to 128 CrPC would depend upon exercise of statutory option available to parties under Section 5 of the 1986 Act and as the appellant wife had taken recourse to the provisions contained in the 1986 Act, it was to be concluded that she was to be governed by the provisions of the 1986 Act; that the claim of the appellant under Section 125 CrPC until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the 1986 Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the 1986 Act to be governed by Section 125 CrPC, was to be governed by the provisions contained in the

1986 Act; that as the application under Section 3 of the 1986 Act had already been allowed and that was affirmed by the High Court too, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 CrPC; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding up to the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction. Hence the present appeal.

The two seminal issues that arose for consideration were: (i) whether the appellant's application for grant of maintenance under Section 125 CrPC was to be restricted to the date of divorce and, as an ancillary to it, whether filing of an application under Section 3 of the 1986 Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain her application under Section 125 CrPC; and (ii), whether regard

being had to the present fact situation, the consent under Section 5 of the 1986 Act was an imperative to maintain the application under Section 125 CrPC.

Allowing the appeal, the Supreme Court

Held :

The High Court held that as the appellant had already taken recourse to Section 3 of the 1986 Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 CrPC would only be maintainable till she was divorced. It is to be noted that the divorce took place during the pendency of the appellant's application under Section 125 CrPC. The appellant preferred an application under Section 3 of the 1986 Act for grant of mahr and return of articles. The Magistrate directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the iddat period by the Magistrate as the petition was different. That apart, the authoritative interpretation in Danial Latifi, (2001) 7 SCC 740, was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 CrPC was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the 1986 Act for grant of maintenance was filed, the parameters of Section 125 CrPC would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued. (Para 15)

Regard being had to the dictum in Khatoon Nisa, (2014) 12 SCC 646, seeking of option under Section 5 of the 1986 Act would not make any difference. The High Court is not correct in opining that when the appellant wife filed application under Section 3 of the 1986 Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 CrPC to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable. (Paras 13 and 17)

The High Court was principally guided by the issue of maintainability and affirmed the findings of the courts below. In this view, the matter is remitted to the trial Magistrate for re-adjudication of the controversy in question keeping in view the principles stated herein. Be it clarified, if, in the meantime, the appellant has remarried, the same has to be taken into consideration. It would be open to the appellant wife to file a fresh application for grant of interim maintenance, if so advised. (Paras 18 and 19)

Danial Latifi v. Union of India, (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266; *Khatoon Nisa v. State of U.P.*, (2014) 12 SCC 646; *Shabana Bano v. Imran Khan*, (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, *applied*

Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *considered*

Shamim Bano v. AsrafKhan, Misc. Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh), reversed

W-M/53216/SRV

Advocates who appeared in this case:

Fakhruddin, Senior Advocate (Raj Kishor Choudhary, Ms Neeru Sharma and Surya Kamal Mishra (for T. Mahipal) Advocates, for the Appellant;

Kaustubh Anshuraj and Vikrant Singh Bais, Advocates, for the Respondent.

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3. (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, Shabana Bano v. Imran Khan 644c, 644c-d

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5. (1985) 2 SCC 556 : 1985 SCC (Cri) 245, Mohd. Ahmed Khan v. Shah BanoBegum 641a-b, 641d-e, 642a-d

The Judgment of the Court was delivered by

Dipak Misra, J. — Leave granted. The appellant, Shamim Bano, and the respondent, Asraf Khan, were married on 17.11.1993 according to the Muslim Shariyat law. As the appellant was meted with cruelty and torture by the husband and his family members regarding demand of dowry, she was compelled to lodge a report at the Mahila Thana, Durg, on 6.9.1994, on the basis of which a criminal case under Section 498-A read with Section 34 IPC was initiated and, eventually, it was tried by the learned Magistrate at Rajnandgaon who acquitted the accused persons of the said charges.

2. Be it noted, during the pendency of the criminal case under Section 498-A/34 IPC before the trial court, the appellant filed an application under Section 125 of the Code of Criminal Procedure (for short "the Code") in the Court of Judicial Magistrate First Class, Durg for grant of maintenance on the ground of desertion and cruelty. While the application for grant of maintenance was pending, divorce

between the appellant and the respondent took place on 5.5.1997. At that juncture, the appellant filed Criminal Case No. 56 of 1997 under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for brevity "the Act") before the learned Judicial Magistrate First Class, Durg. The learned Magistrate, who was hearing the application preferred under Section 125 of the Code, dismissed the same on 14.7.1999 on the ground that the appellant had not been able to prove cruelty and had been living separately and hence, she was not entitled to get the benefit of maintenance. The learned Magistrate, while dealing with the application preferred under Section 3 of the Act, allowed the application directing the husband and others to pay a sum of Rs.11,786/- towards mahr, return of goods and ornaments and a sum of Rs.1,750/- towards maintenance during the *Iddat* period.

3. Being grieved by the order not granting maintenance, the appellant filed Criminal Revision No. 275 of 1999 and the revisional court concurred with the view expressed by the learned Magistrate and upheld the order of dismissal. The aforesaid situation constrained the appellant to invoke the jurisdiction of the High Court under Section 482 of the code in Misc. Crl. Case No. 188 of 2005. Before the High Court a preliminary objection was raised on behalf of the respondent-husband that the petition under Section 125 of the Code was not maintainable by a divorced woman without complying with the provisions contained in Section 5 of the Act. It was further put forth that initial action under Section 125 of the Code by the appellant wife was tenable but the same deserved to be thrown overboard after she had filed an application under Section 3 of the Act for return of gifts and properties, for payment of mahr and also for grant of maintenance during the 'Iddat' period. It was also urged that the wife was only entitled to maintenance during the Iddat period and the same having been granted in the application, which was filed after the divorce, grant of any maintenance did not arise in exercise of power under Section 125 of the Code. Quite apart from the above, both the parties also had advanced certain contentions with regard to obtaining factual score.

4. The High Court, after referring to certain authorities, came to hold[1] that a Muslim woman is entitled to claim maintenance under Section 125 of the Code even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 of the Code in the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either

1 Shamim Bano v. Asraf Khan, Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh)

jointly or separately that they would be preferred to be governed by the provisions of the Code; that the applicability of Sections 125 to 128 of the Code would depend upon exercise of statutory option available to parties under Section 5 of the Act and as the appellant-wife had taken recourse to the provisions contained in the Act, it was to be concluded that she was to be governed by the provisions of the Act; that the claim of the appellant under Section 125 of the Code until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the Act to be governed by Section 125 of the Code, was to be governed by the provisions contained in the Act; that as the application under Section 3 of the Act having already been dealt with by the learned Magistrate and allowed and affirmed by the High Court under Section 482 of the Code, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 of the Code; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding upto the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction.

5. We have heard Mr. Fakhruddin, learned senior counsel appearing for the appellant, and Mr. Kaustubh Anshuraj, learned counsel appearing for the respondent.

6. The two seminal issues that emanate for consideration are, first, whether the appellant's application for grant of maintenance under Section 125 of the Code is to be restricted to the date of divorce and, as an ancillary to it, because of filing of an application under Section 3 of the Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain the application under Section 125 of the Code; and second, whether regard being had to the present fact situation, as observed by the High Court, the consent under Section 5 of the Act was an imperative to maintain the application.

7. To appreciate the central controversy, it is necessary to sit in a time machine for apt recapitulation. In ***Mohd. Ahmed Khan v. Shah Bano Begum***[2], entertaining an application under Section 125 of the Code, the learned Magistrate had granted monthly maintenance for a particular sum which was enhanced by the High Court in exercise of revisional jurisdiction. The core issue before the Constitution Bench was whether a Muslim divorced woman was entitled to grant of maintenance under

2 (1985) 2 SCC 556

Section 125 of the Code. Answering the said issue, after referring to number of texts and principles of Mohammedan Law, the larger Bench opined that taking the language of the statute, as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 of the Code and that mahr is not such a quantum which can ipso facto absolve the husband of the liability under the Code, and would not bring him under Section 127(3)(b) of the Code.

8. After the aforesaid decision was rendered, the Parliament enacted the Act. The constitutional validity of the said Act was assailed in ***Danial Latifi and another v. Union of India***[3] wherein the Constitution bench referred to the Statement of Objects and Reasons of the Act, took note of the true position of the ratio laid down in *Shah Bano*[2] case and after adverting to many a facet upheld the constitutional validity of the Act. While interpreting Sections 3 and 4 of the Act, the Court came to hold that the intention of the Parliament is 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. Thereafter, the Court proceeded to state thus: (*Danial Latifi* case[3], SCC pp. 760-61, para 28)

> *"28. ... 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 clothes, 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 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 nowhere has Parliament 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."*

9. In the said case the Constitution Bench[3] observed that in actuality the Act has codified the rationale contained in *Shah Bano's case*2. While interpreting Section 3 of the Act, it was observed that the said provision provides that a divorced woman is

3 (2001) 7 SCC 740

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 and further indicates 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 Court further observed that 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", and 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 wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the Act.

10. Thereafter the larger Bench opined thus: (*Danial Latifi* case[3], SCC pp. 762, para 30-31)

> *"30. 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 are 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.*
>
> *31. Even under the Act, the parties agree 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."*

11. Eventually the larger Bench in *Danial Latifi* case[3] concluded that 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 and 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 of the Act; that liability of a Muslim husband to his divorced wife arising under Section 3 of the Act to pay maintenance is not confined to the iddat period; and that a divorced Muslim woman who has not remarried and who is not able to maintain herself after the 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 and 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.

12. At this Juncture, it is profitable to refer to another Constitution Bench decision in ***Khatoon Nisa v. State of U.P. and Ors.,***[4] wherein question arose whether a Magistrate is entitled to invoke his jurisdiction under Section 125 of the Code to grant maintenance in favour of a divorced Muslim woman. Dealing with the said issue the Court ruled that subsequent to the enactment of the Act as it was considered that the jurisdiction of the Magistrate under Section 125 of the Code can be invoked only when the conditions precedent mentioned in Section 5 of the Act are complied with. The Court noticed that in the said case the Magistrate had returned a finding that there having been no divorce in the eye of law, he had the jurisdiction to grant maintenance under Section 125 of the Code. The said finding of the magistrate had been upheld by the High Court. The Constitution Bench, in that context, ruled thus: (SCC p. 649, para 10)

> *"10. ... The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India*[3]*. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr.P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr.P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr.P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case*[3] *under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr.P.C., we see no*

4 2002 (6) SCALE 165

ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman."

13. The aforesaid principle clearly lays down that even an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

14. Slightly recently, in ***Shabana Bano v. Imran Khan***[5], a two-Judge Bench, placing reliance on *Danial Latifi*[3], has ruled that: (Shabana Bano case[5], SCC p. 672, para 21)

"21. ... The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in *Khatoon Nisa*[4].

15. Coming to the case at hand, it is found that the High Court has held that as the appellant had already taken recourse to Section 3 of the Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 of the Code would only be maintainable till she was divorced. It may be noted here that during the pendency of her application under Section 125 of the Code the divorce took place. The wife preferred an application under Section 3 of the Act for grant of mahr and return of articles. The learned Magistrate, as is seen, directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the Iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the Iddat period by the learned Magistrate as the petition was different. We are disposed to think so as the said application, which has been brought on record, was not filed for grant of maintenance. That apart, the authoritative interpretation in *Danial*

5 (2010) 1 SCC 666

Latifi[3] was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 of the Code was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the Act for grant of maintenance was filed, the parameters of Section 125 of the Code would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued.

16. Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband. Needless to emphasise, the entitlement and the necessitous provisions have to be made in accordance with the parameters of law.

17. Under these circumstances, regard being had to the dictum in Khatoon Nisa's case, seeking of option would not make any difference. The High Court is not correct in opining that when the appellant-wife filed application under Section 3 of the Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 of the Code to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable.

18. It is noticed that the High Court has been principally guided by the issue of maintainability and affirmed the findings. Ordinarily, we would have thought of remanding the matter to the High Court for reconsideration from all spectrums but we think it appropriate that the matter should be heard and dealt with by the Magistrate so that parties can lead further evidence. Be it clarified, if, in the meantime, the appellant has remarried, the same has to be taken into consideration, as has been stated in the aforestated authorities for grant of maintenance. It would be open to the appellant-wife to file a fresh application for grant of interim maintenance, if so advised. Be it clarified, we have not expressed anything on the merits of the case.

19. In the result, the appeal is allowed and the impugned orders are set aside and the matter is remitted to the learned Magistrate for re-adjudication of the controversy in question keeping in view the principles stated hereinabove.

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(2013) 4 Supreme Court Cases 1

Voluntary Health Association of Punjab v. Union of India

(Before K.S.P. Radhakrishnan and Dipak Misra, JJ.)

Voluntary Health Association of Punjab ... Petitioner;

Versus

Union of India and Others ... Respondents.

Writ Petition (C) No. 349 of 2006†,

decided on March 4, 2013

A. **Crimes Against Women and Children — Female foeticide — Effective implementation of 1994 Act to eradicate evil practice of sex selective abortion of female foetus — Detailed directions issued to authorities under 1994 Act, to State Governments, to Union Territories, to courts dealing with such cases and to High Courts regarding effective: (a) steps for prevention of sex selective abortion of female foetus at illegal clinics/genetic centres, (b) legal action against violators and expeditious disposal of such cases, (c) regulation of abortion and sale and use of sex determination machines by maintenance of registers, etc., and (d) awareness camps against said evil practice so that its causes are rooted out — Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 — Ss. 3 to 7, 9(1), 16 to 30 and Preamble — Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 — Rr. 3, 3-A, 5, 8, 13 and 15 — Medical Termination of Pregnancy Act, 1971 — Ss. 3 to 5 — Constitution of India, Arts. 15, 14, 21 and 32**

B. **Crimes Against Women and Children — Female foeticide — Effective implementation of 1994 Act to eradicate evil practice of sex selective abortion of female foetus — Directions issued regarding conducting of meaningful and effective awareness camps rather than routine and mechanical ones — Importance and dignity of women and female child, need for women's empowerment and gender equality should be propagated so that a scientific temper develops and people are freed from erroneous notions, egocentric traditions, perverse perceptions and evil practices like dowry system and prejudice against female child and women, etc. — That apart, awareness camps should show documentary films for said purpose — Persons involved in awareness camps must be bold and courageous and must have clarity in their thought and action so that they can change mindset of the people**

† Under Article 32 of the Constitution of Inda

— Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 — Ss. 3 to 7, 9(1), 16 to 30 and Preamble — Constitution of India, Arts. 51-A(e) & (h), 15, 14 and 21 (Paras 12 and 32 to 34)

Issuing directions for implementation of the 1994 Act and directing all the State Governments to file compliance reports within three months, the Supreme Court

Held :

Per Radhakrishnan, J.

Indian society's discrimination towards the female child still exists due to various reasons which has its roots in the social behaviour and prejudices against the female child and due to the evils of the dowry system still prevailing in the society in spite of its prohibition under the Dowry Prohibition Act. The decline in the female child ratio all over the country leads to an irresistible conclusion that the practice of eliminating female foetus by the use of pre-natal diagnostic techniques is widely prevalent in this country. Parliament wanted to prevent the same and enacted the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (the 1994 Act). But the provisions of the 1994 Act are not properly and effectively being implemented. Mushrooming of various pre-natal diagnostic centres in almost all parts of the country calls for more vigilance and attention by the authorities under the 1994 Act. But unfortunately their functioning is not being properly monitored or supervised by the authorities under the 1994 Act to find out whether they are misusing the said techniques. Seldom the machines used in said illegal purpose are seized and, even if seized, they are released to the violators of the law only to repeat the crime. Hardly any cases under the 1994 Act end in conviction and such cases are pending disposal for several years. Many of the ultrasonography clinics seldom maintain any record as per the rules. Many of the clinics are totally unaware of the government notifications and amendment of rules concerned. (Paras 1 to 8)

Centre for Enquiry into Health and Allied Themes v. Union of India, (2001) 5 SCC 577; *Centre for Enquiry into Health and Allied Themes v. Union of India,* (2003) 8 SCC 398, *considered*

Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 401, referred to

In such circumstances, the directions as contained in paras 9.1 to 9.11 are issued. (Paras 9 and 10)

Dipak Misra, J. (concurring)

Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, egocentric traditions, perverted perception of societal norms and obsession with ideas which are totally individualistic sans the collective good. No

awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment. A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and leadership. The object of the 1994 Act was to provide for prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualised and its object fruitfully realised when the authorities under the 1994 Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilised. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. The innocence of a child and the creative intelligence of a woman can never ever be brushed aside or marginalised. Civilisation of a country is known by how it respects its women. It is the requisite of the present day that people are made aware that it is obligatory to treat the women with respect and dignity so that humanism in its conceptual essentiality remains alive. Each member of the society is required to develop a scientific temper in the modern context because that is the social need of the present. (Paras 14 to 31)

Centre for Enquiry into Health and Allied Themes v. Union of India, (2001) 5 SCC 577; Stare of H.P. v. Nikku Ram, (1995) 6 SCC 219 : 1995 SCC (Cri) 1090; *M.C. Mehta v. Stare of T.N.*, (1996) 6 SCC 756 : 1997 SCC (L&S) 49; *Ajit Savant Majagvai v. State of Karnataka*, (1997) 7 SCC 110 : 1997 SCC (Cri) 992; *Madhu Kishwarv. State of Bihar*, (1996) 5 SCC 125, *considered*

SS-D/51501/CR

Advocates who appeared in this case:

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Chronological list of cases cited on page(s)

1. (2013) 4 SCC 401, Voluntary Health Assn. of Punjab v. Union of India 5a
2. (2003) 8 SCC 398, Centre for Enquiry into Health and Allied Themes v. Union of India 4g-h
3. (2001) 5 SCC 577, Centre for Enquiry into Health and Allied Themes v. Union of India 4g, 8c-d
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5. (1996) 6 SCC 756 : 1997 SCC (L&S) 49, M.C. Mehta v. State of T.N. 9c
6. (1996) 5 SCC 125, Madhu Kishwar v. State of Bihar 11d
7. (1995) 6 SCC 219 : 1995 SCC (Cri) 1090, State of H.P. v. Nikku Ram 8g-h, 11f-g

The Orders* of the Court were delivered by

K.S.P. Radhakrishnan, J. — Indian society's discrimination towards female child still exists due to various reasons which has its roots in the social behaviour and prejudices against the female child and, due to the evils of the dowry system, still prevailing in the society, in spite of its prohibition under the Dowry Prohibition Act. The decline in the female child ratio all over the country leads to an irresistible conclusion that the practice of eliminating female foetus by the use of pre-natal diagnostic techniques is widely prevalent in this country. Complaints are many, where at least few of the medical professionals do perform Sex Selective Abortion having full knowledge that the sole reason for abortion is because it is a female foetus. The provisions of the Medical Termination of Pregnancy Act, 1971 are also being consciously violated and misused.

* **Ed. :** Dipak Misra, J. delivered a concurring order

2. Parliament wanted to prevent the same and enacted the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994 (for short 'the Act') which has its roots in Article 15(2) of the Constitution of India. The Act is a welfare legislation. The Parliament was fully conscious of the fact that the increasing imbalance between men and women leads to increased crime against women, trafficking, sexual assault, polygamy etc. Unfortunately, facts reveal that perpetrators of the crime also belong to the educated middle class and often they do not perceive the gravity of the crime.

3. This Court, as early as, in 2001 in Centre for ***Enquiry into Health and Allied Themes v. Union of India***[1] had noticed the misuse of the Act and gave various directions for its proper implementation. Non-compliance of various directions was noticed by this Court again in Centre for Enquiry into ***Health and Allied Themes v. Union of India***[2] and this Court gave various other directions.

4. Having noticed that those directions as well as the provisions of the Act are not being properly implemented by the various States and Union Territories, we passed an order on 8.1.2013[3] directing personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they have taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by this Court.

5. We notice that, even though, the Union of India has constituted the Central Supervisory Board and most of the States and Union Territories have constituted State Supervisory Boards, Appropriate Authorities, Advisory Committees etc. under the Act, but their functioning are far from satisfactory.

6. The 2011 Census of India, published by the Office of the Registrar General and Census Commissioner of India, would show a decline in female child sex ratio in many States of India from 2001-2011. The Annual Report on Registration of Births and Deaths - 2009, published by the Chief Registrar of NCT of Delhi would also indicate a sharp decline in the female sex ratio in almost all the Districts. Above statistics is an indication that the provisions of the Act are not properly and effectively being implemented. There has been no effective supervision or follow up action so as to achieve the object and purpose of the Act. Mushrooming of various Sonography Centres, Genetic Clinics, Genetic Counselling Centres,

1 (2001) SCC 577

2 (2003) 8 SCC 398

3 Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 401

Genetic Laboratories, Ultrasonic Clinics, Imaging Centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide.

7. The Union of India has filed an affidavit in September 2011 giving the details of the prosecutions launched under the Act and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Rules, 1996 (for short 'the Rules'), up to June 2011. We have gone through the chart as well as the data made available by various States, which depicts a sorry and an alarming state of affairs. Lack of proper supervision and effective implementation of the Act by various States, are clearly demonstrated by the details made available to this Court. However, State of Maharashtra has comparatively a better track record. Seldom, the ultrasound machines used for such sex determination in violation of the provisions of the Act are seized and, even if seized, they are being released to the violators of the law only to repeat the crime. Hardly few cases end in conviction. Cases booked under the Act are pending disposal for several years in many Courts in the country and nobody takes any interest in their disposal and hence, seldom, those cases end in conviction and sentences, a fact well known to the violators of law. Many of the ultra-sonography clinics seldom maintain any record as per rules and, in respect of the pregnant women, no records are kept for their treatment and the provisions of the Act and the Rules are being violated with impunity.

8. The Central Government vide GSR 80(E) dated 7.2.2002 issued a notification amending the Act and regulating usage of mobile machines capable of detecting the sex of the foetus, including portable ultrasonic machines, except in cases to provide birth services to patients when used within itsregistered premises as part of the Mobile Medical Unit offering a bouquet or other medical and health services. The Central Government also vide GSR 418(E) dated 4.6.2012 has notified an amendment by inserting a new Rule 3.3(3) with an object to regulate illegal registrations of medical practitioners in genetic clinics, and also amended Rule 5(1) by increasing the application fee for registration of every genetic clinic, genetic counselling centre, genetic laboratory, ultrasound clinic or imaging centre and amended Rule 13 by providing that an advance notice by any centre for intimation of every change in place, intimation of employees and address. Many of the clinics are totally unaware of those amendments and are carrying on the same practises.

9. In such circumstances, the following directions are given:

9.1. The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16A of PN&PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PN&PNDT Act.

9.2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PN&PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PN&PNDT Act.

9.3. The Committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of licence to practice.

9.4. The authorities should ensure also that all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, Infertility Clinics, Scan Centres etc. using preconception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the concerned District Authorities, in accordance with Rule 9(8) of the Rules.

9.5. States and District Advisory Boards should ensure that all manufacturers and sellers of ultra-sonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the concerned State/Union Territory and Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Act.

9.6. There will be a direction to all Genetic Counselling Centres, Genetic Laboratories, Clinics etc. to maintain forms A, E, H and other Statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.

9.7. Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultra-sonography clinics, in three months time.

9.8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act

by conducting workshops as well as awareness camps at the State and District levels.

9.9. Special Cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the Courts under the Act and take steps for their early disposal.

9.10. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.

9.11. The various Courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow up action with due intimation to the concerned Courts.

10. All the State Governments are directed to file a status report within a period of three months from today. Ordered accordingly.

Dipak Misra, J. (***Concurring***) — I respectfully concur with the delineation and the directions enumerated in seriatim by my respected learned Brother. However, regard being had to the signification of the issue, the magnitude of the problem in praesenti, and the colossal cataclysm that can visit this country in future unless apposite awareness is spread, I intend to add something pertaining to the direction No. (8)[para 9.8 herein]. To have a comprehensive view I think it seemly to reproduce the said direction: -

> *"9.8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels."*

12. It is common knowledge that the State Governments and Union Territories some times hold workshops as well as awareness camps at the State and District levels which have the characteristic of a routine performance, sans sincerity, bereft of seriousness and shorn of meaning. It is embedded on dataorientation. It does not require Solomon's wisdom to realize that there has not yet been effective implementation of the provisions of the Act, for there has not only been total lethargy and laxity but also failure on the part of the authorities to give accent on social, cultural, psychological and legal awareness that a female foetus is not to be destroyed for many a reason apart from command of the law. Needless to emphasise, there has to be awareness

of the legal provisions and the consequences that have been provided for violation of the Pre-Conception and Pre-Page Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994 (for brevity "the Act") but, a significant one, the awareness in other spheres are absolutely necessitous for concretizing the purposes of the Act.

13. Be it noted, this is not for the first time that this Court is showing its concern. It has also been done before. In *Centre for Enquiry into Health and Allied Themes v. Union of India*[1], the two-Judge Bench commenced the judgment stating that: (SCC p. 577, para 1)

> *"1. ... the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents. The Court also commented on the immoral and unethical part of it as well as on the involvement of the qualified and unqualified doctors or compounders to abort the foetus of a girl child. It is apposite to state here that certain directions were given in the said decision.*

14. Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, ego-centric traditions, pervert perception of societal norms, and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.

15. On many an occasion this Court has expressed its anguish over this problem in many a realm. Dealing with the unfortunate tradition of demand of dowry from the girl's parents at the time of marriage despite the same being a criminal offence, a two-Judge Bench in ***State of H.P. v. Nikku Ram and others***[4] has expressed its agony thus: (SCC p 759, para 1)

> *"1. Dowry, dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours where, in good old days the belief was : "*यत्र नारयस्तु रमन्ते तत्र देवता:*" ["Yatra naryastu pujyante ramante tatra dewatah"] (where woman is worshipped, there is abode of God). We have mentioned about dowry thrice, because this*

4 (1995) 6 SCC 219

demand is made on three occasions: (i) before marriage; (ii) at the time of marriage; and (iii) after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture on the girl, leading to either suicide in some cases or murder in some."

The aforesaid passage clearly reflects the degree of anguish of this Court in regard to the treatment meted out to the women in this country.

16. It is not out of place to state here that the restricted and constricted thinking with regard to a girl child eventually leads to female foeticide. A foetus in the womb, because she is likely to be born as a girl child, is not allowed to see the mother earth. In ***M.C. Mehta v. State of Tamil Nadu***[5], a three-Judge Bench, while dealing with the magnitude of the problem in engagement of the child labour in various hazardous factories or mines, etc., speaking through Hansaria, J., commenced the judgment thus: (SCC p. 759, para 1)

"1. ... I am the child.

All the word waits for my coming.

All the earth watches with interest to see what I shall become.

Civilization hangs in the balance.

For what I am, the world of tomorrow will be.

I am the child.

You hold in your hand my destiny.

You determine, largely, whether I shall succeed or fail,

Give me, I pray you, these things that make for happiness.

Train me, I beg you, that I may be a blessing to the world."

The aforesaid lines from Mamie Gene Cole were treated as an appeal by this Court and the Bench reproduced the famous line from William Wordsworth "child is the father of the man". I have reproduced the same to highlight that this Court has laid special emphasis on the term "child" as a child feels that the entire world waits for his/her coming. A female child, as stated earlier, becomes a woman. Its life-spark cannot be extinguished in the womb, for such an act would certainly bring disaster to the society. On such an act the collective can neither laugh today nor tomorrow.

5 AIR 1997 SC 699

There shall be tears and tears all the way because eventually the spirit of humanity is comatosed.

17. Vishwakavi Rabindranath Tagore, while speaking about a child, had said thus: -

"Every child comes with the message that God is not yet discouraged of man."

18. Long back, speaking about human baby, Charles Dickens had said thus : -

"Every baby born into the world is a finer one than the last."

19. A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society, i.e., thinking, participating and leadership. The legislature has brought the present piece of legislation with an intention to provide for prohibition of sex selection before or after conception and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualised and its object fruitfully realized when the authorities under the Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society.

20. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilized. In the first part of the last century Swami Vivekanand had said: -

"Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."

21. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. Henrik Ibsen emphasized on the individualism of woman. John Milton treated her to be the best of all God's work. In this context, it will be appropriate to quote a few lines from Democracy in America by Alexis De Tocqueville:-

"If I were asked ... to what the singular prosperity and growing strength of that people [Americans] ought mainly to be attributed, I should reply: to the superiority of their women."

22. At this stage, I may with profit reproduce two paragraphs from ***Ajit Savant Majagvai v. State of Karnataka***[6]: (SCC pp. 113-14, paras 3 & 4)

"3. Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times. Even in sarcasm, they have not crossed the literary limit and have adhered to a particular standard of nobility of language. Even when a member of her own species, Madame De Stael, remarked "I am glad that I am not a man; for then I should have to marry a woman", there was wit in it. When Shakespeare wrote, "Age cannot wither her; nor custom stale, her infinite variety", there again was wit. Notwithstanding that these writers have cried hoarse for respect for "woman", notwithstanding that Schiller said "Honour women! They entwine and weave heavenly roses in our earthly life" and notwithstanding that the Mahabharata mentioned her as the source of salvation, crime against "woman" continues to rise and has, today undoubtedly, risen to alarming proportions.

4. It is unfortunate that in an age where people are described as civilised, crime against "female" is committed even when the child is in the womb as the "female" foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as a daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable. To torment a wife can only be described as the most hated and derisive act of a human being." [Emphasis supplied]

23. In ***Madhu Kishwar v. State of Bihar***[7] this Court had stated that Indian women have suffered and are suffering discrimination in silence.

6 (1997) 7 SCC 110

7 AIR 1996 SC 1864

"28. ... Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination." (SCC p. 148, para 28)

24. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility: -

"Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death."

25. Long back, Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress".

26. Recapitulating from the past, I may refer to certain sayings in the Smritis which put women in an elevated position. This Court in Nikku Ram's case (supra) had already reproduced the first line of the "Shloka". The second line of the same which is also significant is as follows: -

"यत्र तास्तु न पूजयन्ते सरवस्त्राफलाः क्रियाः"

[Yatra tāstu na pūjyante sarvāstatraphalāh kriyāh]

A free translation of the aforesaid is reproduced below:-

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

27. Another wise man of the past had his own way of putting it:

"भतृ भातृ पितृनती स्वरूस्वाशुरदेवरहि।

बन्धुभिश्च स्त्रियः पूजयः भूषणाछादनाशनैः।।

[Bhārtr bhratr pitrijnāti śwaśrūswaśuradevaraih|

Bandhubhiśca striyah pūjyāh bhusnachhādanāśnaih||].

A free translation of the aforesaid is as follows:-

"The women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

28. Yet again, the sagacity got reflected in following lines: -

"अतुल यत्र ततजः सर्वदेवासरिरजम्।

एकस्थम् तद्भूननारी व्याप्तलोकत्रयम् त्विषा।।"

[Atulam yatra tattejah śarvadevasarirajam| Ekastham

tadabhūnnāri vyāptalokatrayam tvisā||]

A free translation of the aforesaid is reproduced below:-

"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman."

29. From the past, I travel to the present and respectfully notice what Lord Denning had to say about the equality of women and their role in the society: -

"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom – to develop her personality to the full as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals."

30. I have referred to certain pronouncements of this Court, the sayings of the sagacious ones, thinkers, poets, philosophers and jurists about the child and women only to emphasise that they play a seminal role in the society.

31. The innocence of a child and the creative intelligence of a woman can never ever be brushed aside or marginalized. Civilization of a country is known by how it respects its women. It is the requisite of the present day that people are made aware that it is obligatory to treat the women with respect and dignity so that humanism in its conceptual essentiality remains alive. Each member of the society is required to develop a scientific temper in the modern context because that is the social need of the present.

32. A cosmetic awareness campaign would never subserve the purpose. The authorities of the Government, the Non-Governmental Organisations and other volunteers are required to remember that there has to be awareness camps which are really effective. The people involved with the same must take it up as a service, a crusade. They must understand and accept that it is an art as well as a science and not simple arithmetic. It cannot take the colour of a routine speech. The awareness camps should not be founded on the theory of Euclidian geometry. It must engulf the concept of social vigilance with an analytical mind and radiate into the marrows of the society.

If awareness campaigns are not appositely conducted, the needed guidance for the people would be without meaning and things shall fall apart and everyone would try to take shelter in cynical escapism.

33. It is difficult to precisely state how an awareness camp is to be conducted. It will depend upon what kind and strata of people are being addressed to. The persons involved in such awareness campaign are required to equip themselves with constitutional concepts, culture, philosophy, religion, scriptural commands and injunctions, the mandate of the law as engrafted under the Act and above all the development of modern science. It needs no special emphasis to state that in awareness camps while the deterrent facets of law are required to be accentuated upon, simultaneously the desirability of law to be followed with spiritual obeisance, regard being had to the purpose of the Act, has to be stressed upon. The seemly synchronization shall bring the required effect. That apart, documentary films can be shown to highlight the need; and instill the idea in the mind of the public at large, for when mind becomes strong, mountains do melt.

34. The people involved in the awareness campaigns should have boldness and courage. There should not be any iota of confusion or perplexity in their thought or action. They should treat it as a problem and think that a problem has to be understood in a proper manner to afford a solution. They should bear in mind that they are required to change the mindset of the people, the grammar of the society and unacceptable beliefs inherent in the populace.

35. It should be clearly spelt out that female foeticide is the worst type of dehumanisation of the human race.

36. I have highlighted the aforesaid aspects so that when awareness campaigns are held, they are kept in view, for that is the object and purpose to have real awareness.

37. The matter be listed as directed.

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(2015) 9 Supreme Court Cases 740

(Record of Proceedings)

Writ Petitions (C) No. 349 of 2006 with No. 575 of 2014 and SLP (Crl.) No. 5800 of 2013, decided on January 20, 2015

(Before Dipak Misra and Abhay Manohar Sapre, JJ.)

Voluntary Health Association of Punjab ... petitioner;

versus

Union of India and Others ... respondents.

With

Writ Petitions (C) No. 349 of 2006 with No. 575 of 2014 and SLP (Crl.) No. 5800 of 2013, decided on February 18, 2015

(Before Dipak Misra and Adarsh Kumar Goel, JJ.)

Voluntary Health Association of Punjab ... petitioner;

versus

Union of India and Others ... respondents.

With

Writ Petitions (C) No. 349 of 2006 with No. 575 of 2014 and SLP (Crl.) No. 5800 of 2013, decided on April 15, 2015

(Before Dipak Misra and Prafulla C. Pant, JJ.)

Voluntary Health Association of Punjab ... petitioner;

versus

Union of India and Others ... respondents.

With

Writ Petitions (C) No. 349 of 2006 with No. 575 of 2014 and SLP (Crl.) No. 5800 of 2013, decided on May 6, 2015

(Before Dipak Misra and Prafullac. Pant, JJ.)

Voluntary Health Association of Punjab ... petitioner;

versus

Union of India and Others ... respondents.

With

Writ Petitions (C) No. 349 of 2006 with No. 575 of 2014 and SLP (Crl.) No. 5800 of 2013, decided on August 19, 2015

(Before Dipak Misra and R. Banumathi, JJ.)

Voluntary Health Association of Punjab ... petitioner;

versus

Union of India and Others ... respondents.

With

Writ Petitions (C) No. 349 of 2006 with No. 575 of 2014 and SLP (Crl.) No. 5800 of

2013, decided on September 15, 2015

(Before Dipak Misra and Prafulla C. Pant, JJ.)

Voluntary Health Association of Punjab ... petitioner;

versus

Union of India and Others ... respondents.

Writ Petitions (C) No. 349 of 2006 with No. 575 of 2014 and SLP (Crl.) No. 5800 of 2013, decided on January 20, 2015, February 18, 2015, April 15, 2015, May 6, 2015, August 19, 2015 and September 15, 2015

Crimes Against Women and Children — Female Foeticide/Infanticide — Effective implementation of 1994 Act to prevent sex selective abortion of female foetus — Monitoring of cases in various States — Situation reviewed in various States and detailed directions issued

— Drugs, Cosmetics, Medical Practice & Practitioners and Public Health — Abortion Norms and Infanticide Prohibition — Pre-Conception ^ and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 — Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 — Medical Termination of Pregnancy Act, 1971 — Constitution of India, Arts. 15,14, 21 and 32

Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287; Voluntary Health Assn. of Punjab v. Union of India, (2014) 16 SCC 426; People's Union for Civil Liberties v. Union of India, (2011) 12 SCC 675, relied on Voluntary Health Assn. of Punjab v. Union of India, (2014) 16 SCC 426 (M), referred to

SB-D/54933/CR

Chronological list of cases cited on page(s)

1.	(2014) 16 SCC 426, Voluntary Health Assn. of Punjab v. Union of India	743f, 743f-g
2.	(2014) 16 SCC 426 (M), Voluntary Health Assn. of Punjab v. Union of India	741e
3.	(2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287, Voluntary Health Assn. of Punjab v. Union of India	143a-b
4.	(2011) 12 SCC 675, People's Union for Civil Liberties v. Union of India	149g

Order dated 20th January, 2015

(Before Dipak Misra and Abhay Manohar Sapre, JJ.)

1. On the previous occasion i.e. 13-1-2015[1], we have dealt with the State of Uttar Pradesh and issued certain directions. Today, we intend to deal with the situation prevalent in the State of Haryana.

1 Voluntary Health Assn. of Punjab v. Union of India, (2014) 16 SCC 426 (M)

2. Mr Gonsalves, learned Senior Counsel appearing for the petitioner has submitted that the State of Haryana had produced the data before the Screening Committee as directed by this Court and the Committee has found the data furnished by the State to be correct but that does not really solve the problem.

3. The learned Senior Counsel would submit that the sex ratio in the State of Haryana has been constantly decreasing. The same is demonstrable from the chart given in the affidavit filed by the Additional Chief Secretary to Government of Haryana, Health Department. The worsening of sex ratio is a disturbing and a distressing problem as the same is likely to affect, in the ultimate eventuate, the human race as well as the civilisation in entirety. It is urged by Mr Gonsalves that despite the PC & PNDT Act and the Rules and Regulations framed thereunder for preventing the sex selection, yet maladroit endeavours which have been ingeniously designed are taking place for sex determination which eventually leads to the female foeticide. Apart from this, there is also sex selection by which a married couple are anxious to find out about the sex of the foetus.

4. The learned counsel would urge that the launching of prosecution under the Act in the State of Haryana, as the factual matrix would depict, is basically an apology, for despite there being 21 districts in the State and the decrease in the sex ratio from year to year, the steps taken for prosecution and other coercive measures, as provided under the Act, are absolutely inadequate.

5. Mr Dinesh Yadav, learned counsel appearing for the State would contend that presently the State of Haryana has shown serious concern to stop this malady so that the balance in ʃ,ex ratio is maintained. The learned counsel would contend that the State is galvanising the national programme, namely, "Beti Bachao, Beti Padhao" and immense emphasis is given in praesenti, regard being had to the low sex ratio.

6. At this juncture, we must record the submission of Ms Anitha Shenoy, learned counsel appearing for Dr Sabu Mathew George, the intervenor, that there is no proper launching of prosecution and eventually conviction as there is lethargy on the part of the competent authorities under the Act to lodge the prosecution and prosecute them with the requisite vigour as warranted under the Act. She would also submit that there should be registration of dates of births of the children (male and female) at all the levels especially at the level of the local level, namely, Municipal Corporation/Municipality/Gram Panchayat Samiti/Gram Panchayat, as the case may be.

7. We will be failing in our duty, if we do not take note of an assertion which is reflectible from the affidavit filed on behalf of the State of Haryana that the appropriate authorities who are required to lodge the prosecution sometimes face enormous difficulties as they do not get proper assistance.

8. Having heard the learned counsel for the parties, we issue the following directions:

8.1. The appropriate authorities under the Act who have been authorised to launch/initiate the prosecution shall be imparted training by the Judicial Academy of the High Court of Punjab and Haryana. During the training, the Director of Prosecution of the State shall remain personally present in the academy so that all the officers avail the training with all sincerity, concern and seriousness.

8.2. The trials that are pending before various courts of the State, unless there is an interdiction by the High Court or by this Court, shall proceed with quite promptitude and be finalised within a period of four months commencing 1-2-2015.

8.3. The State may think of appointing a panel of competent lawyers who can render proper assistance to the appropriate authorities for taking appropriate steps for every action under the Act so that eventually the action taken under the Act does not collapse due to technical flaws. This direction is given to have separate lawyers for prosecuting these causes as it requires a lot of technical knowledge and it is the obligation of the State to see that these kinds of maladies are eradicated. Unless eradicated in time, it has the potentiality to lead to a disorderly state of affairs. The State shall respond to the same by the next date.

8.4. The Districts where the sex ratio is less, the Director of Prosecution and the Director of the Judicial Academy shall give adequate stress on their training so that authorities who are in charge of the said districts shall also rise to the occasion.

8.5. As has been stated in our earlier judgment i.e. ***Voluntary Health Assn. of Punjab v. Union of India***[2], there has to be proper awareness camps which are to be organised by the State Legal Services Authority. It is required to be done. It shall issue directions to the District Legal Services Authorities throughout the State to hold awareness camps with a proper perspective so that the persons attending camps not only become aware of the legal consequences

2 (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287

but also the societal and the collective concern for sustenance of child sex ratio. And above all, the value of a life of woman, for she is the basic pillar of the human race in any society. If advised, the Patron-in-Chief of the State Legal Services Authority may constitute a separate cell for imparting such legal aid camps.

8.6. We would request the learned Chief Justice of the High Court of Punjab and Haryana to fix a date for imparting training to the appropriate authorities and thereafter the Registrar (Judicial) shall communicate to the Chief Secretary of the State who shall see to it that all the appropriate authorities attend the training, failing which they will be liable for disciplinary proceedings.

8.7. Mr Yadav, learned counsel for the State shall file a list of the cases which are pending in trial courts for trial before the Registry of this Court within 10 days hence. The Registry shall forward the same forthwith to the Registrar General of the High Court who, in turn, shall place the matter before the learned Chief Justice who is requested to issue a circular with a command that the cases shall be disposed of within four months.

9. Let the matter be listed for consideration of the situation prevalent in the NCT of Delhi on 17-2-2015.

Order dated 18th February, 2015

(Before Dipak Misra and Adarsh Kumar Goel, JJ.)

10. On 25-11-2014[3], this Court, after referring to the malady relating to reduction of sex ratio in various States, had directed as follows: {Voluntary Health Assn. case3, SCC pp. 429-30, paras 7-9)

"7. In our considered opinion, there should be a verification of the documents that form the basis on which these figures have been arrived at. Let it be clarified that the figures that have been put forth do not show any indication of improvement but we would like to have it verified to satisfy ourselves whether the figure that has been put forth is correct or not. The purpose is to find out whether there is degradation of the sex ratio or a stagnation or any steps have really been taken by the States concerned to improve/enhance the sex ratio or not?

8. In view of the aforesaid, we direct that a meeting be held under the auspices of National Inspection and Monitoring Committee wherein the

3 Voluntary Health Assn. of Punjab v. Union of India, (2014) 16 SCC 426

Additional Secretary who has filed the affidavit for the Union of India and two other Joint Secretaries of the Ministry of Health and Family Welfare shall remain present. The deponents who have filed the affidavits before this Court on behalf of the States of Uttar Pradesh and NCT of Delhi shall remain present. The Director General, Health Services, State of Haryana shall remain present in the meeting. The Principal Secretary along with the Special Secretary, State of Uttar Pradesh shall remain present in the meeting. To avoid any amount of controversy, we fix the date for the meeting on 3-12-2014 at 10.30 a.m. The State shall produce the relevant registers/records before the said Committee. We are sure, the States should be in a position to produce the registers/record in the meeting so that it can be scrutinised. Any discrepancy in this respect shall not be appreciated for the States must have prepared the chart on the basis of such registers/records.

9. We recapitulate the saying, 'Awake, Arise, Oh! Parth' and we say this to the States so that they can really wake up to take the issue of female foeticide with all seriousness and sincere concern."

11. Thereafter, the data provided by the States of Uttar Pradesh, Haryana and NCT of Delhi have been verified. As far as the said States are concerned, the data that has been furnished has been found to be approximately correct.

12. The learned counsel for the petitioners prays for some time to file a status report in respect of the State of NCT of Delhi. He may do so within a week hence. The status report that is to be filed by the petitioner would be considered on the next date of hearing and appropriate directions shall be issued qua the State of NCT of Delhi so that the sex ratio is increased in a respectable, acceptable and socially relevant manner. The learned counsel for the State of NCT of Delhi is at liberty to file a reply to the status report.

13. As had been indicated in the earlier order dated 25-11-2014, the data of four other States i.e. Bihar, Himachal Pradesh, Rajasthan and Tamil Nadu are to be verified in the same manner.

14. The Additional Chief Secretary (Health) along with the Director Health (Safety and Regulation) of the State of Himachal Pradesh and Principal Secretary along with the Director General of Health of the State of Rajasthan shall bring the record and appear before the National Inspection and the Monitoring Committee at 11.30 a.m. on 17-3-2015. Mr Gonsalves and Mr Sanjay Parikh, learned Senior Counsel for the petitioner can remain present at the time of verification.

15. The Principal Secretary of Health Department and Director-in-Chief of Health Services of the State of Bihar and the Principal Secretary and Director General of Health of the State of Tamil Nadu shall remain present at 11.30 a.m. on 25-3-2015 before the National Inspection and Monitoring Committee with all the relevant data. Mr Gonsalves and Mr Sanjay Parikh, learned Senior Counsel for the petitioner can remain present at the time of verification. The Committee shall file the report through the Additional Solicitor General on or before 10-4-2015.

16. Let the matter be listed on 15-4-2015.

Order dated 15th April, 2015

(Before Dipak Misra and Prafulla C. Pant, JJ.)

17. On 18-2-2015[4], the Court, after reproducing the order dated 25-11-2014[3] had directed for verification of the records filed in respect of four States, namely, Bihar, Himachal Pradesh, Rajasthan and Tamil Nadu. Certain time schedule was stipulated in the said order. Mr Neeraj Kishan Kaul, learned Additional Solicitor General, has already filed a verification report in respect of the said four States. It is submitted by him that the Committee itself has found that the reports submitted by two States, namely, Bihar and Himachal Pradesh are defective. Let the report be supplied to Mr Manish Kumar, learned counsel for the State of Bihar and Ms Pragati Neekhra, learned counsel for the State of Himachal Pradesh. They shall file their objections, if any, within two weeks hence.

18. Presently, we shall proceed to deal with the State of NCT of Delhi inasmuch as the Monitoring Committee had already verified the record of the State of NCT of Delhi and the learned counsel for the petitioner had prayed for some time to file the status report in respect of the State of NCT of Delhi. Mr Gonsalves, learned Senior Counsel has filed the status report.

19. Mr Gonsalves, learned Senior Counsel, has drawn our attention to the sex ratio in Delhi which has been verified by the Monitoring Committee as per the Population Census. The said sex ratio relates to 2011 which reads as follows:

> *"Sex ratio as per Population Census*
>
> *The universal sex ratio of Delhi as per Population Census for all age groups taken together was 821 females per 1000 males in 2001 and it has become 866 females per 1000 males as per provisional data of Census 2011. Children sex ratio (0-6) of Delhi went down marginally from 868 (as per census 2001) to 866 (as per census 2011). As can be seen from Statement*

4 Set out in paras 10-16, above

1.3, at both points of the figures of Delhi were below than all-India level. The districtwise scenario for the children of 0-6 years varies in different districts.

Statement 1.3: Sex ratio of Delhi/All India as per population Census Data

Sl.No.	Item	Census year	
A	District wise sex ratio (children of 0-6 years)	2001	2011
	South	888	878
	South West	846	836
	North West	857	863
	North	886	872
	Central	903	902
	New Delhi	898	884
	East	865	870
	North East	875	875
	West	859	867
B.	Delhi		
	Children of 0-6 years	868	866
	All ages	821	866
C.	All India		
	Children of 0-6 years	927	914
	All ages	933	940

Source: Population census – 2011"

20. Mr Gonsalves has also drawn our attention to the document which is "Monthly monitoring of the sex ratio of institutional birth". It states thus:

"The data is collected on monthly basis from 50 major hospitals which accounts for 50.87% of total registered births in the year 2013 in Delhi. This helps to review the sex ratio at the highest level in the shortest possible time without waiting for the yearly indicators. The sex ratio of institutional births on the basis of these 50 hospitals was also 895 in the year 2013.

Efforts will be made to increase the coverage of health institutions under the monthly monitoring system to make this exercise meaningful and truly represehtative of the ground reality."

21. Mr Qadri, learned counsel appearing for the NCT of Delhi, on his turn, has drawn our attention to the affidavit filed by the Union of India and especially to Annexure E. Annexure E is only the report on registration of births and deaths in Delhi in 2013. At p. 114, the profile of birth registration has been mentioned under the caption "The birth registration in civil registration system". It is as follows:

"During 2013, a total of 3,70,000 birth events were registered by all the local bodies taken together. Oul of them, 1.95 lakhs (52.76%) were male and 1.75 lakhs (47.24%) were female.

Statement 3.1: Total number of births registered under CRS sexwise

Year	*Total Births*	*Male*	*Female*	*Sex Ratio*
2001	*296287*	*163816 (55.29)*	*132471 (44.71)*	*809*
2002	*300659*	*164184 (54.61)*	*136475 (45.39)*	*831*
2003	*301165*	*165173 (54.84)*	*135992 (45.16)*	*823*
2004	*305974*	*167849 (54.86)*	*138125 (45.11)*	*823*
2005	*324336*	*178031 (54.89)*	*146305 (45.11)*	*822*
2006	*322750*	*176242 (54.69)*	*146508 (45.39)*	*831*
2007	*322044*	*174289 (54.12)*	*147755 (45.88)*	*848*
2008	*333908*	*166583 (49.89)*	*167325 (50.11*	*1004*
2009	*354482*	*185131 (52.22)*	*169351 (47.78)*	*915*
2010	*359463*	*189122 (52.61)*	*170341 (47.39)*	*901*
2011	*353759*	*186870 (52.82)*	*166889 (47.18)*	*893*
2012	*360473*	*191129 (53.02)*	*169344 (46.98)*	*886*

Year	Total Births	Male	Female	Sex Ratio
2013	370000	195226 (52.76)	174774 (47.24)	895"

22. It is submitted by Mr Gonsalves that the said profile of birth would not reflect the correct sex ratio as the data has been collected only from 50 major hospitals. In any case, as we find, there has been really no improvement in the sex ratio in Delhi.

23. At this juncture, we must take note of the suggestions given by Mr Gonsalves. The suggestions given by the learned Senior Counsel, are quite a number. We do not intend to advert to the same in detail and we would only proceed to direct as follows, as far as the State of NCT of Delhi is concerned, for today we are only concerned with the State of NCT of Delhi:

(i) Section 2(q) of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for brevity "the 1994 Act") provides for the "State Board" which means a State Supervisory Board or Union Territory Supervisory Board constituted under Section 16-A. Section 16-A(2) which deals with the State Board reads as follows:

"16-A. (2) The State Board shall consist of—

(a) the Minister in charge of Health and Family Welfare in the State, who shall be the Chairperson, ex officio;

(b) Secretary in charge of the Department of Health and Family Welfare who shall be the Vice-Chairperson, ex officio;

(c) Secretaries or Commissioners in charge of Departments of Women and Child Development, Social Welfare, Law and Indian System of Medicines and Homeopathy, ex officio, or their representatives;

(d) Director of Health and Family Welfare or Indian System of Medicines and Homeopathy of the State Government, ex officio;

(e) three women members of Legislative Assembly or Legislative Council;

(f) ten members to be appointed by the State Government out of which two each shall be from the following categories—

(i) eminent social scientists and legal experts;

(ii) eminent women activists from non-governmental organisations or otherwise;

(iii) eminent gynecologists and obstetricians or experts of stri-roga or prasuti-tantra:

(iv) eminent paediatricians or medical geneticists;

(v) eminent radiologists or sonologists;

(g) an officer not below the rank of Joint Director in charge of Family Welfare, who shall be the Member-Secretary, ex officio."

It is submitted by Mr Gonsalves that the legislature has provided in Sections 16-A(2)(f)(ii) and (iii) that there should be eminent women activists from non-governmental organisations and eminent gynaecologists and obstetricians or experts of stri-roga or prasuti-tantra to be the members. He has also drawn our attention to Section 16-A(2)(f)(v) which provides for eminent radiologists or sonologists to be members. The learned counsel would submit that the persons who have conflict of interest with the provisions of the Act should not be appointed by the State Government. As advised at present, we will require the State Government to strictly verify the antecedents of the members who fall in these categories so that they do not have any conflict of interest. We are not stating that there is conflict of interest. Needless to emphasise, there can be eminent women activists from non-governmental organisations, eminent gynecologists and obstetricians or experts of stri-roga or prasuti-tantra and eminent radiologists or sonologists but care has to be taken that they do not have conflict of interest.

(ii) As per Section 16-A(3), the State Board shall meet at least once in four months. We have been apprised that the Board is meeting at least once in four months. Regard being had to the fall in the sex ratio which is really a burning problem for the nation, we would direct the State Board to meet at least once in two months for the present.

(iii) The meeting should be held by the State Board in an effective manner by conferring adequate time to the members whose categories find place in Section 16-A(2)(f) so that there is proper participation.

(iv) The agenda of the meeting shall be circulated by email to all the members before a week along with the reports of the Deputy Commissioners for each district so that there can be effective participation by all the members. We are compelled to say so as the meetings of this type have to be taken seriously and all the members are expected to understand the seriousness of the enactment and participate with sincerity.

(v) The appropriate authorities, when they find there is violation of the provisions of the Act, must act with strictness keeping in view the language employed in Sections 20, 23 and 25 of the 1994 Act.

(vi) The appropriate authority shall, as defined under Section 28 and is appointed under Section 17 of the 1994 Act, shall develop a system so that anyone, who comes to know of any illegality being committed under the 1994 Act by any person, can send the complaint/information to the said authority even anonymously so that it can take appropriate action. Needless to say that there has to be appropriate verification. This can really apprise the appropriate authority about certain things happening in a clandestine manner.

(vii) Though the Act has come into force since 1994 and there has not been much rise in the sex ratio which may indicate the disrespect for the restriction on sex selection. We have apprised that only 44 cases have been instituted and certain cases are pending in various courts in Delhi since 2002 onwards. The cases under this Act have to be given priority, for litigations under the 1994 Act should be put to an end at the earliest, regard being had to the fact that the object and purpose of the Act is for the prohibition of the misuse of pre-natal diagnostic techniques for the determination of sex and leading to female foeticide and prohibition of advertisement of pre-natal diagnostic techniques for determination of sex, etc. Needless to say, if the criminal cases are kept pending, it will give an impression that the provisions of the Act are not taken seriously. Keeping in view the same, all the trial Magistrates before whom the prosecution under the 1994 Act are pending shall finalise the same by 30-9-2015. A copy of this order be sent to the learned Chief Justice of Delhi to issue a circular to all the District and Sessions Judges of Delhi so that they Can, in their turn, circulate amongst the Magistrates concerned to proceed accordingly. The prosecution shall fully cooperate in the early disposal of these cases. There should not be laxity on the part of the Public Prosecutors.

Though we are issuing these directions in respect of the State of NCT of Delhi, some of the directions shall also be applicable to other States and the said facet shall be adverted to on the next date of hearing.

24. At this juncture, Mr Gonsalves, learned Senior Counsel submitted that reduction in sex ratio in this country is quite disturbing and agonising. The learned Senior Counsel would submit that the honour killing is also reflective of the attitude of the society at large, for the proclivity to scuttle the female from being born and to see the mother earth and the sunlight. It is his submission that though this Court has

been passing series of orders, yet there is no awareness and fear in the society. He has drawn our attention to an order passed on 29-10-2002 in People's Union for Civil Liberties v. Union of India, wherein this Court had directed the Chief Secretaries of the States to translate the order and display the same on the Gram Panchayats, school buildings and fair price shops and giving wide publicity on the All-India Radio and Doordarshan. The learned Senior Counsel would submit that there need be no display on the Gram Panchayats, school buildings or fair price shops but it should be given wide publicity in newspapers, All-India Radio and Doordarshan. Regard being had to the said submission, we direct that the order passed today should be translated and be given wide publicity in newspapers, All-India Radio and Doordarshan so that the people at large know the sacrosanctity of the 1994 Act, the issues raised before this Court and the manner in which the same is being addressed to and how there should be real concern not to go for sex selection, or destruction of female foetus subject to law, that is, the provisions of the Medical Termination of Pregnancy Act.

25. Let the matter be listed on 6-5-2015 to consider the objections of the States of Bihar and Himachal Pradesh and also to issue directions in respect of the other States whose reports have not been verified.

Order dated 6th May, 2015

(Before Dipak Misra and Prafulla C. Pant, JJ.)

26. On 15-4-2015[5], after recording the submissions of Mr Gonsalves, learned Senior Counsel appearing for the petitioner, we had issued certain directions in respect of the State of NCT of Delhi and, at that juncture, we had observed that though the said directions had been issued in respect of the State of NCT of Delhi, some of the directions are also applicable to other States and the said facet shall be adverted to on the next date of hearing.

27. Apart from the directions issued, this Court directed as follows: (SCC para 24, above)

> *"24. At this juncture, Mr Gonsalves, learned Senior Counsel submitted that reduction in sex ratio in this country is quite disturbing and agonising. The learned Senior Counsel would submit that the honour killing is also reflective of the attitude of the society at large, for the proclivity to scuttle the female from being born and to see the mother earth and the sunlight. It is his submission that though this Court has been passing series of orders, yet there*

5 Set out in paras 17-25, above.

is no awareness and fear in the society. He has drawn our attention to an order passed on 29-10-2002 in People's Union for Civil Liberties v. Union of India5, wherein this Court had directed the Chief Secretaries of the States to translate the order and display the same on the Gram Panchayats, school buildings and fair price shops and giving wide publicity on the All-India Radio and Doordarshan. The learned Senior Counsel would submit that there need be no display on the Gram Panchayats, school buildings or fair price shops but it should be given wide publicity in newspapers, All-India Radio and Doordarshan. Regard being had to the said submission, we direct that the order passed today should be translated and be given wide publicity in newspapers, All-India Radio and Doordarshan so that the people at large know the sacrosanctity of the 1994 Act, the issues raised before this Court and the manner in which the same is being addressed to and how there should be real concern not to go for sex selection, or destruction of female foetus subject to law, that is, the provisions of the Medical Termination of Pregnancy Act."

28. It is submitted by Mr Wasim Qadri that he will file an affidavit clearly indicating all the steps that have been taken by the NCT of Delhi in regard to compliance with the directions contained at SI. Nos. (i) to (viii) in the previous order. The affidavit shall be absolutely specific. As far as the directions which we have reproduced hereinabove are concerned, Mr Qadri could not tell us what steps have been taken. He could not apprise us whether any publicity has been given in newspapers, All-India Radio and Doordarshan so that the people at large know the sacrosanctity of the 1994 Act and the issues raised before this Court and the matter in which the same is being addressed to and how there should be real concern not to go for sex selection or destruction of female foetus subject to law i.e. the provision of the Medical Termination of Pregnancy Act. Needless to say, the said directions are to be complied with by all the States in India.

29. Ms Binu Tamta, learned counsel appearing for the Union of India, submitted that she will see to it that appropriate directions are issued to the authorities of All-India Radio and Doordarshan functioning in various States to give wide publicity. As all the States are represented before us, the learned counsel appealing for them shall send a copy of the order to the Principal Secretary, Health as well as to the Principal Secretary, Law so that the said order can be translated and be published in the newspapers and broadcast on All-India Radio and telecast on Doordarshan in appropriate manner.

30. We hope that by the next date of hearing, there would be substantial compliance with the aforesaid directions.

31. At this juncture, we must note that on the last occasion, we had directed the States of Bihar and Himachal Pradesh to file objections to the report submitted by the Union of India. The State of Bihar has already filed the response. Ms Binu Tamta, learned counsel for the Union of India shall peruse the objections filed by the State of Bihar and file response thereto within six weeks hence.

32. At this juncture, we may note with profit that the State of Bihar has filed a chart indicating that from the date of commencement of the enactment of the 1994 Act, 159 cases had been launched in various courts in the State of Bihar and presently 126 cases are pending. They are pending since 2012-2013. In our considered opinion, the cases under the 1994 Act should be dealt with in quite promptitude and the courts concerned have to treat the said cases with utmost primacy. In view of the aforesaid, we direct that the cases which are pending before the trial court shall positively be disposed of by end of October 2015.

33. A copy of this order be sent to the learned Chief Justice of the Patna High Court so that he can issue a circular to the District and Sessions Judge concerned who, in turn, can circulate the same amongst the Presiding Officers wherein the cases are pending. The order passed today and the chart filed by the State of Bihar shall also be forwarded for convenience.

34. We will be failing in our duty, if we do not take note of a submission made by Mr Divya Jyoti Jaipuriar, learned counsel appearing for the petitioner, that the launching of prosecution in the State of Bihar is extremely low and no case has been launched after 2013. We do not intend to say anything on this score but we cannot restrain ourselves from observing that had there been apposite awareness among the competent authorities in all possibility, the result would have been different. Lack of awareness is a known fact. In our considered opinion, the competent authorities who have been authorised under the Act to launch^rosecution and also to see that the Act is properly carried out and the sex ratio is increased, are required to be given training. In view of the aforesaid, we would request the Chairman of the Bihar Judicial Academy of the High Court of Judicature of Patna to fix a time schedule for imparting the training. The Chief Secretary concerned of the State shall see to it that competent authorities are guided by the schedule fixed by the High Court.

35. Ms Pragati Neekhra, learned counsel for the State of Himachal Pradesh, prays for two weeks' time to file objections. Prayer stands allowed.

36. Let the matter be listed in the first week of August, 2015 for further hearing.

Order dated 19th August, 2015

(Before Dipak Misra and R. Banumathi, JJ.)

37. We have been apprised by Mr Manish Kumar, learned counsel for the State of Bihar and Ms Pragati Neekhra, learned counsel for the State of Himachal Pradesh that they have rectified the defects pointed out by the National Inspector and Monitoring Committee (the Committee). The Committee shall scrutinise the rectifications and file the report before us within two weeks from today. That apart, the Committee shall also file a status report as regards the other States and also its concerns which would also include whether the Committee is getting cooperation from the States.

38. As far as the State of Bihar is concerned, the direction was issued that the cases which have been pending before the trial court should be disposed of positively by the end of October 2015. Mr Manish Kumar, learned counsel appearing for the State of Bihar submitted that he has no instructions in this regard. The State is the prosecutor and, therefore, the State has an obligation to have the information. Regard being had to the same, we direct the Principal Secretary (Health), in consultation with other departments, shall file an affidavit within two weeks from today as regards all such cases pending for trial.

39. A report be called for from the Director of Bihar Judicial Academy about the training imparted to the authorised officers under the Act. Whether they have been imparted training or not and, if not, the reason should be indicated. We have so directed, for vide order dated 6-5-20157, we had directed the Chief Secretaries of the States to see to it that the competent authorities are guided by the schedule filed by the High Court.

40. Be it stated, initially, we had directed for verification of the data given in respect of four States, namely, Tamil Nadu, Rajasthan, Himachal Pradesh and Bihar. We have been apprised that some more States have been left out. Regard being had to the same, the Committee shall verify the data of States of Orissa, West Bengal, Chhattisgarh and Jharkhand. The authorities of the State Governments shall cooperate wilh the Committee.

41. Let the matter be listed on 15-9-2615.

Order dated 15th September, 2015

(Before Dipak Misra and Prafulla C. Pant, JJ.)

42. On 19-8-2015, submissions were made on behalf of the learned counsel for the States of Bihar and Himachal Pradesh that they had rectified the defects pointed out by the National Inspection and Monitoring Committee (the Committee) and on the basis of the said submission, a direction was issued that the Committee shall scmtinise the rectifications and file a report within two weeks from that date. That apart, a direction was issued that the Committee shall file a status report as regards the said States, and also the cooperation extended by the States. Additionally, certain other directions were issued in respect of the State of Bihar which need not be mentioned today.

43. As far as the States of Orissa, West Bengal, Chhattisgarh and Jharkhand are concerned, a direction was issued for providing the dates and verification of the same. In pursuance of our earlier order, a report has been filed on behalf of the Union of India. In the report, as far as the States of Bihar and Himachal Pradesh are concerned, it has been stated as follows:

> *"12. Finally, the Committee scrutinised the rectifications of defects/ records in the information related to the prosecutions, convictions and sex ratio submitted by the States of Bihar and Himachal Pradesh. The Committee observed that the information provided on the prosecutions launched in the State of Bihar was ambiguous and incomprehensible. In order to address this persistent difficulty, the Committee decided (and was agreed to by Dr Sabu George) that Dr Sabu George (NIMC Member) along with the officer concerned from the Ministry of Health and Family Welfare would undertake a visit to the State of Bihar and cross verify the documents related with prosecutions and convictions so that the correct facts are submitted to the Hon'ble Supreme Court of India.*
>
> *13. The State of Himachal Pradesh was expected to explain the methodology used by the State for figures of sex ratio at birth data cited in the affidavit. In the affidavit, shared by the State the Committee members confirmed that the methodology used for calculating the districtwise sex ratio at birth was detailed out at length.*
>
> *14. The Committee stressed on the strengthening of civil registration of births in the States so that real time data of sex ratio at birth is available to monitor and evaluate the impact of implementation of the PC&PNDT Act and related activities."*

44. As far as the States of Odisha and Chhattisgarh are concerned, the Committee has opined, thus:

"9. In the second round, the Committee members verified and scrutinised the affidavits filed by the States of Odisha and Chhattisgarh. In the affidavit filed by Odisha, the State had cited sex ratio at birth from the civil registration of births of State. However, no documentary evidence from the department concerned was provided for cross-verification of these figures. The State was requested to submit the same for the verification. To substantiate the facts regarding State Inspection and Monitoring Committee (SIMC) provided in the affidavit, the State was also asked to provide details of the inspections conducted by the SIMC and consequent follow-up action initiated by the appropriate authorities for the verification."

In view of the aforesaid, we would like the State of Orissa to provide the Committee relevant documents and desired by it and with regard to the deficiencies pointed out by it and the Committee is directed to proceed further with regard to the said State within a period of eight weeks.

45. At this juncture, we must note with profit that Ms Anitha Shenoy, learned counsel who is appearing for Dr Sabu George, the newly impleaded party, submits that the appropriate authorities are not following the mandate enshrined under Rule 18-A of the Pre-Conception and Pre-Natal Diagnostics Techniques (Prohibition of Sex Selection) Rules, 1996 (for brevity "the Rules"). She has drawn our attention to sub-rule (6) of Rule 18-A. It reads as follows:

"18-A. (6) All the appropriate authorities including the State, districts, sub-districts notified under the Act, inter alia, shall submit quarterly progress report to the Government of India through the State Government and maintain Form H for keeping the information of all the registrations made readily available."

In view of the aforesaid Rule, it is directed that all the appropriate authorities including the State, districts and sub-districts notified under the Act shall submit quarterly progress report to the Government of India through the State Government and maintain Form H for keeping the information of all registrations readily available.

46. The learned counsel for the States shall file the compliance report pertaining to sub-rule (6) of Rule 18-A of the Rules by the next date. The learned counsel for the Union of India shall also apprise this Court about the information received from the various appropriate authorities.

6. Let the matter be listed on 17-11-2015.

❑❑❑

(2014) 16 Supreme Court Cases 433

Order dated 16th September, 2014

(Before Dipak Misra and N.V. Ramana, JJ.)

1. This Court on 4th March, 2013 had delivered the judgment in Voluntary Health Association of Punjab vs. Union of India & Ors. [(2013) 4 SCC 1], expressing its concern about female foeticide and the reduction of sex ratio and further how the persons who are required to involve in such awareness for stopping of female foeticide should equip themselves, and in that context had issued number of directions. After enumerating the directions, the Court directed all the State Governments to file a status report within a period of three months.

2. In paragraphs 33 and 34, in a concurring opinion, it had been observed thus :

> *"33. It is difficult to precisely state how an awareness camp is to be conducted. It will depend upon what kind and strata of people are being addressed to. The persons involved in such awareness campaign are required to equip themselves with constitutional concepts, culture, philosophy, religion, scriptural commands and injunctions, the mandate of the law as engrafted under the Act and above all the development of modern science. It needs no special emphasis to state that in awareness camps while the deterrent facets of law are required to be accentuated upon, simultaneously the desirability of law to be followed with spiritual obeisance, regard being had to the purpose of the Act, has to be stressed upon. The seemly synchronization shall bring the required effect. That apart, documentary films can be shown to highlight the need; and instil the idea in the mind of the public at large, for when the mind becomes strong, mountains do melt.*
>
> *34. The people involved in the awareness campaigns should have boldness and courage. There should not be any iota of confusion or perplexity in their thought or action. They should treat it as a problem and think that a problem has to be understood in a proper manner to afford a solution. They should bear in mind that they are required to change the mindset of the people, the grammer of the society and unacceptable beliefs inherent in the populace."*

3. When the matter was listed today, Mr. Parikh, learned counsel appearing for Dr. Sabu Mathew George in IA No.11 of 2013 In Writ Petition (Civil) No.349 of 2006 has submitted that certain directions in paragraph 99.1 may require clarification. It is also contended by him that the Union of India has to animate itself in an appropriate

manner to see that the sex ratio is maintained and does not reduce further. It is his submission that the Central Supervision Committee which is required to meet to take stock of the situation has not met for the last 14 months. It is also urged that the National Monitoring Committee who is required to monitor has failed in its duty. That apart, learned counsel would submit pointing out from the affidavit filed by applicant in IA No.11 of 2013 that the State of Kerala has adopted a method as a consequence of which the female foeticide has decreased and sex ratio has increased/improved. He has drawn our attention to paragraphs 8 and 9 which read as follows :

> *"8. The Sevana website, accessed at www.cr.lsgkerala.gov.in maintained by the Kerala Government (Local self government Department) provides details of all births and other vital statistics which are electronically registered by the Local Governments in the registration units. Kerala was the first State in India to have a centralized database of civil registration records from all registration units. This initiative of the Kerala Government has received wide acclaim. Thereby from the website we get information regarding the number of boys and girls being born.*
>
> *Public display of birth data sex-wise provides transparency about the performance of each State, District and sub-District in respect to the actual births and therefore, helps to highlight any potential mal-practice of sex determination. This public knowledge may dissuade both the unethical medical professionals and the general public in the long run from committing crimes of sex determination and sex selective abortion. As no community would like to be stigmatized in the public domain year after year for crimes of sex determination or sex selection committed secretly.*
>
> *9. That below are details of some of the information displayed on the website:*
>
> *i) The birth information is summarised for the State. And for each unit, District, Municipality, Corporation or Gram Panchayat level data can be obtained by clicking the map.*
>
> *ii) Graphs provide a visual comparison of boys and girls born over the past three years.*
>
> *iii) This is available at the State, District and other local body levels."*

4. Mr. Parikh has also drawn out attention to the proviso to Section 4(3) of the Act which reads as follows :

"4. Regulation of pre-natal diagnostic techniques.-- On and from the commencement of this Act,--

(1) ...

(2) ...

(3) ...

Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of section 5 and section 6 unless contrary is proved by the person conducting such ultrasonography."

It is propounded by him that the concerned authorities have not acted on the basis of the aforesaid provision in all seriousness as a result of which the nation is facing the disaster of female foeticide.

5. Mr. Gonsalves, learned senior counsel appearing for the writ petitioner has drawn out attention to the affidavit filed by the petitioner contending, inter alia, that the sex ratio in most of the States has decreased and in certain States, there has been a minor increase, but the same is not likely to subserve the aims and objects of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (the Act). After referring to the history of this litigation which has been continuing in this Court since long, he has submitted that certain directions are required to be issued. We think it apt to reproduce certain suggestions that have been made in the affidavit:

"a) For an order directing the Central Supervisory Board to review the functioning of the State/UT Supervisory Boards and submit a report to this Court within one month.

b) For an order directing the immediate reconstitution of the State and Union Territory Supervisory Boards in accordance with sections 7 and 16-A, including therein those who are knowledgeable, concerned, experienced and in a position to spend a substantial amount of time to fully implement the provisions of this Act.

c) For a direction to all the state governments and union territories and all the states/UT supervisory boards to file in this Court the minutes of their meetings over the past 5 years.

d) For a direction to the Boards to meet regularly at least once in every six/ four months, as the case may be, in accordance with the provisions of this Act.

e) For an order directing the state / union territories to ensure that the Advisory Committees are constituted and are functioning under section 17 of the Act in all districts

within three months from today and for a direction to the District Advisory Committees to conduct their meetings at least once in every two months in accordance with the provisions of the Act.

f) For an order directing the central and state supervisory boards to submit reports in this Court regarding the status and the functioning the advisory committees throughout the country.

g) For an order directing all states and union territories, as well as the state supervisory boards to file status reports in this Court regarding the status and functioning of the appropriate authorities giving full details of the seizing of records, the sealing of machines, the instituting of legal proceedings and the results thereof, the cancellation of registration and other details as are required.

h) For an order directing the Respondents to constitute Sub District Appropriate Authorities (AA) within six months from today and to ensure that all the appropriate authorities in the state have inducted reputated individuals/NGOs who are passionately interested in the enforcement of the Act and are willing to spend adequate time for enforcement measures.

i) For an order directing the AAs throughout the country to act immediately on information received relating to breach of the provisions of the Act and Rules by, inter alia, forthwith seizing records, sealing machines and instituting legal proceedings in accordance with law in a time bound manner.

j) For an order directing all AA's throughout the country to monitor on a monthly basis the progress of prosecution under this Act and to make a report of the progress of cases with special emphasis on delay and the acquittal of accused persons including the reasons for the same.

k) For an order directing the AA's to make a report to the State Medical Councils in respect of charges framed and the conviction of doctors under the Act, for necessary action including suspension of the registration of the doctor and for removal of the name of the doctor from the register of the Council in accordance with section 23(2) of the Act.

l) For an order directing the AAs to forthwith investigate whether the operators of the clinics are qualified and if not to cancel the registration of such clinics.

m) For an order directing the State/Union of India to give a compliance report to the order of the court in the case of Committee for Legal Aid and Protection vs. Union of India & Ors.

n) For an order directing all AAs throughout the country to forthwith investigate and seize all machines where the registration of the centres have expired or where the centres have not been validly registered and take legal action in accordance with law.

o) For an order directing all AAs to complete the renewal of registration process in time and on default by the AAs for an order directing the State to prosecute the AAs under Section 25 of the Act.

p) For an order directing the AAs to cancel the registration of all centres not sending reports completed in all respects to the AAs by the fifth day of the month.

q) For an order directing the AAs to cancel the registration of all centres not properly maintaining the registers and records as required under the Act, particularly from 'H' and Form 'F' and particularly when registers and records are not fully filled up and not duly signed.

r) for an order directing all AAs to ensure that all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics Infertility Clinics and Scan Centres using pre conception and pre natal diagnostic techniques and procedures maintain duplicate copies of all records and all forms required to be maintained under the Act and send the duplicate copies to the concerned district AAs on a monthly basis along with the monthly report, in accordance with the provisions of the Rule 9(8).

s) For an order directing the AAs to ensure that all manufacturers and sellers of ultrasound machines etc. not sell any machines to unregistered centres as provided under rule 3-A and disclose on a quarterly basis to the concerned state/UT and the Central Government the lists of persons to whom the machines have been sold in accordance with Rule 3-A(2) of the Act.

t) For an order directing the AAs to ensure the registration and monitoring of all infertility Centres and to deregister all such centres and prosecute if it is

found that the records are not being maintained fully and accurately and the reports are not being sent on time in accordance with the provisions of this act. In particular to monitor the information received in forms D, E and G.

u) For an order directing the Respondents to take disciplinary proceedings against the members of the AAs, CSB, SSBs and NIMC for failing to do their duty under the Act and to prosecute such officers under Section 25 of the Act in a time bound manner.

v) For an order directing the Respondents to take disciplinary proceedings against the members of the AAs, CSB, SSBs and NIMC as the case may be, whenever a Complaint Case is Quashed/Dismissed on account of technical faults or improper paperwork.

w) For an order directing the Respondents to frame a witness/victim protection protocol forthwith this will provide, inter alia, for police protection and compensation.

x) For an order directing the Union of India to lay down the norms for the qualification for the trainers, the place of training and the training content and the period of training for the trainers who provide experience certificates to qualified doctors who operate the machines.

y) For an order directing Union of India to prepare and submit to the Honourable Court a comprehensive status report state wise of the total number of cases instituted from the inception of this Act and the outcome of such cases. Such report shall be prepared annually and put on the website.

xxx xxx xxx

aa) For an order directing the Respondents to set up an extensive website displaying thereon complete data regarding the functioning of the authorities including the activities of the AAs district wise, the State Appropriate Authorities, State Supervisory Boards, Central Supervisory Board and National Inspection and Monitoring Committee and the State Inspection and Monitoring Committees.

xxx xxx xxx

ee) For an order directing the Respondents to constitute the National Inspection and Monitoring Committee and the State Inspection and Monitoring Committees, if not so constituted.

xxx xxx xxx

hh) For an order directing MCI/Union of India to develop a curriculum for medical courses regarding this Act including gender concerns and ethics.

ii) For an order directing all courts where proceedings under this Act are instituted to fast track the proceedings to be completed within 6 months from today."

We have not referred to all the suggestions as the same are not to be responded by the Union of India but has to be argued before this Court as they are in the realm of pure questions of law.

6. Mr Neeraj Kishan Kaul, learned Additional Solicitor General, shall file an affidavit of the Additional Secretary of Health and/or any other concerned Additional Secretary which shall reflect the response in the proper perspective. The affidavit shall clearly indicate what steps have been taken and on the basis of the steps taken, what results have been achieved.

7. Similarly, learned counsel for all the States shall file their responses through the concerned Health Secretaries. The affidavits shall be filed, as directed hereinabove, within four weeks barring the State of Jammu Kashmir. The competent authority of the State of Jammu and Kashmir shall file its affidavit within six weeks.

We may hasten to add that the affidavits shall be comprehensive and must reflect sincerity and responsibility. It should not be an affidavit in formality.

8. Let the matters be listed on 25.11.2014.

❑❑❑

(2014) 9 Supreme Court Cases 1

Manoj Narula v. Union of India

(Before R.M. Lodha, C.J. And Dipak Misra, Madan B. Lokur, Kurian Joseph And S.A. Bobde, JJ.)

MANOJ NARULA ... Petitioner;
Versus
UNION OF INDIA ... Respondent.

Writ Petition (C) No. 289 of 2005†**,**
decided on August 27, 2014

A. **Constitution of India — Arts. 75(1) & 164(1) and 32 — Appointment of Council of Ministers (Union or State) — Choice of persons as Ministers by Prime Minister/Chief Minister — Meaning of "advice" under Arts. 75(1) and 164(1) — Constitutional responsibility on PM/CM while giving such advice — Faith/trust reposed in PM/CM under Constitution — -Expectations of good governance by people of India — Held, no directions can be issued in this regard but PM/CMs are constitutionally advised to avoid choosing persons as Ministers who have criminal antecedents, especially those facing charges in respect of serious or heinous criminal offences or offences pertaining to corruption**

— Held (*per curiam*), "advice" under Arts. 75(1) and 164(1) means formation of opinion by PM/CM and it is in their wisdom to choose any person for appointment as Minister of Council of Ministers — Said formation of opinion by PM/CM is expressed by use of word "advice" under Arts. 75(1) and 164(1) because of immense trust reposed in PM/CM under the Constitution — However, at the same time, it is a legitimate constitutional expectation from PM/CM that they would give apposite advice to President/Governor and would not choose persons as Ministers who have criminal antecedents, especially those facing charges in respect of serious or heinous criminal offences or offences pertaining to corruption — PM/CM have to bear in mind that unwarranted elements or persons who are facing charges in certain categories of offences may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish the constitutional trust — In democracy, people never intend to be governed by persons who have criminal antecedents

† Arising out of SLP (Crl) No. 5273 of 2012. From the Judgment and Order dated 1-2-2010 in CRA No. 808 of 2009, passed by the High Court of Madhya Pradesh at Gwalior

— *Per Lokur, J.*, burden of appointing suitable person as Minister lies entirely on shoulders of PM/CM and be left to their good sense — PM/CM however, are answerable to Parliament/State Legislature and are under the gaze of watchful eye of People of India

— *Per Kurian, J.*, the Court is the conscience of the Constitution of India — When things go wrong constitutionally, unless the conscience speaks, it is not a good conscience: it will be accused of being a numb conscience — Good governance is only in hands of good men — Court cannot decide what is good or bad but it can always indicate constitutional ethos on goodness, good governance and purity in administration and remind constitutional functionaries to preserve, protect and promote the same — Selecting colleagues in Council of Ministers is constitutional prerogative of PM/CM who cannot be directed by Court as to the manner in which they should exercise their power — However, they can be reminded of their role in working of Constitution — Hence, PM/CM will be constitutionally well advised to consider avoiding any person in Council of Ministers, against whom charges have been framed by criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Ch. Ill of Representation of the People Act, 1951

— Words and Phrases — "Advice" — Meaning of — Held, word "advice" conveys formation of opinion — Doctrines and Maxims — Constitutional Trust — Applicability to high constitutional functionaries including Prime Minister/Chief Ministers — Constitutional Law — Conventions of the Constitution — Election — Democracy and General Principles — Criminalisation of politics — Negative effects on democracy — Criminal Procedure Code, 1973 — Ss. 228 and 240 — Representation of the People Act, 1951, S. 8

B. **Constitution of India — Arts. 75(1) and 164(1) — Appointment of Council of Ministers (Union or State) — Power/authority of Prime Minister/Chief Ministers to advice/suggest/recommend a person for appointment as Minister — Restriction, if any, that may be imposed on PM/CM from recommending person against whom charges have been framed for serious or heinous offences or offences relating to corruption — Non-applicability of doctrine of implied limitation**

— Held, PM/CMs cannot be constitutionally prohibited to give advice to President/Governor in respect of person for becoming Minister who is charged for serious or heinous offences or offences relating to corruption — By interpretative process, it is difficult to read such prohibition into Arts. 75(1) or 164(1) on the powers of PM/CMs as that would tantamount to prescribing eligibility qualification

and adding a disqualification which has not been stipulated in the Constitution — Representation of the People Act, 1951 — S. 8 — Constitutional Interpretation — Basic rules of interpretation — Framers'/legislative intent — Doctrine of implied limitation — Constitution of India, Art. 32

C. **Constitutional Law — Silences of the Constitution/Implied Limitation — Doctrine of silence — Nature, scope and applicability — Principle of constitutional silence or abeyance, held, is progressive and is applied as a recognised advanced constitutional practice to fill up gaps in respect of certain areas in interest of justice and larger public interest — Non-applicability, when there is already express provision existing — Matter relating to disqualifications for person to be appointed as Minister of Council of Ministers (Union or State) — Express provisions stating disqualifications already provided under Constitution and Representation of the People Act, 1951 — New/additional disqualification for person facing charges for serious or heinous offences or offences relating to corruption, held, cannot be read into existing expressed disqualifications by taking recourse to principle of constitutional silence or abeyance — Moreover, doing so would amount to crossing boundaries of judicial review — Constitution of India — Arts. 32, 75, 102, 164 and 191 — Representation of the People Act, 1951, S. 8**

D. **Constitutional Law — Silences of the Constitution/Implied Limitation — Constitutional trust reposed in holders of high office — Held, in a controlled Constitution like ours, the Prime Minister, as also the Chief Ministers, are expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified — The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister — The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to a constitutional renaissance — Constitution of India, Arts. 75 and 164**

E. **Constitutional Law — Constitutional Trust — Applicability — Held, doctrine of constitutional trust is applicable not only to exercise of legislative power but also to every high constitutional functionary — Therefore, doctrine is applicable to Prime Minister as also Chief Ministers who hold high constitutional positions — Constitution of India — Arts. 75 and 164 — Prime Minister and Chief Ministers — Position and status of**

F. **Constitutional Interpretation — Subsidiary rules of interpretation — Casus omissus/Necessary implication — Doctrine of implication — Scope and applicability — Explained in detail — Held, doctrine of implication can be taken**

aid of for interpreting constitutional provision in expansive manner — Doctrine is fundamentally founded on rational inference of idea from words used in the text — However, interpretation given by Court has to have a base in Constitution — Court cannot rewrite a constitutional provision

— Words "on the advice of the Prime Minister/Chief Minister" under Arts. 75(1) and 164(1) of Constitution — Interpretation of — Held, while interpreting these words "on the advice of the PM/CM" appearing in Arts. 75(1) and 164(1), it cannot be legitimately inferred that there is prohibition to think of person as Minister if charges have been framed against him in respect of serious or heinous offences including corruption cases — Constitution of India, Arts. 32, 75(1) and 164(1)

G. **Constitution of India — Arts. 75, 164, 84, 102 and 32 — Appointment of Council of Ministers (Union or State) — Legality of appointment of persons with criminal background or charged with serious offences as Ministers — Framing of guidelines for appointment — Appropriate authority — Held (per Lokur, J.), is legislature and not Court — Though it is necessary, due to criminalisation of our polity/politics, to ensure that certain persons do not become Ministers, but this is not possible through guidelines issued by Court — It is not for Court to lay down any guidelines relating to who should or should not be entitled to become legislator or who should or should not be appointed Minister in Central or State Government — It is for electorate to ensure that suitable (not merely eligible) persons are elected to legislature and it is for legislature to enact or not enact a more restrictive law — Therefore, appropriate legislature would decide if such guidelines for appointment of Ministers in Central and State Governments are necessary and the frame of such guidelines — Election — Democracy and General Principles — Criminalisation of politics — Negative effects on democracy**

H. **Constitution of India — Arts. 75(1) and 164(1) — Appointment of Council of Ministers (Union or State) — Disqualifications — Framing of criminal charge against person, not a disqualification — Applicability of principle of presumption of innocence — Held (per Lokur, J.), merely because charges are framed against a person, there is no bar to that person being elected as Member of Parliament or of a State Legislature or being appointed as Minister in Central or State Government — Representation of the People Act, 1951 — S. 8 — Criminal Procedure Code, 1973, Ss. 228 and 240**

I. **Constitutional Law — Grant and Separation of powers — Judicial power —Court as conscience of Constitution — Consideration of right or wrong by Court from constitutional sense and not in ethical sense of morality — Function of**

conscience, held (per Kurian, J.), is to speak when things go wrong constitutionally — If conscience does not speak, it is not a good conscience and will be accused of being a numb conscience — Hence, though no directions could be issued to PM/CMs not to appoint persons with criminal antecedents as Ministers, constitutional advice given not to appoint such persons as Ministers — Constitution of India — Arts. 32 and 226 — Words and Phrases — "Conscience" — Meaning of — Jurisprudence

J. **Words and Phrases — "Conscientious" — Meaning of — Constitution of India, Arts. 75(4) and 164(3) r/w Sch. Ill**

K. **Constitution of India — Arts. 75(1) and 164(1) — "Advice" given by Prime Minister/Chief Ministers under — Nature of — Held, is constitutional advice — It is formation of an opinion by PM/CMs which is expressed by use of word "advice"**

L. **Constitutional Law — Conventions of the Constitution — Adoption and development of constitutional conventions — Nature, scope and purpose of constitutional conventions — Principles summarised**

M. **Constitution of India - Arts. 75, 164, 84, 102, 173 and 191 — Appointment as Minister in Union or State Council of Ministers — Disqualifications for — Implied limitations read in by Supreme Court — Enumerated** (***per Lokur, J.***)

The petitioner filed the present writ petition before the Supreme Court under Article 32 of the Constitution assailing the appointment of some of the original respondents as Ministers to the Council of Ministers of Union of India despite their involvement in serious and heinous crimes. A larger question that was raised was about the legality of the persons with criminal background/antecedents and/or charged with offences involving moral turpitude being appointed as Ministers in the Central and State Governments. Having regard to the importance of the matter, the petition was placed before the present Constitution Bench of the Supreme Court comprising of five Judges.

Disposing of the petition, the Supreme Court

Held :

Per Dipak Misra, 3. (for Lodha, C.J., himself and Bobde, J.; Lokur and Kurian, J J., concurring)

There is no doubt that the principle of implied limitation is attracted to the sphere of constitutional interpretation. The question that is required to be posed here is whether taking recourse to this principle of interpretation, the Supreme Court can read a categorical prohibition to the words contained in Article 75(1) of the Constitution so that the Prime Minister is constitutionally prohibited to give advice to the President in

respect of a person for becoming a Minister of the Council of Ministers who is facing a criminal trial for a heinous and serious offence and charges have been framed against him by the trial Judge. Reading such an implied limitation as a prohibition would tantamount to adding a disqualification at a particular stage of the trial in relation to a person. This is neither expressly stated nor is impliedly discernible from the provision. When there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition into Article 75(1) or, for that matter, into Article 164(1) of the Constitution to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such disqualification cannot be read into Article 75(1) or Article 164(1) of the Constitution. (Paras 62 and 64)

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; *Minerva Mills Ltd. v. Union of India,* (1980) 3 SCC 625; B.R. Kapurv. State of T.N., (2001) 7 SCC 231, *relied on*

Centre for PIL v. Union of India, (2011) 4 SCC 1 : (2011) 1 SCC (L&S) 609; *N. Kannadasan v. Ajoy Khose,* (2009) 7 SCC 1 : (2009) 3 SCC (Civ) 1; *Inderpreet Singh Kahlon v. State of Punjab,* (2006) 11 SCC 356 : (2007) 1 SCC (L&S) 444; *Arun Kumar Agrawal v. Union of India,* (2014) 2 SCC 609 : (2014) 1 SCC (L&S) 433; *State of Punjab v. Salil Sabhlok,* (2013) 5 SCC 1 : (2013) 2 SCC (L&S) 1; *Centre for Public Interest Litigation v. Union of India,* (2005) 8 SCC 202 : (2006) 1 SCC (Cri) 23; *Shrikant v. Vasantrao,* (2006) 2 SCC 682, *affirmed on this point*

I.R. Coelho v. State of T.N., (2007) 2 SCC 1; *James v. Commonwealth of Australia,* 1936 AC 578 : (1936) 2 All ER 1449 (PC); *Bribery Commr. v. Ranasinghe,* 1965 AC 172 : (1964) 2 WLR 1301 : (1964) 2 All ER 785 (PC); *Taylor v. Attorney General of Queensland,* (1917) 23 CLR 457 (Aust); *Mangal Singh v. Union of India,* AIR 1967 SC 944 : (1967) 2 SCR 109; *G. Narayanaswami v. G. Pannerselvam,* (1972) 3 SCC 717, *considered*

Lane, P.H.: *Commentary on the Australian Constitution, 1986*; House of Commons Library paper on disqualification for membership of the House of Commons; Rodney Brazier: "Is it a Constitutional Issue: Fitness for Ministerial Office" in Public Law 1994; Hilaire Barnett: *Constitutional and Administrative Law*, 4th Edn., p. 354; E.C.S. Wade and A.W. Bradley: *Constitutional and Administrative Law, considered*

The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Supreme Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest. Liberalisation of the concept of locus standi for the purpose of

development of public interest litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in Laxmi Kant Pandey, (1987) 1 SCC 66 or issuance of guidelines pertaining to arrest in D.K. Basu, (1997) 1 SCC 416 or directions issued in Vishaka, 1997 SCC (Cri) 932 are some of the instances. However, the Court cannot add a disqualification to the already expressed disqualifications provided under the Constitution and the Representation of the People Act, 1951 (1951 Act). This is because there are express provisions stating the disqualifications and second, it would tantamount to crossing the boundaries of judicial review. (Paras 65 and 67)

Laxmi Kant Pandey v. Union of India, (1987) 1 SCC 66 : 1987 SCC (Cri) 33; *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92; *Vishaka v. State of Rajasthan,* (1997) 6 SCC 241 : 1997 SCC(Cri) 932; *Bhanumati v. State of U.P.,* (2010) 12 SCC 1, *distinguished on facts*

S.P. *Gupta v. Union of India*, 1981 Supp SCC 87; *M. Nagarajv. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013, cited

Michael Foley: *The Silence of Constitutions* (Routledge, London and New York), cited

There is no speck of doubt that the Supreme Court has applied the doctrine of implication to expand the constitutional concepts, but the context in which the horizon has been expanded has to be borne in mind. The principle of implication is fundamentally founded on rational inference of an idea from the words used in the text. The concept of legitimate deduction is always recognised. Any proposition that is arrived at taking this route of interpretation must find some resting pillar or strength on the basis of certain words in the text or the scheme of the text. In the absence of that, it may not be permissible for a court to deduce any proposition as that would defeat the legitimacy of reasoning. Af>roposition can be established by reading a number of articles cohesively, for that will be in the domain of substantive legitimacy. Thus, the principle of implication can be taken aid of for the purpose of interpreting constitutional provision in an expansive manner. But, it has its own limitations. The interpretation has to have a base in the Constitution. The Court cannot rewrite a constitutional provision. Thus analysed, it is not possible to accept the submission that while interpreting the words "advice of the Prime Minister", it can legitimately be inferred that there is a prohibition to think of a person as a Minister if charges have been framed against him in respect of heinous and serious offences including corruption cases under the criminal law. (Paras 70 to 72)

Kuldip Nayar v. Union of India, (2006) 7 SCC 1; *Melbourne Corpn. v. Commonwealth,* (1947) 74 CLR 31 (Aust); *Australian Capital Television Pty. Ltd.* v. Commonwealth, (1992) 177 CLR 106 (Aust); *Australian National Airways Pty. Ltd.* (No. Commonwealth,

(1945) 71 CLR 29 (Aust); *Lamshedv. Lake,* (1958) 99 CLR 132 (Aust); *Victoria v. Commonwealth,* (1971) 122 CLR 353 (Aust), *relied on*

R. Rajagopalv. State of T.N., (1994) 6 SCC 632; *Joginder Kumar v. State ofU.P.,* (1994) 4 SCC 260 : 1994 SCC (Cri) 1172; *Romesh Thappar v. State of Madras,* AIR 1950 SC 124 : (1950) 51 Cri L3 1514, *distinguished on facts*

The Prime Minister has been conferred an extremely special status under the Constitution. As the Prime Minister is the effective head of the Government, indubitably, he has enormous constitutional responsibility. The decisions are taken by the Council of Ministers headed by the Prime Minister and that is the Cabinet form of government and our Constitution has adopted it. The doctrine of constitutional trust is applicable under our Constitution since it lays the foundation of representative democracy. Thus, in a representative democracy, the doctrine of constitutional trust has to be envisaged in every high constitutional functionary, whether it be the legislature, the Prime Minister or Chief Ministers. (Paras 87, 88 and 93)

Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549; *Samsher Singh v. State of Punjab,* (1974) 2 SCC 831 : 1974 SCC (L&S) 550; *Supreme Court Advocates-on-Record Assn. v. Union of India,* (1993) 4 SCC 441; Delhi Laws Act, 1912, In re, AIR 1951 SC 332, *relied on*

H.M. Seervai: Constitutional Law of India, Vol. 2, 4th Edn., 2060; *David Polland, Neil Parpworth David Hughs: Constitutional and Administrative Law,* 2nd Edn., 368-370; *Hilaire Barnett: Constitutional & Administrative Law,* 5th Edn., 297-305; Nolan Report, "Standards in Public Life", Cm 2850-1, 1995, London HMSO, Chapter 3, Para 4; Rodney Brazier: *Constitutional Practice,* Second Edn., 146-148, *referred to*

The word "advice" conveys formation of an opinion. The said formation of an opinion by the Prime Minister in the context of Article, 75(1) of the Constitution is expressed by the use of the word "advice" because of the trust reposed in the Prime Minister under the Constitution. To put it differently, it is a "constitutional advice". (Para 95)

New Shorter Oxford English Dictionary; P. Ramanatha Aiyer: Law Lexicon, 2nd Edn., (Abbot L. Diet.); *Webster Comprehensive Dictionary,* International Edition, *referred to*

The repose of faith in the Prime Minister by the entire nation under the Constitution has expectations of good governance which is carried on by the Ministers of his choice. It is also expected that the persons who are chosen as Ministers do not have criminal antecedents, especially facing trial in respect of serious or heinous criminal offences or offences pertaining to corruption. There can be no dispute over the proposition that unless a person is convicted, he is presumed to be innocent but the presumption of innocence in criminal jurisprudence is something altogether different, and not to be considered for being chosen as a Minister to the Council of Ministers because framing of charge in a

criminal case is totally another thing. Framing of charge in a trial has its own significance and consequence. Setting the criminal law into motion by lodging of an FIR or charge-sheet being filed by the investigating agency is in the sphere of investigation. Framing of charge is a judicial act by an experienced judicial mind. As the debates in the Constituent Assembly would show, after due deliberation, they thought it appropriate to leave it to the wisdom of the Prime Minister because of the intrinsic faith in the Prime Minister. At the time of framing of the Constitution, the debate pertained to conviction. With the change of time, the entire complexion in the political arena as well as in other areas has changed. The Supreme Court, on number of occasions, has taken note of the prevalence and continuous growth of criminalisation in politics and the entrenchment of corruption at many a level. In a democracy, the people never intend to be governed by persons who have criminal antecedents. This is not merely a hope and aspiration of citizenry but the idea is also engrained in apposite executive governance. It would be apt to say that when a country is governed by a Constitution, apart from constitutional provisions, and principles of constitutional morality and trust, certain conventions are adopted and grown. (Paras 96 and 97)

Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441, *relied on*

Narendra Singh v. State ofM.P., (2004) 10 SCC 699 : 2004 SCC (Cri) 1893; *Ranjitsing Brahmajeetsing Sharma v. Stare of Maharashtra,* (2005) 5 SCC 294 : 2005 SCC (Cri) 1057; *S. Ganesan v. Rama Raghuraman,* (2011) 2 SCC 83 : (2011) 1 SCC (Cri) 607; *State of U.P. v. Naresh,* (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216; *Kailash Gourv. State of Assam,* (2012) 2 SCC 34 : (2012) 1 SCC (Cri) 717, *affirmed*

K.C. Wheare: *The Statute of Westminster and Dominion Status* (4th Edn.); I. Jennings: *The Law and the Constitution,* 5th Edn., ELBS: London, 1976, Chapter "Conventions" 247; I. Lovehead: *Constitutional Law — A Critical Introduction,* 2nd Edn.,

Butterworths: London, 2000, 247; Constituent Assembly Debates, Vol. 7, *referred to*

Loveland: *Constitutional Law*; David Polland, Neil Parpworth David Hughs: *Constitutional* and *Administrative Law*; Hilaire Barnett: *Constitutional and Administrative Law,* 5th Edn.; *Constitutional Practice; International Covenant on Civil and Political Rights,* Art. 14(2), *cited*

Therefore, it becomes graphically vivid that the Prime Minister has been regarded as the repository of constitutional trust. The use of the words "on the advice of the Prime Minister" cannot be allowed to operate in a vacuum to lose their significance. There can be no scintilla of doubt that the Prime Minister's advice is binding on the President for the appointment of a person as a Minister to the Council of Ministers unless the said person is disqualified under the Constitution to contest an election or under the 1951 Act. That is in the realm of disqualification. But, the trust reposed in a high constitutional functionary like the Prime Minister under the Constitution does not end there. That the Prime Minister

would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance. (Para 98)

B.R. Kapurv. State of T.N., (2001) 7 SCC 231; *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831 : 1974 SCC (L&S) 550; *M.P. Special Police Establishments. State ofM.P.,* (2004) 8 SCC 788 : 2005 SCC (Cri) l; *U.N.R. Rao v. Indira Gandhi*, (1971) 2 SCC 63, *relied on*

The Council of Ministers has the collective responsibility to sustain the integrity and purity of the constitutional structure. That is why the Prime Minister enjoys a great magnitude of constitutional power. Therefore, the responsibility is more, regard being had to the instillation of trust, a constitutional one. It is also expected that the Prime Minster should act in the interest of the national polity of the nation-State. He has to bear in mind that unwarranted elements or persons who are facing charge in certain categories of offences may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish the constitutional trust. It is already held that prohibition cannot be brought in within the province of "advice" but indubitably, the concepts, especially the constitutional trust, can be allowed to be perceived in the act of such advice. (Para 99)

Thus, while interpreting Article 75(1) of the Constitution, definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. Nothing more, nothing less. Further, what is said for the Prime Minister is wholly applicable to the Chief Minister, regard being had to the language employed in Article 164(1) of the Constitution of India. (Paras 100 and 101)

Manoj Narula v. Union of India, (2014) 9 SCC 77, referred to

Per Lokur, J. (concurring)

The Constitution does not provide for any limitation on a Member of Parliament becoming a Minister, but certain implied limitations have been read into the Constitution by the decisions rendered by the Supreme Court regarding an unelected person becoming a Minister. One implied limitation is that a person not elected to Parliament can nevertheless be appointed as a Minister for a period of six months. Another implied limitation is that though a person can be appointed as a Minister for a period of six months, he or she cannot repeatedly be so appointed. Yet another implied limitation read into the Constitution is that a person otherwise not qualified to be elected as a Member of Parliament or disqualified from being so elected cannot be appointed as a Minister. In other words, any person, not subject to any disqualification, can be appointed a Minister in the Central or State Government. It is not necessary to read any other implied limitation in the Constitution concerning the appointment of a person as a Minister in the Government of India, particularly any implied limitation on the appointment of a person with a criminal background or having criminal antecedents. (Paras 120.3 to 120.8)

S.R. Chaudhuri v: State of Punjab, (2001) 7 SCC 126; *B.R. Kapurv. State of T.N.*, (2001) 7 SCC 231; *B.P. Singhal v. Union of India*, (2010) 6 SCC 331, *relied on*

State of Punjab v. Salil Sabhlok, (2013) 5 SCC 1 : (2013) 2 SCC (L&S) 1, *affirmed*

The expression "criminal antecedents" or "criminal background" is extremely vague and incapable of any precise definition. Does it refer to a person accused (but not charged or convicted) of an offence or a person charged (but not convicted) of an offence or only a person convicted of an offence? No clear answer was made available to this question, particularly in the context of the presumption of innocence that is central to our criminal jurisprudence. Therefore, to say that a person with criminal antecedents or a criminal background ought not to be elected to the Legislature or appointed a Minister in the Central or State Government is really to convey an imprecise view. (Para 121)

The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offence—be it in the form of an off-the-cuff allegation or an allegation in the form of a first information report or a complaint or an accusation in a final report under Section 173 of the CrPC or even on charges being framed by a competent court. The reason for this is fundamental to criminal jurisprudence, the rule of law and is quite simple, although it is often forgotten or overlooked—a person is innocent until proven guilty. This would apply to a person accused of one or multiple offences. At law, he or she is not a criminal—that person may stand "condemned" in the public eye, but even that does not entitle anyone to brand him or her a criminal. Consequently, merely because a first information report is lodged against a person or a criminal complaint is filed against him

or her or even if charges are framed against that person, there is no bar to that person being elected as a Member of Parliament or being appointed as a Minister in the Central or State Government. (Para 122)

The burden of appointing a suitable person as a Minister in the Central Government lies entirely on the shoulders of the Prime Minister and may eminently be left to his or her good sense. In this respect, the Prime Minister is, of course, answerable to Parliament and is under the gaze of the watchful eye of the people of the country. Despite the fact that certain limitations can be read into the Constitution and have been read in the past, the issue of the appointment of a suitable person as a Minister is not one which enables the Supreme Court to read implied limitations in the Constitution. (Paras 136 and 137)

B.P. Singhal v. Union of India, (2010) 6 SCC 331, *relied on*

<http://hansard.millbanksystems.com/written_answers/1994/jan/25/ministers-unsuitability-for office#S6-CV0236-P0_19940125_CWA_172>, *referred to*

The second substantive relief is for the framing of possible guidelines for the appointment of a Minister in the Central or State Government. It is not clear who should frame the possible guidelines, perhaps the Supreme Court. As far as this substantive relief is concerned, it is entirely for the appropriate Legislature to decide whether guidelines are necessary, as prayed for, and the frame of such guidelines. No direction is required to be given on this subject. While it may be necessary, due to the criminalisation of our polity and consequently of our politics, to ensure that certain persons do not become Ministers, this is not possible through guidelines issued by the Supreme Court. It is for the electorate to ensure that suitable (not merely eligible) persons are elected to the legislature and it is for the legislature to enact or not enact a more restrictive law. It is not for the Supreme Court to lay down any guidelines relating to who should or should not be entitled to become a legislator or who should or should not be appointed a Minister in the Central or State Government. (Paras 108, 132 and 133.5)

Per Kurian, J. (concurring)

"Conscientious" means "wishing to do what is right, relating to a person's conscience". Court is the conscience of the Constitution of India. Conscience is the moral sense of right and wrong of a person. Right or wrong, for court, not in the ethical sense of morality but in the constitutional sense. Conscience does not speak to endorse one's good conduct; but when things go wrong, it always speaks: whether you listen or not. It is a gentle and sweet reminder for rectitude. That is the function of conscience. When things go wrong constitutionally, unless the conscience speaks, it is not good conscience: it will be accused of as numb conscience. (Paras 146 and 143)

Oxford English Dictionary, referred to

There is no dispute that under criminal jurisprudence a person is presumed to be innocent until he is convicted. But is there not a stage when a person is presumed to be culpable and hence called upon to face trial, on the court framing charges? Under Section 228 CrPC, charge is framed by the court only if the Judge (the Magistrate — under Section 240 CrPC) is of the opinion that there is ground for presumption that the accused has committed an offence, after consideration of opinion given by the police under Section 173(2) CrPC (challan/police charge-sheet) and the record of the case and documents. It may be noted that the prosecutor and the accused person are heard by the court in the process. Is there not a cloud on his innocence at that stage? Is it not a stage where his integrity is questioned? If so, is it not a stage where the person has come in conflict with law, and if so, is it desirable in a country governed by the rule of law to entrust the executive power with such a person who is already in conflict with law? Will any reasonably prudent master leave the keys of his chest with a servant whose integrity is doubted? It may not be altogether irrelevant to note that a person even of doubtful integrity is not appointed in the important organ of the State which interprets law and administers justice; then why to speak of questioned integrity! What to say more, a candidate involved in any criminal case and facing trial, is not appointed in any civil service because of the alleged criminal antecedents, until acquitted. (Paras 147 and 148)

Good governance is only in the hands of good men. No doubt, what is good or bad is not for the court to decide: but the court can always indicate the constitutional ethos on goodness, good governance and purity in administration and remind the constitutional functionaries to preserve, protect and promote the same. That ethos are the unwritten words in our Constitution. However, as the Constitution-makers stated, there is a presumption that the Prime Minister/Chief Ministers would be well advised and guided by such unwritten yet constitutional principles as well. According to Dr B.R. Ambedkar, such things were only to be left to the good sense of the Prime Minister, and for that matter, the Chief Minister of the State, since it was expected that the two great constitutional functionaries would not dare to do any infamous thing by inducting an otherwise unfit person to the Council of Ministers. It appears, over a period of time, at least in some cases, it was only a story of great expectations. Some of the instances pointed out in the writ petition indicate that Dr Ambedkar and other great visionaries in the Constituent Assembly have been bailed out. Qualification has been wrongly understood as the mere absence of prescribed disqualification. Hence, it has become the bounden duty of the Court to remind the Prime Minister and the Chief Minister of the State of their duty to act in accordance with the constitutional aspirations. Beauty of democracy depends on the proper exercise of duty by those who work it. (Paras 149 and 151)

No doubt, it is not for the Court to issue any direction to the Prime Minister or the Chief Ministers, as the case may be, as to the manner in which they should exercise their power while selecting the colleagues in the Council of Ministers. That is the constitutional prerogative of those functionaries who are called upon to preserve, protect and defend the Constitution. But it is the prophetic duty of the Supreme Court to remind the key duty holders about their role in working the Constitution. Hence, the Prime Minister and the Chief Minister of the State, who themselves have taken oath to bear true faith and allegiance to the Constitution of India and to discharge their duties faithfully and conscientiously, will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed by a criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Chapter III of the 1951 Act. (Para 152)

N. **Constitutional Law — Democracy — Democratic polity — Pure concept of — Abhorrence to corruption and repulsiveness to idea of criminalisation of politics — Held, democracy expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance — Election — Democracy and General Principles — Broad Principles — Constitution of India — Preamble**

O. **Constitutional Law — Democracy — Concept of — Protection, preservation and sustainment of health of democracy — Need for enunciation and crystallisation of norms therefor — Rule of Law**

Held :

A democratic polity, as understood in its quintessential purity, is conceptually abhorrent to corruption and, especially corruption at high places, and repulsive to the idea of criminalisation of politics as it corrodes the legitimacy of the collective ethos, frustrates the hopes and aspirations of the citizens and has the potentiality to obstruct, if not derail, the rule of law. Democracy, which has been best defined as the government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance. (Para 1)

The democracy in India is a product of the rule of law and aspires to establish an egalitarian social order. It is not only a political philosophy but also an embodiment of constitutional philosophy. The health of democracy, a cherished constitutional value, has to be protected,

preserved and sustained, and for that purpose, instilment of certain norms in the marrows of the collective is absolutely necessitous. (Paras 1 and 2)

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; *T.N. Seshan, CEC of India v. Union of India,* (1995) 4 SCC 611; *Kuldip Nayar v. Union of India,* (2006) 7 SCC 1, *followed*

People's Union for Civil Liberties v. Union of India, (2013) 10 SCC 1 : (2013) 4 SCC (Civ) 587 : (2013) 3 SCC (Cri) 769, *affirmed*

P. Constitutional Law — Democracy — Free and fair elections and democracy — Holding of free and fair election held, is the heart and soul of parliamentary system — It is one of the features, absence of which can erode fundamental values of democracy — Concern of Supreme Court expressed in earlier cases with regard to various facets of candidates who contest election and seek votes, noticed (Paras 4 to 8)

Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405, *followed*

S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra, 1980 Supp SCC 53; *Union of India v. Assn. for Democratic Reforms,* (2002) 5 SCC 294, *affirmed*

Q. **Constitutional Law — Democracy — Criminalisation of politics — Negative effects on democracy — Held, systemic corruption and sponsored criminalisation can corrode fundamental core of elective democracy and, consequently, the constitutional governance — Criminalisation of politics creates dent in marrows of the nation — Democratic republic polity hopes and aspires to be governed by government which is run by elected representatives who do not have any involvement in serious criminal offences or offences relating to corruption, casteism, societal problems, affecting sovereignty of nation and many other offences — Election — Democracy and General Principles — Criminalisation of politics — Negative effects on democracy**

R. **Election — Democracy and General Principles — Criminalisation of politics — Need for cleansing of political climate — Electoral reforms — Recommendations of Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013) and Law Commission 244th Report (2014) on electoral reforms — Need for enactment into law, emphasised**

Held :

Criminalisation of politics is an anathema to the sacredness of democracy. It is worth saying that systemic corruption and sponsored criminalisation can corrode the fundamental core of elective democracy and, consequently, the constitutional governance. A democratic republic polity hopes and aspires to be governed by a government which is

run by the elected representatives who do not have any involvement in serious criminal offences or offences relating to corruption, casteism, societal problems, affecting the sovereignty of the nation and many other offences. There are recommendations given by different committees constituted by various Governments for electoral reforms. Some of the reports are (i) Goswami Committee on Electoral Reforms (1990), (ii) Vohra Committee Report (1993), (iii) Indrajit Gupta Committee on State Funding of Elections (1998), (iv) Law Commission Report on Reforms of the Electoral Laws (1999), (v) National Commission to Review the Working of the Constitution (2001), (vi) Election Commission of India — Proposed Electoral Reforms (2004), (vii) the Second Administrative Reforms Commission (2008), (viii) Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013), and (ix) Law Commission Report (2014). (Paras 9 to 12)

K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754 : 2005 SCC (Cri) 451, *relied on*

Dinesh Trivedi v. Union of India, (1997) 4 SCC 306; *Anukul Chandra Pradhan v. Union of India*, (1997) 6 SCC 1, *affirmed*

Vohra Committee Report and other reports have been taken note of on various occasions by the Supreme Court. Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013) has proposed insertion of Schedule 1 to the Representation of the People Act, 1951 (1951 Act) enumerating offences under IPC befitting the category of "heinous" offences. It recommended that Section 8(1) of the 1951 Act should be amended to cover, inter alia, the offences listed in the proposed Schedule 1 and a provision should be engrafted that a person in respect of whose acts or omissions a court of competent jurisdiction has taken cognizance under Sections 190(l)(a), (b) or (c) of the CrPC or who has been convicted by a court of competent jurisdiction with respect to the offences specified in the proposed expanded list of offences under Section 8(1) shall be disqualified from the date of taking cognizance or conviction, as the case may be. It further proposed that disqualification in case of conviction shall continue for a further period of six years from the date of release upon conviction and in case of acquittal, the disqualification shall operate from the date of taking cognizance till the date of acquittal. (Para 13)

The Law Commission, in its 244th Report, 2014, has suggested amendment to the 1951 Act by insertion of Section 8-B after Section 8-A, after having numerous consultations and discussions, with the avowed purpose to prevent criminalisation of politics. It proposes to provide for electoral reforms. (Para 14)

The aforesaid vividly exposits concern at all quarters about the criminalisation of politics. Criminalisation of politics, it can be said with certitude, creates a dent in the marrows of the nation. (Para 15)

S. **Public Accountability, Vigilance and Prevention of Corruption — Corruption / Abuse of power — Held, erodes fundamental tenets of rule of law — Corruption has potentiality to destroy many a progressive aspect and has acted as formidable enemy of the nation — Prevention of Corruption Act, 1988 — Ss. 7 to 13 — Rule of Law (Paras 16 to 18)**

Subramanian Swamy v. CBI, (2014) 8 SCC 682, relied on

Niranjan Hemchandra Sashittal v. State of Maharashtra, (2013) 4 SCC 642 : (2013) 2 SCC (Cri) 737 : (2013) 2 SCC (L&S) 187, *affirmed*

T. **Election — Representation of the People Act, 1951 — S. 8(1) — Scope and coverage — Public Accountability, Vigilance and Prevention of Corruption — People in Power/Politically Influential Personalities/MPs/MLAs/Ministers**

U. **Election — Representation of the People Act, 1951 — S. 8 — Disqualification for MPs and MLAs/MLCs on conviction for certain offences — Scheme, scope and objective of S. 8 — Constitution of India — Arts. 102(l)(e) and 191(l)(e) — Public Accountability, Vigilance and Prevention of Corruption — People in Power/ Politically Influential Personalities/MPs/MLAs/Ministers**

Held :

Parliament by the Representation of the People Act, 1951 (1951 Act) has prescribed qualifications and disqualifications to become a Member of Parliament or to become a Member of Legislative Assembly. Section 8 of the 1951 Act stipulates the disqualification on conviction for certain offences. Section 8(1) covers a wide range of offences not only under the Indian Penal Code but also under many other enactments which have the potentiality to destroy the core values of a healthy democracy, safety of the State, economic stability, national security, and prevalence and sustenance of peace and harmony amongst citizens,, and many others. (Para 23)

The scheme of immediate disqualification upon conviction laid down by the Representation of the People Act, 1951 (1951 Act) clearly upholds the principle that a person who has been convicted for certain categories of criminal activities is unfit to be a representative of the People. Criminal activities that result in disqualification are related to various spheres pertaining to the interest of the nation, common citizenry interest, communal harmony, and prevalence of good governance. It is clear that the 1951 Act lays down that the commission of serious criminal offences renders a person ineligible to

contest in elections or continue as a representative of the people. Such a restriction does provide the salutary deterrent necessary to prevent criminal elements from holding public office thereby preserving the probity of representative government. (Para 27)

K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754 : 2005 SCC (Cri) 451, *relied on*

Lily Thomas v. Union of India, (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811, *affirmed*

V. **Constitutional Law — Constitutional morality — Meaning of constitutional morality — Role in institution building**

W. **Constitution of India — Generally — Nature, scope and working of the Constitution**

X. **Constitutional Law — Democracy — Conditions for survival and success of democratic values — Constitution of India — Preamble**

Held :

The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. The Constitution can live and grow on the bedrock of constitutional morality. The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. Democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality. Thus, institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember that a Constitution is "written in blood, rather than ink". (Paras 74 to 76, 138 and 139)

Constituent Assembly Debates, 1989, VII, 38; James Madison as Publius, Federalist 51, <http://parliamentofindia.nic.in/ls/debate3/volllpll.htm>;

<http://parliamentofindia.nic.in/ls/debates/volllpl2.htm>; Laurence H. Tribe, *The Invisible Constitution* (2008) 29, *relied on*

Y. Executive Wing of State — Good Governance — Concept and features of, discussed — Held, maxim salus populi suprema lex (welfare of the people is the Supreme Law), has not only to be kept in view but also has to be revered

Z. Constitutional Law — Democracy — Democracy and good governance — Growth of democracy is dependent upon good governance

Held :

In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as primary and any other interest secondary. The maxim salus populi suprema lex, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for fundamental rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and fnculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision-making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not a Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependent upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation. (Para 82)

A. Abdul Farook v. Municipal Council, Perambalur, (2009) 15 SCC 351; *Patangrao Kadam v. Prithviraj Sayajirao Yadav Deshmukh*, (2001) 3 SCC 594; *M.J. Sivani v. State of Karnataka*, (1995) 6 SCC 289; *State of Maharashtra v. Jalgaon Municipal Council*, (2003) 9 SCC 731, *affirmed*

U.P. Power Corpn. Ltd. v. Sant Steels & Alloys (P) Ltd., (2008) 2 SCC 777, affirmed on this point otherwise held, overruled

ZA. **Constitution of India — Art. 84 — Qualifications for MP — Scope of Art. 84 — Held (per Lokur, J.), Art. 84 negatively provides the qualifications for membership of Parliament (Para 110)**

ZB. **Constitution of India — Art. 84(c) — Qualifications for MP — "Such other qualifications as may be prescribed by law by Parliament" under Art. 84(c) — No such qualifications as postulated by Art. 84(c) prescribed by Parliament till date — Speech of Dr Rajendra Prasad, President of Constituent Assembly and first President of India, quoted in which his insistence for prescribing high qualifications for legislators (MPs) was apparent — Supreme Court expressed its hope that**

Parliament would take action on these views of Dr Rajendra Prasad (Paras 111 and 112)

<http://parliamentofindia.nic.in/ls/debates/volllpl2.htm>, *relied on*

ZC. **Election — Representation of the People Act, 1951 — S. 8(3) — Disqualification under — Anomaly in — Person who is convicted of heinous offences for instance, under S. 307 or S. 363 IPC (not prescribing minimum sentences) and awarded sentence of less than 2 years, would not attract disqualification under S. 8(3) and would become MP — Need for amendment to remove anomaly, discussed (Paras 123 to 133)**

Store of H.P. v. Parent of a student of Medical College, (1985) 3 SCC 169; *Municipal Committee, Patiala v. Model Town Residents Assn.*, (2007) 8 SCC 669; *V.K. Naswa v. Union of India*, (2012) 2 SCC 542 : (2012) 1 SCC (Cri) 914; *Gainda Ram v. MCD*, (2010) 10 SCC 715, *considered*

Rodney Brazier: "Is it a Constitutional Issue: Fitness for Ministerial Office in the 1990s", Public Law 1994, Aut, 431-45, *referred to*

0-D/53729/C

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Chronological list of cases cited on page(s)

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2. (2014) 8 SCC 682, Subramanian Swamy v. CBI 26b

3. (2014) 2 SCC 609 : (2014) 1 SCC (L&S) 433, Arun Kumar Agrawal v. Union of India 31b-c

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5. (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811, Lily Thomas v. Union of India 28d-e, 28e, 28g, 71e-f 5.

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18. (2008) 2 SCC 777, U.P. Power Corpn. Ltd. v. Sant Steels & Alloys (P) Ltd. (held, overruled) 50e

19. (2007) 8 SCC 669, Municipal Committee, Patiala v. Model Town Residents Assn. 67b-c

20. (2007) 2 SCC 1, I.R. Coelho v. Srare of T.N. 43f

21. (2006) 11 SCC 356 : (2007) 1 SCC (L&S) 444, Inderpreet Singh Kahlon v. State of Punjab 316-c

22. (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013, M. Nagaraj v. Union of India 32f

23. (2006) 7 SCC 1, Kuldip Nayarv. Union of India 2Qc-d, 48c, 48f

51.	1975 Supp SCC 1, Indira Nehru Gandhi v. Raj Narain	20c
52.	(1974) 2 SCC 831 : 1974 SCC (L&S) 550, Samsher Singh v. State of Punjab	31e-f, 31f, 31f-g, 35f-g, 51g
53.	(1973) 4 SCC 225, Kesavananda Bharati v. State of Kerala	30e, 35b-c, 38g-h, 39a, 39e, 39g, 40b, 40e, 41a, 41e, 41f-g, 42e-f, 43a, 43b-c, 43d, 44a, 45a-b
54.	(1972) 3 SCC 717, G. Narayanaswami v. G. Pannerselvam	35e-f
55.	(1971) 2 SCC 63, U.N.R. Rao v. Indira Gandhi	35d-e
56.	(1971) 122 CLR 353 (Aust), Victoria v. Commonwealth	48b
57.	AIR 1967 SC 944 : (1967) 2 SCR 109, Mangal Singh v. Union of India	41a-b
58.	1965 AC 172 : (1964) 2 WLR 1301 : (1964) 2 All ER 785 (PC), Bribery Commr. v. Ranasinghe	41a-b
59.	(1958) 99 CLR 132 (Aust), Lamshed v. Lake	48b
60.	AIR 1955 SC 549, Ram Jawaya Kapur v. State of Punjab	51f
61.	AIR 1951 SC 332, Delhi Laws Act, 1912, In re	53f
62.	AIR 1950 SC 124 : (1950) 51 Cri U 1514, Romesh Thapparsi. State of Madras	41d-e
63.	(1947) 74 CLR 31 (Aust), Melbourne Corpn. v. Commonwealth	41f-g
64.	(1945) 71 CLR 29 (Aust), Australian National Airways Pty. Ltd. (No. l) v. Commonwealth	48a-b
65.	1936 AC 578 : (1936) 2 All ER 1449 (PC), James v. Commonwealth of Australia	40c-d
66.	(1917) 23 CLR 457 (Aust), Taylor v. Attorney General of Queensland	41a-b

The Judgement* of the Court were delivered by

Dipak Misra, J. (*For Lodha, C.J., himself and Bobde, J.; Lokur and Kurian, JJ. concurring*) — A democratic polity, as understood in its quintessential purity, is conceptually abhorrent to corruption and, especially corruption at high places, and repulsive to the idea of criminalization of politics as it corrodes the legitimacy of the collective ethos, frustrates the hopes and aspirations of the citizens and has the potentiality to obstruct, if not derail, the rule of law. Democracy, which has been best defined as the Government of the People, by the People and for the People, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance. While dealing with the concept of democracy, the majority in ***Indira Nehru Gandhi v. Raj Narain***[1], stated that 'democracy' as an essential feature of the Constitution is unassailable. The said principle

* **Ed.** Lokur and Kurian, JJ. delivered separate concurring judgments.

1 AIR 1975 SC 2299

was reiterated in ***T.N. Seshan, CEC of India v. Union of India***[2] and ***Kuldip Nayar v. Union of India***[3] It was pronounced with asseveration that democracy is the basic and fundamental structure of the Constitution. There is no shadow of doubt that democracy in India is a product of the rule of law and aspires to establish an egalitarian social order. It is not only a political philosophy but also an embodiment of constitutional philosophy.

2. In ***People's Union for Civil Liberties v. Union of India***[4], while holding the voters' rights not to vote for any of the candidates, the Court observed that democracy and free elections are a part of the basic structure of the Constitution and, thereafter, proceeded to lay down that democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The term "fair" denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for millions of individual voters to participate in the governance of our country. For democracy to survive, it is fundamental that the best available men should be chosen as the people's representatives for the proper governance of the country and the same can be best achieved through men of high moral and ethical values who win the elections on a positive vote. Emphasizing on a vibrant democracy, the Court observed that the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. Accordingly, the principle of the dire need of negative voting was emphasised. The significance of free and fair election and the necessity of the electorate to have candidates of high moral and ethical values was re-asserted. In this regard, it may be stated that the health of democracy, a cherished constitutional value, has to be protected, preserved and sustained, and for that purpose, instilment of certain norms in the marrows of the collective is absolutely necessitous.

THE REFERENCE

3. We have commenced our judgment with the aforesaid prologue as the present writ petition under Article 32 of the Constitution was filed by the petitioner as pro bono publico assailing the appointment of some of the original respondents as Ministers to the Council of Ministers of Union of India despite their involvement in serious and heinous crimes. On 24.3.2006[5], when the matter was listed before the Bench presided by the learned Chief Justice, the following order came to be passed: -

2 (1995) 4 SCC 611

3 Kuldip Nayar v. Union of India, (2006) 7 SCC 1 : AIR 2006 SC 3127

4 (2013) 10 SCC 1 : (2013) 4 SCC (Civ) 587 : (2013) 3 SCC (Cri) 769

5 Manoj Narula v. Union of India, (2014) 9 SCC 77

"1. A point of great public importance has been raised in this petition. Broadly, the point is about the legality of the person with criminal background and/or charged with offences involving moral turpitude being appointed as ministers in Central and State Governments.

2. We have heard in brief Mr. Rakesh Dwivedi, learned senior counsel who was appointed as amicus curiae to assist the Court, as also the learned Solicitor General, appearing for the Union of India, and Mr. Gopal Subramaniam, learned Additional Solicitor General appearing on behalf of the Attorney General for India. Having regard to the magnitude of the problem and its vital importance, it is but proper that the petition is heard by a Bench of five Judges.

3. We issue notice to Union of India. Formal notice need not be issued since the Union of India is represented by learned Solicitor General.

4. Notices shall also be issued to the Advocates General of all the States. The notice shall state that the State Governments and the Union of India may file their affidavits along with relevant material within four weeks of service of notice.

5. The Prime Minister and some of the Ministers in Union Cabinet have been arrayed as party respondents 2 to 7. It is not necessary to implead individual ministers and/or Prime Minister for deciding the question above-named. Accordingly, respondent Nos. 2 to 7 are deleted from the array of parties.

List the case after the Court reopens after the summer vacation for directions as to fixing a date for its being placed before the Constitution Bench."

In view of the aforesaid order and the subsequent orders, the matter has been placed before us. Considering the controversy raised, we are required to interpret the scope and purpose of Articles 75 and 164 of the Constitution, regard being had to the text, context, scheme and spirit of the Constitution.

THE PURITY OF ELECTION

4. In the beginning, we have emphasized on the concept of democracy which is the corner stone of the Constitution. There are certain features absence of which can erode the fundamental values of democracy. One of them is holding of free and fair election by adult franchise in a periodical manner as has been held in ***Mohinder***

Singh Gill and another v. Chief Election Commissioner, New Delhi and others[6], for it is the heart and soul of the parliamentary system. In the said case, Krishna Iyer, J. quoted with approval the statement of Sir Winston Churchill which is as follows: -

> *"At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper – no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."*

5. In ***Raghbir Singh Gill v. S. Gurcharan Singh Tohra***[7], the learned Judges, after referring to ***Mohinder Singh Gill's*** case, stated that nothing can diminish the overwhelming importance of the cross or preference indicated by the dumb sealed lip voter. That is his right and the trust reposed by the Constitution in him is that he will act as a responsible citizen choosing his masters for governing the country.

6. This Court has laid emphasis on the purity of elections in ***Union of India v. Association for Democratic Reforms and another***[8] and, in that context, has observed that: (SCC p. 321, para 46)

> *"elections in this country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money which is used for retaining power and for re-election."*

The Court further observed that (SCC p. 321, para 46)

> *"if on an affidavit a candidate is required to disclose the assets held by him at the time of election, the voter can decide whether he should be re-elected...."*

7. Thereafter, as regards the purity of election, the Court observed *Assn. for Democratic Reforms*[8] that to maintain purity of elections and, in particular, to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties, and the voters would have basic elementary right to know full particulars of a candidate who is to represent them in Parliament where laws to bind their liberty and property may be enacted because the right to get information in a democracy is recognised all throughout and it is a natural right flowing from the concept of democracy. Elaborating further, the Court opined that a voter has a right to know the antecedents including the criminal past of his candidate contesting election for MP or MLA as it is fundamental and basic

6 (1978) 1 SCC 405

7 1980 Supp SCC 53 : AIR 1980 SC 1362

8 (2002) 5 SCC 294

for the survival of democracy, for he may think over before making his choice of electing law-breakers as lawmakers. Eventually, the Court directed the Election Commission to exercise its power under Article 324 of the Constitution requiring the candidate to furnish information pertaining to the fact whether the candidate has been convicted/ acquitted/discharged of any criminal offence in the past, if any, and whether he has been punished with imprisonment or fine; whether the candidate is accused in any pending case of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law; and certain other information.

8. From the aforesaid authorities, it is perceivable that while giving emphasis on the sanctity of election, the Court has expressed its concern with regard to various facets of the candidates who contest the election and seek votes.

CRIMINALISATION OF POLITICS

9. Criminalisation of politics is an anathema to the sacredness of democracy. Commenting on criminalization of politics, the Court, in ***Dinesh Trivedi, M.P. and others v. Union of India and others***[9], lamented the faults and imperfections which have impeded the country in reaching the expectations which heralded its conception. While identifying one of the primary causes, the Court referred to the report of N.N. Vohra Committee that was submitted on 5.10.1993. The Court noted that the growth and spread of crime syndicates in Indian society has been pervasive and the criminal elements have developed an extensive network of contacts at many a sphere. The Court, further referring to the report, found that the Report reveals several alarming and deeply disturbing trends that are prevalent in our present society. The Court further noticed that: (SCC p. 317, para 27)

> *"27. ... the nexus between politicians, bureaucrats and criminal elements in our society has been on the rise, the adverse effects of which are increasingly being felt on various aspects of social life in India. Indeed, the situation has worsened to such an extent that the President of our country felt constrained to make references to the phenomenon in his addresses to the Nation on the eve of the Republic Day in 1996 as well as in 1997."*

and hence, it required to be handled with extreme care and circumspection.

10. In ***Anukul Chandra Pradhan v. Union of India***[10], the Court, in the context of the provisions made in the election law, observed that they have been made to

9 (1997) 4 SCC 306

10 (1997) 6 SCC 1

"...exclude persons with criminal background of the kind specified therein from the election scene as candidates and voters with the object to prevent criminalization of politics and maintain propriety in elections."

Thereafter, the three-Judge Bench opined that any provision enacted with a view to promote the said object must be welcomed and upheld as subserving the constitutional purpose.

11. In ***K. Prabhakaran v. P. Jayarajan***[11], in the context of enacting disqualification under Section 8(3) of the Representation of the People Act, 1951 (for brevity "the 1951 Act"), it has been reiterated that persons with criminal background pollute the process of election as they have no reservation from indulging in criminality to gain success at an election.

12. It is worth saying that systemic corruption and sponsored criminalization can corrode the fundamental core of elective democracy and, consequently, the constitutional governance. The agonized concern expressed by this Court on being moved by the conscious citizens, as is perceptible from the authorities referred to hereinabove, clearly shows that a democratic republic polity hopes and aspires to be governed by a Government which is run by the elected representatives who do not have any involvement in serious criminal offences or offences relating to corruption, casteism, societal problems, affecting the sovereignty of the nation and many other offences. There are recommendations given by different committees constituted by various Governments for electoral reforms. Some of the reports that have been highlighted at the bar are (i) Goswami Committee on Electoral Reforms (1990), (ii) Vohra Committee Report (1993), (iii) Indrajit Gupta Committee on State Funding of Elections (1998), (iv) Law Commission Report on Reforms of the Electoral Laws (1999), (v) National Commission to Review the Working of the Constitution (2001), (vi) Election Commission of India – Proposed Electoral Reforms (2004), (vii) The Second Administrative Reforms Commission (2008), (vii) Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013), and (ix) Law Commission Report (2014).

13. Vohra Committee Report and other Reports have been taken note of on various occasions by this Court. Justice J.S. Verma Committee Report on Amendments to Criminal Law has proposed insertion of Schedule 1 to the 1951 Act enumerating offences under IPC befitting the category of 'heinous' offences. It recommended that Section 8(1) of the 1951 Act should be amended to cover, inter alia, the offences listed in the proposed Schedule 1 and a provision should be engrafted that a person

11 K. Prabhakaran v. P. Jayaranjan, (2005) 1 SCC 754 : 2005 SCC (Cri) 451 : AIR 2005 SC 688

in respect of whose acts or omissions a court of competent jurisdiction has taken cognizance under Section 190(1)(a), (b) or (c) of the Code of Criminal Procedure or who has been convicted by a court of competent jurisdiction with respect to the offences specified in the proposed expanded list of offences under Section 8(1) shall be disqualified from the date of taking cognizance or conviction, as the case may be. It further proposed that disqualification in case of conviction shall continue for a further period of six years from the date of release upon conviction and in case of acquittal, the disqualification shall operate from the date of taking cognizance till the date of acquittal.

14. The Law Commission, in its 244th Report, 2014, has suggested amendment to the 1951 Act by insertion of Section 8B after Section 8A, after having numerous consultations and discussions, with the avowed purpose to prevent criminalization of politics. It proposes to provide for electoral reforms. Though it is a recommendation by the Law Commission, yet to understand the existing scenario in which the criminalization of politics has the effect potentiality to create a concavity in the highly treasured values of democracy, we think it apt to reproduce the relevant part of the proposed amendment. It reads as follows: -

"8B. Disqualification on framing of charge for certain offences. - (1) A person against whom a charge has been framed by a competent court for an offence punishable by at least five years imprisonment shall be disqualified from the date of framing the charge for a period of six years, or till the date of quashing of charge or acquittal, whichever is earlier.

(2) Notwithstanding anything contained in this Act, nothing in sub-section (1) shall apply to a person:

(i) Who holds office as a Member of Parliament, State Legislative Assembly or Legislative Council at the date of enactment of this provision, or

(ii) Against whom a charge has been framed for an offence punishable by at least five years imprisonment;

(a) Less than one year before the date of scrutiny of nominations for an election under Section 36, in relation to that election;

(b) At a time when such person holds office as a Member of Parliament, State Legislative Assembly or Legislative

Council, and has been elected to such office after the enactment of these provisions;

(3) For Members of Parliament, State Legislative Assembly or Legislative Council covered by clause (ii) of sub-section (2), they shall be disqualified at the expiry of one year from the date of framing of charge or date of election, whichever is later, unless they have been acquitted in the said period or the relevant charge against them has been quashed."

15. The aforesaid vividly exposits concern at all quarters about the criminalisation of politics. Criminalisation of politics, it can be said with certitude, creates a dent in the marrows of the nation.

CORRUPTION IN THE PRESENT SCENARIO

16. Criminality and corruption go hand in hand. From the date the Constitution was adopted, i.e., 26th January, 1950, a Red Letter Day in the history of India, the nation stood as a silent witness to corruption at high places. Corruption erodes the fundamental tenets of the rule of law. In ***Niranjan Hemchandra Sashittal and another v. State of Maharashtra***[12] the Court has observed:(SCC pp. 654-55, para 26)

"26. It can be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality."

17. Recently, in ***Dr. Subramanian Swamy v. CBI.***[13], the Constitution Bench, speaking through R.M. Lodha, C.J., while declaring Section 6A of the Delhi Special Police Establishment Act, 1946, which was inserted by Act 45 of 2003, as unconstitutional, has opined that:(SCC pp. 725-26, para 59)

"59. It seems to us that classification which is made in Section 6-A on the basis of status in the Government service is not permissible under Article

12 (2013) 4 SCC 642 : (2013) 2 SCC (Cri) 737 : (2013) 2 SCC (L&S) 187

13 (2014) 8 SCC 682 : Writ Petition (Civil) No. 38 of 1997 etc. pronounced on May 06, 2014

14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988. Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988."

And thereafter, the larger Bench further said: (SCC p. 726, para 60)

"60. Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6-A because the goal of law in the PC Act, 1988 is to meet corruption cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences."

And again: (SCC pp. 730-31, paras 71-72)

"70. Office of public power cannot be the workshop of personal gain. The probity in public life is of great importance. How can two public servants against whom there are allegations of corruption of graft or bribe taking or criminal misconduct under the PC Act, 1988 can be made to be treated differently because one happens to be a junior officer and the other, a senior decision maker.

71. Corruption is an enemy of nation and tracking down corrupt public servant, howsoever high he may be, and punishing such person is a necessary mandate under the PC Act, 1988. The status or position of public servant does not qualify such public servant from exemption from equal treatment. The decision making power does not segregate corrupt officers into two classes as they are common crime doers and have to be tracked down by the same process of inquiry and investigation."

18. From the aforesaid authorities, it is clear as noon day that corruption has the potentiality to destroy many a progressive aspect and it has acted as the formidable enemy of the nation.

PROVISIONS RELATING TO QUALIFICATIONS AND DISQUALIFICATION OF MPs AND MLAs/MLCs

19. Having stated about the significance of democracy under our Constitution and holding of free and fair elections as a categorical imperative to sustain and subserve the very base of democracy, and the concern of this Court on being moved under various circumstances about criminalization of politics, presently we shall look at the constitutional and the statutory provisions which provide for qualifications and disqualifications of Members of Parliament and that of the State Legislature.

20. Article 84 of the Constitution provides for qualifications for membership of Parliament. The said Article lays down that a person shall not be qualified to be chosen to fill a seat in the Parliament unless he is a citizen of India, and makes and subscribes before a person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule; and further in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty five years of age; and that apart, he must possess such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

21. Article 102 provides for disqualifications for membership. It provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder; if he is of unsound mind and stands so declared by a competent court; if he is an undischarged insolvent; if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State; and if he is so disqualified by or under any law made by Parliament. The explanation expressly states what would be deemed not to be an office of profit under the Government of India or the Government of any State. That apart, the said Article prescribes that a person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

22. Similarly, Article 173 provides for qualification for membership of the State Legislature and Article 191 enumerates the disqualifications similar to Article 102.

23. The Parliament by the 1951 Act has prescribed further qualifications and disqualifications to become a member of Parliament or to become a member of Legislative Assembly. Section 8 of the Act stipulates the disqualification on conviction

for certain offences. We need not state the nature of the offences enumerated therein. Suffice it to mention Section 8(1) covers a wide range of offences not only under the Indian Penal Code but also under many other enactments which have the potentiality to destroy the core values of a healthy democracy, safety of the State, economic stability, national security, and prevalence and sustenance of peace and harmony amongst citizens, and many others.

24. Sub-sections 8(3) and 8(4), which have been a matter of great debate, are reproduced below:-

> *"8(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.*
>
> *(4) Notwithstanding anything in sub-section (1), Sub-section (2) or sub-section (3), a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapse from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court."*

25. At this juncture, it is apposite to mention that the constitutional validity of sub-section (4) of Section 8 of the 1951 Act was challenged before this Court under Article 32 of the Constitution in ***Lily Thomas v. Union of India and others***[14] wherein the Court, referring to the decision in K Prabhakaran (supra) and Articles 102(1)(e) and 191(1)(e) of the Constitution, held that: (Lily Thomas case14, SCC pp. 671-72, para 32)

> *"32. ... once a person who was a Member of either House of Parliament or House of the State Legislature becomes disqualified by or under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, his seat automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Act to defer the date on which the disqualification of a sitting Member will have effect and prevent his seat becoming vacant on account of the disqualification under Article 102(1)(e)*

14 Lily Thomas v. Union of India, (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811

or Article 191(1)(e) of the Constitution. Eventually, the Court ruled that the affirmative words used in Articles 102(1)(e) and 191(1)(e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as Member of either House of Parliament or as a Member of the Legislative Assembly or Legislative Council of a State and for a person who is a sitting Member of a House of Parliament or a House of the State Legislature and the words in Articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such power of the Parliament to defer the date on which the disqualifications would have effect and, therefore, sub-section (4) of Section 8 of the Act, which carves out a saving in the case of sitting Members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting Member of Parliament or a State Legislature, is beyond the powers conferred on Parliament by the Constitution."

Thereafter, dealing with sitting members of the Parliament and State Legislature, the two-Judge Bench ruled that if any sitting Member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act, and by virtue of such conviction and/or sentence, suffers the disqualifications mentioned in subsections (1), (2) and (3) of Section 8 of the Act, his membership of Parliament or the State Legislature, as the case may be, would not be saved by sub-section (4) of Section 8 of the Act.

27. Thus, the scheme of disqualification upon conviction laid down by the 1951 Act clearly upholds the principle that a person who has been convicted for certain categories of criminal activities is unfit to be a representative of the people. Criminal activities that result in disqualification are related to various spheres pertaining to the interest of the nation, common citizenry interest, communal harmony, and prevalence of good governance. It is clear that the 1951 Act lays down that the commission of serious criminal offences renders a person ineligible to contest in elections or continue as a representative of the people. Such a restriction does provide the salutary deterrent necessary to prevent criminal elements from holding public office thereby preserving the probity of representative government.

SUBMISSIONS OF THE COUNSEL

28. In this backdrop, the proponements put forth by Mr. Dwivedi, learned senior counsel, who was appointed as amicus curiae, are to be noted and considered. It is his submission that under the constitutional scheme, it is the right of a citizen

to be governed by a Government which does not have Ministers in the Council of Ministers with criminal antecedents. Though qualifications and disqualifications for the Members of Parliament and Members of the State Legislative Assembly or the State Legislative Council are provided under the Constitution, and they basically relate to the election process and continuance in the House and the further disqualifications which have been enumerated under the 1951 Act have been legislated by the Parliament being empowered under the specific provisions of the Constitution, yet when the Ministers are appointed who constitute the spectrum of collective responsibility to run the Government, a stronger criteria has to be provided for. A Minister is appointed by the President on the advice of the Prime Minister as per Article 75(1) of the Constitution and a Minister enters upon his Office after the President administers him oath of office and secrecy according to the form set out for the said purpose in the Third Schedule and, therefore, submits Mr. Dwivedi, it is the constitutional obligation on the part of the Prime Minister not to recommend any person to be appointed as a Minister of the Council of Ministers who has criminal antecedents or at least who is facing a criminal charge in respect of heinous or serious offences. The choice made by the Prime Minister has to have its base on constitutional choice, tradition and constitutional convention which must reflect the conscience of the Constitution. It is propounded by him that the same would serve the spirit and core values of the Constitution, the values of constitutionalism and the legitimate expectations of the citizens of this country. The power conferred on any constitutional authority under any of the Articles of the Constitution may not be circumscribed by express or obvious prohibition but it cannot be said that in the absence of use of any express phraseology in that regard, it would confer an unfettered and absolute power or unlimited discretion on the said constitutional authority.

Learned senior counsel would contend that the doctrine of implied limitation has been accepted as a principle of interpretation of our organic and living Constitution to meet the requirements of the contemporaneous societal metamorphosis and if it is not applied to the language of Article 75(1), the élan vital of the Constitution would stand extinguished. It is urged by him that judiciary, as the final arbiter of the Constitution, is under the constitutional obligation to inject life to the words of the Constitution so that they do not become stagnate or sterile. In this context, Mr. Dwivedi has commended us to the views of the learned Judges in His ***Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another***[15] to highlight

15 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225

that the applicability of the doctrine of implied limitation has been accepted by this Court.

29. Relying on the said principle, it is contended by him that the same has to be read into the language of Article 75(1) of the Constitution to state that the Prime Minister, while giving advice to the President for appointment of a person as Minister, is not constitutionally permitted to suggest the name of a person who is facing a criminal trial and in whose case charge/charges have been framed. Learned senior counsel has further submitted that high constitutional offices have to possess "institutional integrity" so that the faith of the people at large is not shaken. He has emphasised on the office of the President, the Governors, Judges of the High Courts and of the Supreme Court of the country and the Comptroller and Auditor General of India. Such offices, as contended, are offices of high public trust and, therefore, it is a natural necessity that in such appointments, the incumbent should be of impeccable integrity and character and it cannot be conceived that such a person would be involved in any kind of criminal offence. Mr. Dwivedi has made a distinction with regard to the eligibility of a person for becoming a Member of Parliament as that is controlled by qualifications and disqualifications and the absence of disqualifications, but to be a Minister in the Council of Ministers which is done solely on the advice of the Prime Minister, absence of criminal antecedents has to be a condition precedent. It is canvassed by him that when parliamentary democracy is a basic feature of the Constitution and the Council of Ministers exercise all the powers as per the democratic conventions, it has to be treated as an important constitutional institution of governance of the nation and, therefore, it cannot be allowed to be held by persons involved in criminal offences. He has placed reliance upon the authorities in ***Centre for PIL and another v. Union of India and another***[16], ***N. Kannadasan v. Ajoy Khose and others***[17], ***Inderpreet Singh Kahlon v. State of Punjab***[18], **Arun Kumar Agarwal v. Union of India**[19], **State of Punjab v. Salil Sabhlok and others**[20] and ***Centre for Public Interest Litigation and another v. Union of India and another***[21].

30. Laying stress on the word "advice", apart from referring to the dictionary meaning, the learned senior counsel has urged that the framers of the Constitution have used

16 (2011) 4 SCC 1 : (2011) 1 SCC (L&S) 609
17 (2009) 7 SCC 1 : (2009) 3 SCC (Civ) 1
18 (2006) 11 SCC 356 : (2007) 1 SCC (L&S) 444
19 (2014) 2 SCC 609 : (2014) 1 SCC (L&S) 433
20 (2013) 5 SCC 1 : (2013) 2 SCC (L&S) 1
21 (2005) 8 SCC 202 : (2006) 1 SCC (Cri) 23

the word "advice" as the Office of the Prime Minister is expected to carry the burden of the constitutional trust. The advice given by the Prime Minister to the President in the context of Article 75(1) has to be a considered, deliberate and informed one, especially taking note of the absence of criminal antecedents and lack of integrity. A Minister, though holds the office during the pleasure of the President, yet as per the law laid down by this Court and the convention, the advice of the Prime Minister binds the President. However, the President, being the Executive Head of the State, can refuse to follow the advice, if there is constitutional prohibition or constitutional impropriety or real exceptional situation that requires him to act to sustain the very base of the Constitution. Learned senior counsel would submit that the President, in exercise of his constitutional prerogative, may refuse to accept the advice of the Prime Minister, if he finds that the name of a Member of Parliament is suggested to become a Minister who is facing a criminal charge in respect of serious offences. To buttress the said submission, he has drawn inspiration from the decisions in ***Samsher Singh v. State of Punjab and another***[22] and ***B. R. Kapur v. State of T.N. and another***[23].

31. Mr. Dwivedi has said that the situation "peril to democracy", as visualized in Samsher Singh (supra, confers the discretion on the President and he may not accept the advice. Learned senior counsel would submit that the decision in Samsher Singh (supra) has been followed in ***M.P. Special Police Establishment v. State of M.P. and others***[24] wherein the Governor in an exceptional circumstance differed with the advice of the Council of Ministers and granted sanction for prosecution. Emphasising on the concept of constitutional trust in the Prime Minister which is inherent in the Constitution and which was a part of the Constituent Assembly Debates, Mr. Dwivedi has referred to the Debates in the Constituent Assembly. It is argued that a constitutional convention has to be read into Article 75(1) which would convey that a person charged with serious crimes cannot be appointed as a Minister, for the individual responsibility of the Cabinet is always comprehended as a facet of collective responsibility. For the aforesaid purpose, he has found the stimulus from "Constitutional Law" by Loveland, "Constitutional and Administrative Law" by David Polland, Neil Parpworth David Hughs, "Constitutional and Administrative Law" by Hilaire Barnett (5th Edn.) and "Constitutional Practice".

32. Mr. Anil Kumar Jha, learned counsel who has preferred the writ petition on behalf of the petitioner, supplementing the arguments of Mr. Dwivedi, contended that though

22 Samsher Singh v. State of Punjab, (1974) 2 SCC 831 L 1974 SCC (L&S) 550

23 B. R. Kapur v. State of Punjab, (2001) 7 SCC 231

24 (2004) 8 SCC 788 : 2005 SCC (Cri) 1

the choice of the Prime Minister relating to a person being appointed as a Minister is his constitutional prerogative, yet such choice cannot be exercised in an arbitrary manner being oblivious of the honesty, integrity and the criminal antecedents of a person who is involved in serious criminal offences. The Prime Minister, while giving advice to the President for appointment of a person as a Minister, is required to be guided by certain principles which may not be expressly stated in the Constitution but he is bound by the unwritten code pertaining to morality and philosophy encapsulated in the Preamble of the Constitution. Learned counsel has emphasised on the purposive interpretation of the Constitution which can preserve, protect and defend the Constitution regardless of the political impact. It is contended by him that if a constitutional provision is silent on a particular subject, this Court can necessarily issue directions or orders by interpretative process to fill up the vacuum or void till the law is suitably enacted. The broad purpose and the general scheme of every provision of the Constitution has to be interpreted, regard being had to the history, objects and result which it seeks to achieve. Learned counsel has placed reliance on ***S.P. Gupta v. Union of India and another***[25] and ***M. Nagaraj and others v. Union of India and others***[26].

33. Mr. T.R. Andhyarujina, learned senior counsel, who was requested to assist the Court, has submitted that in the absence of any express provision for qualification of a Minister in the Union Cabinet under Article 75 of the Constitution except that he has to be a Member of either House of the Parliament and when the oath required to be taken by a Minister under Article 75(4) as given in the Third Schedule, does not give any requirement of his antecedent, there is no legal restriction under the Constitution for a person unless convicted of an offence as provided under Section 8A of the 1951 Act to be appointed as a Minister. It is his submission that Article 84 specifies certain qualifications for filling up the seats of Parliament, but it does not state anything as to the character and qualification of a person qualified to sit in the Parliament. Apart from the disqualifications prescribed under Article 102(i)(e) and the provisions under the 1951 Act, there is no other disqualification for a Member of Parliament to hold the post of a Minister. Therefore, the criminal antecedents or any disqualification that is going to be thought of to hold the post of a Minister after the charge is framed, as contended by the petitioner, may be in the realm of propriety but that cannot be read into the constitutional framework.

34. Mr. Andhyarujina has further submitted that Section 44(4)(ii) of the Australian Constitution puts a limitation on the member of the House which travels beyond

25 1981 Supp SCC 87

26 (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

conviction in a criminal case, for the said provision provides that any person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer, would be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. Learned counsel has commended us to Lane's Commentary on the Australian Constitution, 1986 to highlight that this is an exceptional provision in a Constitution which disqualifies a person from being a Member of Parliament even if he is not convicted but likely to be subject to a sentence for the prescribed offence, but in the absence of such a provision in our Constitution or in law made by the Parliament, the Court cannot introduce such an aspect on the bedrock of propriety.

35. The learned counsel has also referred to the U.K. Representation of Peoples Act, 1981 which provides that a person who is sentenced or ordered to be imprisoned or detained indefinitely or for more than one year is disqualified and his election is rendered void and the seat of such a member is vacated. Mr. Andhyarujina has also referred to the House of Commons Library paper on disqualification for membership of the House of Commons wherein the practice is that the existence of a criminal record may not disqualify a person from ministerial office, but convictions for offences involving corruption, dishonesty, serious violence or serious sexual misconduct would jeopardize a person's prospect of a ministerial career. Learned senior counsel has also drawn our attention to a publication by Professor Rodney Brazier "Is it a Constitutional issue: Fitness for ministerial office" in Public Law 1994 wherein it has been stated that whether a criminal record should disqualify a person from membership of Government is unclear, however, conviction for serious offences could impede a ministerial appointment. He has also referred to a passage from *Constitutional and Administrative Law* by Hilaire Barnett 4th Ed. P. 354, to show that by an unwritten rule of constitutional propriety, in United Kingdom, a person is unlikely to be made a Minister if he has been convicted of a serious offence or even if he is facing prosecution for a serious offence.

36. The Submission of learned amicus curiae is that there is no implied prohibition in our Constitution on appointment of a Minister in case of a pending prosecution of a serious offence except conviction and, therefore, the principle of implied prohibition that a person who is not convicted but is being prosecuted or charge sheeted for a criminal offence is to be debarred from being a Member of the Legislature and, consequently, a Minister would not be attracted. Learned senior counsel would contend that the jurisprudence is based on innocence of the accused until he is proved guilty which is in tune with Article 14(2) of the International Covenant on

Civil and Political Rights and it cannot be brushed aside. Learned amicus curiae contended that in respect of certain constitutional officials like President of India, Judges of courts including superior courts, Attorney General of India, Comptroller and Auditor General of India and Governor of a State, implied prohibition is implicit. It is urged by him that this Court, while interpreting Article 75(1), cannot introduce the concept of rule of law to attract the principle of implied prohibition as rule of law is an elusive doctrine and it cannot form the basis of a prohibition on the appointment of a Minister.

37. Mr. Andhyarujina, while submitting about the absence of an express constitutional prohibition or a statutory bar founded on the basis of the 1951 Act prescribing conviction, has also submitted that despite the absence of a legal prohibition, there are non-legal requirements of a constitutional behavior implicit in the character of an appointment. He has referred to a passage from Constitutional and Administrative Law by ECS Wade and AW Bradley as well as the Constitutional Debates and urged that a convention should be developed that persons facing charge for serious criminal offences should not be considered for appointment as a Minister, but the Court cannot form a legal basis for adding a prohibition for making such an appointment justiciable in the court of law unless there is a constitutional prohibition or a statutory bar.

38. Mr. K. Parasaran, learned senior counsel, who was also requested to render assistance, has submitted that the area of election in a democratic set-up is governed by the 1951 Act and the rules framed thereunder and in the present mosaic of democracy such a controversy, in the absence of constitutional impediment or statutory prohibition, would not come within the parameters of judicial review. It is his proponement that the Prime Minister, in certain circumstances, regard being had to the political situations, may have certain political compulsions to appoint a Minister so that the frequent elections are avoided. It is his submission that any kind of additional prohibition under Article 75(1) by way of judicial interpretation is impermissible as the Prime Minister is the sole repository of power under the Constitution to advise the President as to who should become a Minister if he is otherwise constitutionally eligible and there is no statutory impediment. Learned senior counsel would contend that the 1951 Act includes certain offences and specifies the stage, i.e., conviction and, therefore, if anything is added to it in respect of the stage, it would be travelling beyond the text which would be contrary to the principles of statutory interpretation.

39. Mr. Parasaran, learned amicus curiae, has drawn a distinction between the two concepts, namely, constitutional morality and constitutional propriety on one hand and ethical acceptability on the other and, in that regard, he has submitted that the advice of the Prime Minister, as has been stated by the framers of the Constitution, to the Head of the Executive for appointment of a Minister should conform to the standards of constitutional morality, regard being had to the constitutional norms, democratic polity and the sanctity of democracy. In essence, the submission of Mr. Parasaran is that the framers of the Constitution have bestowed immense trust on the Prime Minister as would be seen from the Constitutional Debates, and, therefore, this Court should reiterate the principle of constitutional trust and that would be a suggestive one in terms of Article 75(1) of the Constitution.

40. Mr. Paras Kuhad, learned Additional Solicitor General, in his turn, has contended that the doctrine of implied limitation has not been accepted in *Kesavananda Bharati case*[15] by the majority of Judges and, therefore, the interpretation put forth by the learned friend of the Court for the petitioner is impermissible. It is urged by him that while interpreting Article 75(1) of the Constitution, the principle of implied limitation cannot be read into it to curtail the power of a high constitutional functionary like the Prime Minister.

41. It is his further submission that in the absence of a constitutional prohibition or restriction, nothing should be engrafted into it or implanted. It is put forth by him that the submission of learned amicus curiae to the effect that the President can exercise his discretion by not accepting the recommendations of the Prime Minister or by not acting on the advice of the Prime Minister is contrary to the constitutional norms and the parliamentary system prevalent in our country under the Constitution. For the aforesaid purpose, he has placed reliance on the decision in ***U.N.R. Rao v. Indira Gandhi***[27]. It is urged by him that if anything is added to Article 75(1), that would tantamount to incorporating a disqualification which is not present and the principle of judicial review does not conceptually so permit, for such a disqualification could have been easily imposed by the framers of the Constitution or by the Parliament by making a provision under the 1951 Act. To bolster the said submission, he has commended us to the Constitution Bench decision in ***G. Narayanaswami v. G. Pannerselvam***[28] and a three-Judge Bench decision in ***Shrikant v. Vasantrao***[29]. The choice of the Prime Minister is binding on the President and a Minister holds the office till he enjoys the confidence of

27 (1971) 2 SCC 63

28 (1972) 3 SCC 717

29 (2006) 2 SCC 682

the House. Learned Additional Solicitor General, for the said purpose, has drawn inspiration from certain passages from Samsher Singh (supra).

42. It is his further submission that if the stage of framing of charge of any offence is introduced, it would frustrate and, eventually, defeat the established concept of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty and there is indeed a long distance between the accused "may have committed the offence" and "must have committed the offence" which must be traversed by the prosecution by adducing reliable and cogent evidence. In this regard, reliance has been placed on ***Narendra Singh v. State of M.P.***[30], ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra***[31], ***S. Ganesan v. Rama Ranghuraman***[32], ***State of U.P. v. Naresh***[33] and ***Kailash Gour & ors. v. State of Assam***[34].

Learned counsel would suggest that the stage would affect the concept of democratic legitimacy and a person cannot become ineligible on the basis of perceived seriousness of the crime without providing a protection despite the person being otherwise eligible, efficient and capable of being chosen as a Minister by the Prime Minister.

CONSTITUTIONAL PROVISIONS

43. Having regard to the aforesaid submissions which have been put forth from various perspectives, we shall proceed to deal with the ambit and scope of the constitutional provisions which are relevant in the present context and how they are to be interpreted on the parameters of constitutional interpretation and on the bedrock of the precedents of this Court. We think it seemly to refer to the relevant Articles of the Constitution which are centripodal to the controversy.

44. Articles 74 and 75 read as follows:-

> *"**74. Council of Ministers to aid and advice Presidents.**—(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:*

30 (2004) 10 SCC 699
31 (2005) 5 SCC 294
32 (2011) 2 SCC 83
33 (2011) 4 SCC 324
34 (2012) 2 SCC 34

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

75. Other provisions as to Ministers. *(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.*

(1A) The total number of Ministers, including the Prime Minister, in the Council of Ministers shall not exceed fifteen per cent of the total number of members of the House of the People.

(1B) A member of either House of Parliament belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to either House of Parliament before the expiry of such period, till the date on which he is declared elected, whichever is earlier.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule."

From the aforesaid Articles, it is vivid that they deal with the Council of Ministers for the Union of India.

45. Article 163 pertains to the Council of Ministers of State who aid and advise the Governor. It reads as follows:-

> *"**163. Council of Ministers to aid and advice Governor.**—(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.*
>
> *(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.*
>
> *(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.*

46. The relevant part of Article 164 is extracted below:-

> *"**164. Other provisions as to Ministers.** — (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:*
>
> *xxx xxx xxx*
>
> *(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.*
>
> *(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.*
>
> *(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister."*

47. At this juncture, it is apt to refer to the nature of oath which is meant for the office of a Minister. The Third Schedule provides the forms of Oaths or Affirmations of the Constitution:-

> *"Form of oath of office for a Minister for the Union: -*

"I, A.B., do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill-will."

48. The Form of Oath for office of a Minister of State is as follows:-

"I, A.B., do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the State of ..... and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or ill-will."

49. The form of oath of secrecy for a Minister for the Union is as follows: -

"I, A.B., do swear in the name of God/solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."

Similar is the oath of secrecy for a Minister for a State.

We have reproduced the forms pertaining to oath as Mr. Dwivedi stressed on the concept of sanctity of oath that pertains to allegiance to the Constitution, performing of duties without fear or favour and maintenance of secrecy. It is urged by him that a person with criminal antecedents taking such an oath would violate the fundamental values enshrined in the Constitution.

DOCTRINE OF IMPLIED LIMITATION

51. It has been highlighted before us by Mr. Dwivedi, as noted earlier, that regard being had to the nature of office a Minister holds in a democratic set-up under the Constitution, persons with criminal antecedents especially charged for heinous and serious offences cannot and should not hold the said office. He has emphatically put forth that apart from the prohibitions contained in Articles 102 and 179 of the Constitution and the conviction under the 1951 Act, the relevant stage in trial needs to be introduced to the phraseology of Article 75(1) as well as Article 164(1) so that the Prime Minister's authority to give advice has to be restricted to the extent not to

advise a person with criminal antecedents to become a Minister. To substantiate the said view, he has taken aid of the doctrine of "implied limitation".

52 In *Kesavananda Bharati's case*[15], Sikri, CJ, while expressing his view on the doctrine of implied limitation, has observed that in a written Constitution, it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution.

He has further held: (Kesavananda Bharti case[15], SCC pp. 364-65, paras 282-284)

> *"282. It seems to me that reading the Preamble the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense.*
>
> *283. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.*
>
> *284. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents."*

53. Shelat and Grover, JJ., in their opinion, while speaking about the executive power of the President, have observed that although the executive power of the President is apparently expressed in unlimited terms, an implied limitation has been placed on his power on the ground that he is a formal or constitutional head of the executive and that the real executive power vests in the Council of Ministers. The learned Judges arrived at the said conclusion on the basis of the implications of the Cabinet System of Government so as to constitute an implied limitation on the power of the President and the Governors. Proceeding further as regards the amending power of the Constitution, as engrafted under Article 368 of the Constitution, said the learned Judges: (Kesavananda Bharti case[15], SCC p. 454, paras 583)

> *"583. The entire discussion from the point of view of the meaning of the expression "amendment" as employed in Article 368 and the limitations*

which arise by implications leads to the result that the amending power under Article 368 is neither narrow nor unlimited. On the footing on which we have proceeded the validity of the 24th Amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. The insertion of Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit amendment of each and every article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity."

54. Hegde and Mukherjea, JJ., while discussing about implied limitations, opined thus: (Kesavananda Bharti case[15], SCC p. 482, paras 655)

"655. Implied limitations on the powers conferred under a statute constitute a general feature of all statutes. The position cannot be different in the case of powers conferred under a Constitution. A grant of power in general terms or even in absolute terms may be qualified by other express provisions in the same enactment or may be qualified by the implications of the context or even by considerations arising out of what appears to be the general scheme of the statute."

And again: (SCC p. 482, paras 656)-

"656. Lord Wright in James v. Commonwealth of Australia[35] stated the law thus:

"The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and in the construction must hold a balance between all its parts."

Thereafter, the learned Judges proceeded to state that: (Kesavananda Bharti case[15], SCC p. 482, paras 657)

"657. Several of the powers conferred under our Constitution have been held to be subject to implied limitations though those powers are expressed in general terms or even in absolute terms."

And further proceeded to state thus: (SCC p. 483, paras 657)

35 1936 AC 578

> *".... though plenary powers of legislation have been conferred on the Parliament and the State Legislatures in respect of the legislative topics allotted to them, yet this Court has opined that by the exercise of that power neither Parliament nor the State Legislatures can delegate to other authorities their essential legislative functions nor could they invade on the judicial power.*
>
> *These limitations were spelled out from the nature of the power conferred and from the scheme of the Constitution. But, it was urged on behalf of the Union and the States that, though there might be implied limitations on other powers conferred under the Constitution, there cannot be any implied limitations on the amending power. We see no basis for this distinction."*

55. Jaganmohan Reddy, J., in his separate opinion, concurred with the view expressed by Sikri, C.J.

56. Palekar, J., has opined thus: (Kesavananda Bharti case[15], SCC p. 713, paras 1307)

> *"Some more cases like Ranasinghe's case[36] Taylor v. Attorney General of Queensland[37]; Mangal Singh v. Union of India[38], were cited to show that constitutional laws permit implications to be drawn where necessary. Nobody disputes that proposition. Courts may have to do so where the implication is necessary to be drawn."*

After so stating, the learned Judge distinguished the cases by observing that: (SCC p. 713, paras 1307)

> *"1307. ... None of the cases sheds any light on the question with which we are concerned viz. whether an unambiguous and plenary power to amend the provisions of the Constitution, which included the Preamble and the fundamental rights, must be frightened by the fact that some superior and transcendental character has been ascribed to them."*

And eventually, ruled thus: (SCC p. 720, paras 1318)

> *"1318. On a consideration, therefore, of the nature of the amending power, the unqualified manner in which it is given in Article 368 of the Constitution it is impossible to imply any limitations on the power to amend the fundamental rights. Since there are no limitations express or implied on the amending power, it must be conceded that all the Amendments which*

36 1965 AC 172

37 23 CLR 457

38 (1967) 2 SCR 109

are in question here must be deemed to be valid. We cannot question their policy or their wisdom."

57. Chandrachud, J., has observed that: (Kesavananda Bharti case[15], SCC p. 988, paras 2087)

"2087. In considering the petitioner's argument on inherent limitations, it is well to bear in mind some of the basic principles of interpretation. Absence of an express prohibition still leaves scope for the argument that there are implied or inherent limitations on a power, but absence of an express prohibition is highly relevant for inferring that there is no implied prohibition."

58. Khanna, J., while speaking on implied limitation, noted the submission of the learned counsel for the petitioner in the following terms: (Kesavananda Bharti case[15], SCC p. 776, paras 1444)

"1444. Learned counsel for the petitioners has addressed us at some length on the point that even if there are no express limitations on the power of amendment, the same is subject to implied limitations, also described as inherent limitations. So far as the concept of implied limitations is concerned, it has two facets. Under the first facet, they are limitations which flow by necessary implications from express provisions of the Constitution. The second facet postulates limitations which must be read in the Constitution irrespective of the fact whether they flow from express provisions or not because they are stated to be based upon certain higher values which are very dear to the human heart and are generally considered essential traits of civilized existence. It is also stated that those higher values constitute the spirit and provide the scheme of the Constitution. This aspect of implied limitations is linked with the existence of natural rights and it is stated that such rights being of paramount character, no amendment of Constitution can result in their erosion."

Dealing with the same, the learned Judge ruled: (SCC p. 776, paras 1446)

"1446. So far as the first facet is concerned regarding a limitation which flows by necessary implication from an express provision of the Constitution, the concept derives its force and is founded upon a principle of interpretation of statutes. In the absence of any compelling reason it may be said that a constitutional provision is not exempt from the operation of such a principle. I have applied this principle to Article 368 and despite that, I have not been

able to discern in the language of that article or other relevant articles any implied limitation on the power to make amendment contained in the said article."

Be it clarified, in subsequent paragraphs, the learned Judge expressed the view that though the Parliament has been conferred the power of amendment under Article 368 of the Constitution, yet it cannot be permitted to incorporate an amendment which would destroy the basic structure or essential feature of the Constitution.

59. In ***Minerva Mills Ltd. v. Union of India***[39], the Constitution Bench was dealing with the validity of Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976. Chandrachud, C.J., speaking for himself, Gupta, Untwalia and Kailasam, JJ., referred to the majority opinion in Kesavananda Bharati (supra) and referred to the opinion given by Sikri, C.J., Shelat and Grover, JJ., Hegde and Mukherjea, JJ., Jaganmohan Reddy, J. and Khanna, J. and opined thus: (*Minerva Mills Ltd. case*[39], SCC p. 641, paras 11-12)

"11. Khanna, J. broadly agreed with the aforesaid views of the six learned Judges and held that the word "amendment" postulated that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution. According to the learned Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions, it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution", in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution.

12. The summary of the various judgments in Kesavananda Bharati was signed by nine out of the thirteen Judges. Paragraph 2 of the summary reads to say that according to the majority, "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". Whether or not the summary is a legitimate part of the judgment, or is per incuriam for the scholarly reasons cited by authors, it is undeniable that it correctly reflects the majority view."

Thereafter, the learned Chief Justice proceeded to state thus:(*Minerva Mills Ltd. case*[39], SCC p. 642, para 16)

39 (1980) 3 SCC 625

"16. ...The theme song of the majority decision in Kesavananda Bharati is: "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity"."

60. In *B. R. Kapur*[23], the Constitution Bench, after referring to the decision in *Kesavananda Bharti*[15], reproduced paragraph 16 from *Minerva Mills case*[39] and opined that: (*B. R. Kapur*[23], SCC p. 292, para 28)

"28. ... since the Constitution had conferred a limited amending power on Parliament, Parliament could not in the exercise of that limited power, enlarge that very power into an absolute power. A limited amending power was one of the basic features of the Constitution and, therefore, the limitations on that power could not be destroyed. In other words, Parliament could not, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power could not by the exercise of that power convert the limited power into an unlimited one."

61. In ***I.R. Coelho (Dead) by Lrs. v. State of Tamil Nadu***[40], the Nine-Judge Bench, while dealing with the doctrine of implied limitation, ruled thus:

"96.....In the four different opinions six learned Judges came substantially to the same conclusion. These Judges read an implied limitation on the power of Parliament to amend the Constitution. Khanna, J. also opined that there was implied limitation in the shape of the basic structure doctrine that limits the power of Parliament to amend the Constitution but the learned Judge upheld the 29th Amendment and did not say, like the remaining six Judges, that the Twenty-ninth Amendment will have to be examined by a smaller Constitution Bench to find out whether the said amendment violated the basic structure theory or not. This gave rise to the argument that fundamental rights chapter is not part of basic structure. Khanna, J. however, does not so say in Kesavananda Bharati case.[39]"

62. From the aforesaid authorities, it is luminescent that the principle of implied limitation is attracted to the sphere of constitutional interpretation. The question that is required to be posed here is whether taking recourse to this principle of interpretation, this Court can read a categorical prohibition to the words contained in Article 75(1) of the Constitution so that the Prime Minister is constitutionally

40 (2007) 2 SCC 1

prohibited to give advice to the President in respect of a person for becoming a Minister of the Council of Ministers who is facing a criminal trial for a heinous and serious offence and charges have been framed against him by the trial Judge. Reading such an implied limitation as a prohibition would tantamount to adding a disqualification at a particular stage of the trial in relation of a person. This is neither expressly stated nor is impliedly discernible from the provision. The doctrine of implied limitation was applied to the amending power of the Constitution by the Parliament on the fundamental foundation that the identity of the original Constitution could not be amended by taking recourse to the plenary power of amendment under Article 368 of the Constitution. The essential feature or the basic structure of the doctrine was read into Article 368 to say that the identity or the framework of the Constitution cannot be destroyed. In Minerva Mills case, giving example, the Court held that by amendment, the Parliament cannot damage the democratic republican character as has been conceived in the Constitution. Though in Article 368 of the Constitution there was no express prohibition to amend the constitutional provisions, yet the Court in the aforesaid two cases ruled that certain features which are basic to the Constitution cannot be changed by way of amendment. The interpretative process pertained to the word "amendment". Therefore, the concept of implied limitation was read into Article 368 to save the constitutional integrity and identity.

63. In B.R. Kapur's case[23], the Constitution Bench ruled that a non-legislator can be made a Chief Minister or Minister under Article 164(1) only if he has qualifications for membership of the Legislature prescribed under Article 173 and is not disqualified from the membership thereof by reason of the disqualifications set out in Article 191. Bharucha, J. (as his Lordship then was), speaking for the majority, opined that as the second respondent therein had been convicted for offences punishable under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 and Sections 409 and 120-B of the Indian Penal Code and sentenced to undergo rigorous imprisonment of three years, she was disqualified under Section 8(4) of the 1951 Act as the said respondent was disqualified to contest the election. In the said case, she was sworn in as the Chief Minister by the Governor. This Court was moved in by a writ of quo warranto that she was not eligible to hold the post of the Chief Minister. A submission was advanced that it was not open to the Court to read anything into Article 164, for a non-legislator could be sworn in as the Chief Minister, regardless of the qualifications or disqualifications. The Court placed reliance on *Kesavananda Bharati's case*[39] and *Minerva Mills' case*[15] and opined that if a non-legislator is made a Chief Minister under Article 164, then he must satisfy

the qualification for membership of a legislator as prescribed under Article 173. A specific query was made by the Court that even when the person recommended, was, to the Governor's knowledge, a non-citizen or under-age or lunatic or discharged insolvent, could he be appointed as a Chief Minister. It was urged that he/she could only be removed by the vote of no-confidence in the Legislature or at the next election. Discarding the same, the Court opined that acceptance of such a submission would invite disaster. The Court further ruled that when a person is not qualified to become a Member in view of Article 173, he cannot be appointed as a Chief Minister under Article 164(1). Be it noted, there was disqualification in the Constitution and under the 1951 Act to become a Member of the State Legislature, and hence, the Court, appreciating the text and context, read the disqualification into Article 164(1) of the Constitution.

64. On a studied scrutiny of the ratio of the aforesaid decisions, we are of the convinced opinion that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition into Article 75(1) or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such disqualification, in our considered opinion, cannot be read into Article 75(1) or Article 164(1) of the Constitution.

PRINCIPLE OF CONSTITUTIONAL SILENCE OR ABEYANCE

65. The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognized advanced constitutional practice. It has been recognized by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest. Liberalization of the concept of locus standi for the purpose of development of Public Interest Litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in the case of ***Laxmi Kant Pandey v. Union of India***[41] or issuance of guidelines pertaining to arrest in the case of ***D.K. Basu v. State of West***

41 AIR 1987 SC 232

Bengal[42] or directions issued in ***Vishakha and others v. State of Rajasthan and others***[43] are some of the instances.

66. In this context, it is profitable to refer to the authority in Bhanumati and others v. State of Uttar Pradesh through its Principal Secretary and others[44] wherein this Court was dealing with the constitutional validity of the U.P. Panchayat Laws (Amendment) Act, 2007. One of the grounds for challenge was that there is no concept of no confidence motion in the detailed constitutional provision under Part IX of the Constitution and, therefore, the incorporation of the said provision in the statute militates against the principles of Panchayati Raj institutions. That apart, reduction of one year in place of two years in Sections 15 and 28 of the Amendment Act was sought to be struck down as the said provision diluted the principle of stability and continuity which is the main purpose behind the object and reason of the constitutional amendment in Part IX of the Constitution. The Court, after referring to Articles 243-A, 243-C(1), (5), 243-D(4), 243-D(6), 243-F(1), (6), 243-G, 243-H, 243-I(2), 243-J, 243-K(2) and (4) of the Constitution and further taking note of the amendment, came to hold that the statutory provision of no-confidence is contrary to Part-IX of the Constitution. In that context, it has been held as follows: (*Bhnumathi case*[44], SCC p. 17, paras 49-50)

> *"49. Apart from the aforesaid reasons, the arguments by the appellants cannot be accepted in view of a very well-known constitutional doctrine, namely, the constitutional doctrine of silence. Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a Constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their strictures". (P. 10)*
>
> *50. The learned author elaborated this concept further by saying, "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components." (P. 82)"*

42 AIR 1997 SC 610

43 (1997) 6 SCC 241

44 (2010) 12 SCC 1

67. The question that is to be posed here is whether taking recourse to this doctrine for the purpose of advancing constitutional culture, can a court read a disqualification to the already expressed disqualifications provided under the Constitution and the 1951 Act. The answer has to be in the inevitable negative, for there are express provisions stating the disqualifications and second, it would tantamount to crossing the boundaries of judicial review.

DOCTRINE OF CONSTITUTIONAL IMPLICATIONS

68. The next principle that we intend to discuss is the principle of constitutional implication. We are obliged to discuss this principle as Mr. Dwivedi, learned amicus curiae, has put immense emphasis on the words "on the advice of the Prime Minister" occurring in Article 75(1) of the Constitution. It is his submission that these words are of immense significance and apposite meaning from the said words is required to be deduced to the effect that the Prime Minister is not constitutionally allowed to advise the President to make a person against whom charge has been framed for heinous or serious offences or offences pertaining to corruption as Minister in the Council of Ministers, regard being had to the sacrosanctity of the office and the oath prescribed under the Constitution. Learned senior counsel would submit that on many an occasion, this Court has expanded the horizon inherent in various Articles by applying the doctrine of implication based on the constitutional scheme and the language employed in other provisions of the Constitution.

69. In this regard, inclusion of many a facet within the ambit of Article 21 is well established. In ***R. Rajagopal alias R.R. Gopal and another v. State of T.N. and others***[45], right to privacy has been inferred from Article 21.

Similarly, in ***Joginder Kumar v. State of U.P. and others***[46], inherent rights under Articles 21 and 22 have been stated. Likewise, while dealing with freedom of speech and expression and freedom of press, the Court, in ***Romesh Thappar v. The State of Madras***[47], has observed that freedom of speech and expression includes freedom of propagation of ideas.

70. There is no speck of doubt that the Court has applied the doctrine of implication to expand the constitutional concepts, but the context in which the horizon has been expanded has to be borne in mind. What is suggested by Mr. Dwivedi is that by taking recourse to the said principle, the words employed in Article 75(1) are to be interpreted to add a stage in the disqualification, i.e., framing of charges in

45 (1994) 6 SCC 632

46 AIR 1994 SC 1349

47 AIR 1950 SC 124

serious and heinous criminal offences or offences relating to corruption. At this juncture, it is seemly to state that the principle of implication is fundamentally founded on rational inference of an idea from the words used in the text. The concept of legitimate deduction is always recognised. In ***Melbourne Corporation v Commonwealth***[48], Dixon, J opined that constitutional implication should be based on considerations which are compelling. Mason, CJ, in ***Political Advertising Case***[49], has ruled that there can be structural implications which are 'logically or practically necessary for the preservation of the integrity of that structure'. Any proposition that is arrived at taking this route of interpretation must find some resting pillar or strength on the basis of certain words in the text or the scheme of the text. In the absence of that, it may not be permissible for a Court to deduce any proposition as that would defeat the legitimacy of reasoning. A proposition can be established by reading number of articles cohesively, for that will be in the domain of substantive legitimacy.

71. Dixon, J, in ***Australian National Airways Pty Ltd. v Commonwealth***[50], said: 'I do not see why we should be fearful about making implications'. The said principle has been approved in ***Lamshed v Lake***[51], and thereafter, in ***Payroll Tax Case***[52]. Thus, the said principle can be taken aid of for the purpose of interpreting constitutional provision in an expansive manner. But, it has its own limitations. The interpretation has to have a base in the Constitution. The Court cannot re-write a constitutional provision. In this context, we may fruitfully refer to Kuldip Nayar's case wherein the Court repelled the contention that a right to vote invariably carries an implied term, i.e., the right to vote in secrecy. The Court observed that where the Constitution thought it fit to do so, it has itself provided for elections by secret ballot e.g., in the case of election of the President of India and the Vice-President of India.

Thereafter, the Court referred to Articles 55(3) and 66(1) of the Constitution which provide for elections of the President and the Vice-President respectively, referring to voting by electoral colleges, consisting of elected Members of Parliament and Legislative Assembly of each State for the purposes of the former office and Members of both Houses of Parliament for the latter office and in both cases, it was felt necessary by the framers of the Constitution to provide that the voting at such elections shall be by secret ballot through inclusion of the words "and the voting

48 (1974) 74 CLR 31

49 (1992) 177 CLR 106

50 (1945) 71 CLR 29, 85

51 (1958) 99 CLR 132, 144-5

52 (1971) 122 CLR 353, 401

at such election shall be by secret ballot". If the right to vote by itself implies or postulates voting in secrecy, then Articles 55(3) and 66(1) would not have required the inclusion of such words. The necessity for including the said condition in the said articles shows that "secret ballot" is not always implied. It is not incorporated in the concept of voting by necessary implication. Thereafter, the Court opined: -

> *"421. It follows that for "secret ballot" to be the norm, it must be expressly so provided. To read into Article 80(4) the requirement of a secret ballot would be to read the words "and the voting at such election shall be by secret ballot" into the provision. To do so would be against every principle of constitutional and statutory construction."*

72. Thus analysed, it is not possible to accept the submission of Mr. Dwivedi that while interpreting the words "advice of the Prime Minister" it can legitimately be inferred that there is a prohibition to think of a person as a Minister if charges have been framed against him in respect of heinous and serious offences including corruption cases under the criminal law.

OTHER RELEVANT CONSTITUTIONAL CONCEPTS – CONSTITUTIONAL MORALITY, GOOD GOVERNANCE AND CONSTITUTIONAL TRUST

73. Though we have not accepted the inspired arguments of Mr. Dwivedi to add a disqualification pertaining to the stage into Article 75(1) of the Constitution, yet we cannot be oblivious of the three concepts, namely, constitutional morality, good governance and constitutional trust.

74. The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr. Ambedkar had, throughout the Debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said: -

> *"Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.*[53]*"*

75. The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic

53 Constituent Assembly Debates 1989: VII, 38.

values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality. In this context, the following passage would be apt to be reproduced: -

> *"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*[54]*"*

76. Regard being had to the aforesaid concept, it would not be out of place to state that institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember the famous line of Laurence H. Tribe that a Constitution is "written in blood, rather than ink"[55].

GOOD GOVERNANCE

77. Having stated about the aspect of constitutional morality, we presently proceed to deal with the doctrine of good governance. In ***A. Abdul Farook v. Municipal Council, Perambalur and others***[56], the Court observed that the doctrine of good governance requires the Government to rise above their political interest and act only in the public interest and for the welfare of its people.

78. In ***Patangrao Kadam v. Prithviraj Sayajirao Yadav Deshmukh and Ors.***[57], the Court, referring to the object of the provisions relating to corrupt practices, elucidated as follows: (SCC p. 305, para 14)

> *"Clean, efficient and benevolent administration are the essential features of good governance which in turn depends upon persons of competency and good character."*

54 James Madison as Publius, Federalist 51

55 Laurance H. Tribe, THE INVISIBLE CONSTITUTION 29 (2008)

56 (2009) 15 SCC 351

57 (2001) 3 SCC 594

79. In ***M.J. Shivani and others v. State of Karnataka and others***[58], it has been held that: (SCC pp. 306-07, para 31)

> *"31. ... fair play and natural justice are part of fair public administration; non-arbitrariness and absence of discrimination are hall marks for good governance under the rule of law."*

80. In ***State of Maharashtra and others v. Jalgaon Municipal Corporation and others***[59], it has been ruled that: (SCC p. 760, para 37)

> *"37. ... one of the principles of good governance in a democratic society is that smaller interest must always give way to larger public interest in case of conflict."*

81 In ***U.P. Power Corporation Ltd. and Anr. v. Sant Steels & Alloys (P) Ltd. and Ors.***[60], the Court observed that in this 21st century, when there is global economy, the question of faith is very important.

82. In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as primary one and any other interest secondary. The maxim *Salus Populi Suprema Lex*, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for Fundamental Rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not an Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependant upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation.

CONSTITUTIONAL TRUST

83. Having stated about good governance, we shall proceed to deal with the doctrine of "constitutional trust". The issue of constitutional trust arises in the context of the debate in the Constituent Assembly that had taken place pertaining to

58 (1995) 6 SCC 289

59 (2003) 9 SCC 731

60 AIR 2008 SC 693

the recommendation for appointment of a Minister to the Council of Ministers. Responding to the proposal for the amendment suggested by Prof. K.T. Shah with regard to the introduction of a disqualification of a convicted person becoming a Minister, Dr. B.R. Ambedkar had replied: (CAD Vol. VII, p. 1160)

> *"His last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it not desirable, is it not sufficient that we should trust the Prime Minister, the Legislature and the public at large watching the actions of the Ministers and the actions of the Legislature to see that no such infamous thing is done by either of them? I think this is a case which may eminently be left to the good-sense of the Prime Minister and to the good sense of the Legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary."*
>
> *[Emphasis supplied]*

84. The trust reposed in the Prime Minister is based on his constitutional status. In ***Rai Sahib Ram Jawaya Kapur and others v. The State of Punjab***[61], B.K. Mukherjea, CJ, while referring to the scope of Article 74, observed that under Article 53(1) of the Constitution, the executive power of the Union is vested in the President but under Article 74, there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has, thus been, made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.

85. In *Samsher Singh*[22], Ray, CJ, speaking for the majority, opined that the President as well as the Governor is the constitutional or the formal head and exercise the power and functions conferred on them by or under the Constitution on the aid and advice of the Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. The learned Chief Justice further observed that the satisfaction of the President or the Governor in the constitutional sense in the Cabinet system of Government is really the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises his powers and functions and, thereafter, it has been held that they are required to act with the aid and advice of the Council of

61 AIR 1955 SC 549

Ministers and are not required by the Constitution to act personally without the aid and advice. Krishna Iyer, J., speaking for himself and Bhagwati,J., opined that under the Constitution, the President and Governor, custodian of all executive and other powers under various Articles, are to exercise their formal constitutional powers only upon and in accordance with the due advice of their Ministers, save in few well-known exceptional situations. The learned Judge has carved out certain exceptions with which we are really presently not concerned with.

86. In ***Supreme Court Advocates-on-Record Association and another v. Union of India***[62], while discussing about constitutional functions, the Court observed that it is a constitutional requirement that the person who is appointed as Prime Minister by the President is the effective head of the Government and the other Ministers are appointed by the President on the advice of the Prime Minister and both the Prime Minister and the Ministers must continuously have the confidence of the House of the People, individually and collectively. The Court further observed that: (SCC 650, para 336)

> *"336. ... The powers of the President are exercised by him on the advice of the Prime Minister and the Council of Ministers which means that the said powers are effectively exercised by the Council of Ministers headed by the Prime Minister."*

87. We have referred to these authorities singularly for the purpose that the Prime Minister has been conferred an extremely special status under the Constitution.

88. As the Prime Minister is the effective head of the Government, indubitably, he has enormous constitutional responsibility. The decisions are taken by the Council of Ministers headed by the Prime Minister and that is the Cabinet form of Government and our Constitution has adopted it. While discussing about the successful working of the Cabinet form of Government, H.M. Seervai, the eminent author of Constitutional Law[63], observed: -

> *"18.57. The Constitution does not guarantee the power would be wisely exercised by the executive. — ... But as long as the political atmosphere remains what it is, the Constitution cannot be worked as it was intended to be worked. It has been said that the constitution confers power, but it does not guarantee that the power would be wisely exercised. It can be said equally that the Constitution confers power but it gives no guarantee that it will be worked by men of high character, capacity and integrity. If*

62 AIR 1994 SC 268

63 H.M. Seervai, Constitutional Law of India, vol. 2, 4th Ed. Pg. 2060

the Constitution is to be successfully worked, an attempt must be made to improve the political atmosphere and to lay down and enforce standards of conduct required for a successful working of our Constitution."

[Emphasis added]

89. In Constitutional and Administrative Law[64], the learned authors while dealing with individual responsibility of Ministers, have said:-

"3. THE INDIVIDUAL RESPONSIBILITY OF MINISTERS

The individual responsibility of ministers illustrates further Professor Munro's continuum theory. Ministers are individually accountable for their own private conduct, the general running of their departments and acts done, or omitted to be done, by their civil servants; responsibility in the first two cases is clearer than in others. A minister involved in sexual or financial scandals particularly those having implications for national security, is likely to have to resign because his activities will so attract the attention of the press that he will be no longer able to carry out departmental duties."

90. In Constitutional & Administrative Law[65], Hilaire Barnett, while dealing with the conduct of Ministers, referred to the Nolan Committee[66] which had endorsed the view that:-

"public is entitled to expect very high standards of behaviour from ministers, as they have profound influence over the daily lives of us all"

91. In Constitutional Practice[67], Rodney Brazier has opined:-

"...a higher standard of private conduct is required of Ministers than of others in public life, a major reason for this today being that the popular press and the investigative journalism of its more serious rivals will make a wayward Minister's continuance in office impossible."

92. Centuries back what Edmund Burke had said needs to be recapitulated: -

"All persons possessing a position of power ought to be strongly and awfully impressed with an idea that they act in trust and are to account for their conduct in that trust to the one great Master, Author and Founder of Society."

64 Constitutional and Administrative Law, 2nd Ed. Pg 368-370, David Polland, Neil Parpworth David Hughs

65 5th Edition, pg 297-305

66 Nolan Report, Standards in Public Life, Cm 2850-I, 1995, Lodon HMSO, Chapter 3, para 4.

67 Constitutional Practice (Second Edition) (pg. 146-148)

93. This Court, in re Art. 143, Constitution of India and Delhi Laws Act (1912)[68], opined that the doctrine of constitutional trust is applicable to our Constitution since it lays the foundation of representative democracy. The Court further ruled that accordingly, the Legislature cannot be permitted to abdicate its primary duty, viz. to determine what the law shall be. Though it was stated in the context of exercise of legislative power, yet the same has signification in the present context, for in a representative democracy, the doctrine of constitutional trust has to be envisaged in every high constitutional functionary.

ANALYSIS OF THE TERM "ADVICE' UNDER ARTICLE 75 (1)

94. Having dealt with the concepts of "constitutional morality", "good governance", "constitutional trust" and the special status enjoyed by the Prime Minister under the scheme of the Constitution, we are required to appreciate and interpret the words "on the advice of the Prime Minister" in the backdrop of the aforestated concepts.

95. As per the New Shorter Oxford English Dictionary, one of the meanings of the word "advice" is "the way in which a matter is looked at; opinion; judgment". As per P. Ramanatha Aiyer's Law Lexicon, 2nd Edition, one of the meanings given to the word "advice" is "counsel given or an opinion expressed as to the wisdom of future conduct" (Abbot L. Dict.). In Webster Comprehensive Dictionary, International Edition, one of the meanings given to the word "advice" is "encouragement or dissuasion; counsel; suggestion". Thus, the word "advice" conveys formation of an opinion. The said formation of an opinion by the Prime Minister in the context of Article 75(1) is expressed by the use of the said word because of the trust reposed in the Prime Minister under the Constitution. To put it differently, it is a "constitutional advice".

96. The repose of faith in the Prime Minister by the entire nation under the Constitution has expectations of good governance which is carried on by Ministers of his choice. It is also expected that the persons who are chosen as Ministers do not have criminal antecedents, especially facing trial in respect of serious or heinous criminal offences or offences pertaining to corruption. There can be no dispute over the proposition that unless a person is convicted, he is presumed to be innocent but the presumption of innocence in criminal jurisprudence is something altogether different, and not to be considered for being chosen as a Minister to the Council of Ministers because framing of charge in a criminal case is totally another thing. Framing of charge in a trial has its own significance and consequence. Setting the criminal law into motion by lodging of an FIR or charge sheet being filed by the investigating agency is in the sphere of

68 AIR 1951 SC 332

investigation. Framing of charge is a judicial act by an experienced judicial mind. As the Debates in the Constituent Assembly would show, after due deliberation, they thought it appropriate to leave it to the wisdom of the Prime Minister because of the intrinsic faith in the Prime Minister. At the time of framing of the Constitution, the debate pertained to conviction. With the change of time, the entire complexion in the political arena as well as in other areas has changed. This Court, on number of occasions, as pointed out hereinbefore, has taken note of the prevalence and continuous growth of criminalization in politics and the entrenchment of corruption at many a level. In a democracy, the people never intend to be governed by persons who have criminal antecedents. This is not merely a hope and aspiration of citizenry but the idea is also engrained in apposite executive governance.

97. It would be apt to say that when a country is governed by a Constitution, apart from constitutional provisions, and principles constitutional morality and trust, certain conventions are adopted and grown. In Supreme Court Advocates-on-Record Association (supra), the Court reproduced a passage from K.C. Wheare's Book "The Statute of Westminster and Dominion Status" (fourth edition) and we quote: (SCC p. 650, para 337)

> *"337. .. The definition of conventions may thus be amplified by saying that their purpose is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating the way in which legal rules shall be applied."*

I. Jennings, in ***The Law and the Constitution***[69], stated that a convention exists not only due to its nonenforceability but also because there is a reason for the rule. I. Lovehead, in ***Constitutional Law – A Critical Introduction***[70], has said that the conventions provide a moral framework within which the government ministers or the monarch should exercise non-justiciable legal powers and regulate relations between the government and other constitutional authorities. In the Constituent Assembly Debates, Dr. Rajendra Prasad, in his speech as President of the Constituent Assembly, while moving for the adoption of the Constitution of India, had observed: (CAD p. 993)

> *"Many things which cannot be written in a Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions."*

69 I. Jennings, The law and the Constitution (5th Edn., ELBS: London, 1976) in his Chapter "Conventions" at 247.

70 I. Lovehead, Constitutional Law-A Critical Introduction (2nd edn., Butterworths: London, 2000) at 247

CONCLUSION

98. From the aforesaid, it becomes graphically vivid that the Prime Minister has been regarded as the repository of constitutional trust. The use of the words "on the advice of the Prime Minister" cannot be allowed to operate in a vacuum to lose their significance. There can be no scintilla of doubt that the Prime Minister's advice is binding on the President for the appointment of a person as a Minister to the Council of Ministers unless the said person is disqualified under the Constitution to contest the election or under the 1951 Act, as has been held in B.R. Kapur's case. That is in the realm of disqualification. But, a pregnant one, the trust reposed in a high constitutional functionary like the Prime Minister under the Constitution does not end there. That the Prime Minister would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance.

99. It is worthy to note that the Council of Ministers has the collective responsibility to sustain the integrity and purity of the constitutional structure. That is why the Prime Minister enjoys a great magnitude of constitutional power. Therefore, the responsibility is more, regard being had to the instillation of trust, a constitutional one. It is also expected that the Prime Minster should act in the interest of the national polity of the nation-state. He has to bear in mind that unwarranted elements or persons who are facing charge in certain category of offences may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish the constitutional trust. We have already held that prohibition cannot be brought in within the province of 'advice' but indubitably, the concepts, especially the constitutional trust, can be allowed to be perceived in the act of such advice.

100. Thus, while interpreting Article 75(1), definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been

framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. We say nothing more, nothing less.

101. At this stage, we must hasten to add what we have said for the Prime Minister is wholly applicable to the Chief Minister, regard being had to the language employed in Article 164(1) of the Constitution of India.

102. Before parting with the case, we must express our unreserved and uninhibited appreciation for the assistance rendered by Mr. Rakesh Dwivedi, Mr. Andhyarjina and Mr. Parasaran, learned senior counsel.

103. The writ petition is disposed of accordingly without any order as to costs.

Madan B. Lokur, J. ***(concurring)*** — While I agree with the draft judgment of my learned brother Justice Dipak Misra, I find it necessary to express my view on the issues raised.

105. The question in the amended writ petition filed under Article 32 of the Constitution is rather narrow, but the submissions were quite broad-based.

106. Two substantive reliefs have been claimed in the writ petition. The first relief is for a declaration that the appointment of Respondent Nos. 3 to 7 as Ministers in the Government of India is unconstitutional. This is based, inter alia, on the averment that these respondents have 'criminal antecedents'. Subsequently by an order passed on 24th March, 2006[5] these respondents (along with respondent No. 2) were deleted from the array of parties since the broad question before this Court was "about the legality of the persons with criminal background and/or charged with offences involving moral turpitude being appointed as ministers in Central and State Governments."

107. As far as the first substantive relief is concerned, the expressions 'criminal background' and 'criminal antecedents' are extremely vague. Nevertheless the legal position on the appointment of a Minister is discussed hereafter.

108. The second substantive relief is for the framing of possible guidelines for the appointment of a Minister in the Central or State Government. It is not clear who should frame the possible guidelines, perhaps this court. As far as this substantive relief is concerned, it is entirely for the appropriate Legislature to decide whether guidelines are necessary, as prayed for, and the frame of such guidelines. No direction is required to be given on this subject.

109. For the sake of convenience, reference is made only to the relevant Articles of the Constitution and the law relating to the appointment and continuance of a Minister in the Central Government. The discussion, of course, would relate to both a Minister in the Central Government and mutatis mutandis in the State Government.

QUALIFICATIONS AND DISQUALIFICATIONS FOR BEING A LEGISLATOR

110. Article 84 of the Constitution negatively provides the qualification for membership of Parliament. This Article is quite simple and reads as follows:

> *"84. Qualification for membership of Parliament. - A person shall not be qualified to be chosen to fill a seat in Parliament unless he –*
>
> *(a) is a citizen of India, and makes and subscribes before someperson authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;*
>
> *(b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and*
>
> *(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament."*

111. The qualifications postulated by clause (c) of Article 84 have not yet been prescribed by law by Parliament. In this context, it is worth quoting the President of the Constituent Assembly Dr. Rajendra Prasad, who said on 26th November, 1949, before formally putting the motion moved by Dr. Ambedkar to vote, as follows[71]: (CAD p. 993)

> *"There are only two regrets which I must share with the honourable Members. I would have liked to have some qualifications laid down for members of the Legislatures. It is anomalous that we should insist upon high qualifications for those who administer or help in administering the law but none for those who made it except that they are elected. A law giver requires intellectual equipment but even more than that capacity to take a balanced view of things to act independently and above all to be true to those fundamental things of life – in one word – to have character (Hear, hear). It is not possible to devise any yardstick for measuring the moral qualities of a man and so long as that is not possible, our Constitution will remain*

71 http://parliamentofindia.nic.in/ls/debates/vol11p12.htm

defective. The other regret is that we have not been able to draw up our first Constitution of a free Bharat in an Indian language. The difficulties in both cases were practical and proved insurmountable. But that does not make the regret any the less poignant."

112. Hopefully, Parliament may take action on the views expressed by Dr. Rajendra Prasad, the first President of our Republic.

113. Article 102 provides the disqualifications for membership of either House of Parliament. This Article too is quite simple and straightforward and reads as follows:

"102. Disqualifications for membership. - (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation. - For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

12. In ***S.R. Chaudhuri***[72] the following question arose for consideration: (SCC p 138, para 20)

"20. ... Can a non-member, who fails to get elected during the period of six consecutive months, after he is appointed as a Minister or while a Minister has ceased to be a legislator, be reappointed as a Minister, without being

72 S.R. Chaudhuri v. State of Punjab, (2001) 7 SCC 126

elected to the Legislature after the expiry of the period of six consecutive months?" (emphasis in original)

This question arose in the context of Article 164 of the Constitution[73] and is mentioned here since one of the issues raised during submissions related to the permissibility of reading implied limitations in the Constitution. It was submitted that implied limitations can be read into the Constitution and this is an appropriate case in which this Court should read an implied limitation in the appointment of a Minister in the Government of India, the implied limitation being that a person with criminal antecedents or a criminal background should not be appointed a Minister.

115. In *S.R. Chaudhuri*[72] this Court examined the law in England, Canada and Australia and by reading an implied limitation, answered the question in the negative. It was held that a nonelected person may be appointed as a Minister, but only for a period

73 164. Other provisions as to Ministers.—(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:

Provided that in the States of Chhattisgarh, Jharkhand, Madhya Pradesh and Odisha, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(1-A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent of the total number of members of the Legislative Assembly of that State:

Provided that the number of Ministers, including the Chief Minister, in a State shall not be less than twelve:

Provided further that where the total number of Ministers, including the Chief Minister, in the Council of Ministers in any State at the commencement of the Constitution (Ninety first Amendment) Act, 2003 exceeds the said fifteen per cent or the number specified in the first proviso, as the case may be, then, the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date as the President may by public notification appoint.

(1-B) A member of the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council belonging to any political party who is disqualified for being a member of that House under Paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council, as the case may be, before the expiry of such period, till the date on which he is declared elected, whichever is earlier.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

Note: The Article is reproduced as it is today.

of six months. During that period the Minister would either have to get elected to the Legislature or quit his or her position. That person cannot again be appointed as a Minister unless elected. It was said: (SCC p. 142, paras 32-33)

"32. Thus, we find from the positions prevailing in England, Australia and Canada that the essentials of a system of representative government, like the one we have in our country, are that invariably all Ministers are chosen out of the members of the Legislature and only in rare cases, a non-member is appointed as a Minister, who must get himself returned to the Legislature by direct or indirect election within a short period. He cannot be permitted to continue in office indefinitely unless he gets elected in the meanwhile. The scheme of Article 164 of the Constitution is no different, except that the period of grace during which the nonmember may get elected has been fixed as 'six consecutive months', from the date of his appointment. (In Canada he must get elected quickly and in Australia, within three months.) The framers of the Constitution did not visualise that a non-legislator can be repeatedly appointed as a Minister for a term of six months each time, without getting elected because such a course strikes at the very root of parliamentary democracy. According to learned counsel for the respondent, there is no bar to this course being adopted on the "plain language of the article", which does not "expressly" prohibit reappointment of the Minister, without being elected, even repeatedly, during the term of the same Legislative Assembly. We cannot persuade ourselves to agree.

"33. Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a "privilege" that extends only for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends

upon the democratic spirit underlying it being respected in letter and in spirit. The debates clearly indicate the "privilege" to extend "only" for six months."

116. An implied limitation in the Constitution was also read in *B. R. Kapur.*[23] In that case, the second respondent was not even eligible to become a legislator (having earned a disqualification under Section 8 of the Representation of the People Act, 1951) and therefore the question of getting elected to the State Legislature did not arise. Nevertheless, having been projected as the Chief Ministerial nominee of the political party that obtained a majority in the elections, she was elected as its leader and appointed as the Chief Minister of the State. The question before this Court was whether a person who has been convicted of a criminal offence and whose conviction has not been suspended pending appeal can be sworn in and can continue to function as the Chief Minister of a State. Reliance was placed on the plain language of Article 164 of the Constitution. Answering the question in the negative, this Court held in (B.R. Kapur case[23], SCC p. 293, para 30)

"We hold, therefore, that a non-legislator can be made a Chief Minister or Minister under Article 164 only if he has the qualifications for membership of the Legislature prescribed by Article 173 and is not disqualified from the membership thereof by reason of the disqualifications set out in Article 191."

This was reiterated by this Court in paragraph 45 of the Report in the following words: (B.R. Kapur case[23], SCC p. 298)

"Our conclusion, therefore, is that on the date on which the second respondent was sworn in as Chief Minister she was disqualified, by reason of her convictions under the Prevention of Corruption Act and the sentences of imprisonment of not less than two years, for becoming a member of the Legislature under Section 8(3) of the Representation of the People Act."

117. Finally, in paragraphs 50 and 51 of the Report, this Court held: (B.R. Kapur case[23], SCC p.301)

"50. We are in no doubt at all that if the Governor is asked by the majority party in the Legislature to appoint as the Chief Minister a person who is not qualified to be a member of the Legislature or who is disqualified to be such, the Governor must, having due regard to the Constitution and the laws, to which he is subject, decline, and the exercise of discretion by him in this regard cannot be called in question.

51. If perchance, for whatever reason, the Governor does appoint as Chief Minister a person who is not qualified to be a member of the Legislature or who is disqualified to be such, the appointment is contrary to the provisions of Article 164 of the Constitution, as we have interpreted it, and the authority of the appointee to hold the appointment can be challenged in quo warranto proceedings. That the Governor has made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to constitutional provisions it will be struck down. The submission to the contrary - unsupported by any authority - must be rejected."

Therefore, two implied limitations were read into the Constitution with regard to the appointment of an unelected person as a Minister. Firstly, the Minister cannot continue as a Minister beyond a period of six months without getting elected, nor can such a person be repeatedly appointed as a Minister. Secondly, the person should not be under any disqualification for being appointed as a legislator. If a person is disqualified from being a legislator, he or she cannot be appointed as a Minister.

118. Implied limitations to the Constitution were also read in B.P. Singhal[74]. In that case, an implied limitation was read into the pleasure doctrine concerning the removal of the Governor of a State by the President in terms of Article 156 of the Constitution. It was held that the pleasure doctrine as originally envisaged in England gave unfettered power to the authority at whose pleasure a person held an office. However, where the rule of law prevails, the "fundamentals of constitutionalism" cannot be ignored, meaning thereby that the pleasure doctrine does not enable an unfettered discretion to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure, which can only be for valid reasons.

119. Similarly, in *Salil Sabhlok*[20] integrity and competence were read as implied in the appointment of the Chairperson of the State Public Service Commission. It was held in paragraph 45 of the Report as follows: (SCC pp. 35-36)

"45. I have already held that it is for the Governor who is the appointing authority under Article 316 of the Constitution to lay down the procedure for appointment of the Chairman and Members of the Public Service Commission, but this is not to say that in the absence of any procedure laid down by the Governor for appointment of Chairman and Members of the Public Service Commission under Article 316 of the Constitution, the State Government would have absolute discretion in selecting and appointing

74 B.P. Singhal v. Union of India, (2010) 6 SCC 331

any person as the Chairman of the State Public Service Commission. Even where a procedure has not been laid down by the Governor for appointment of Chairman and Members of the Public Service Commission, the State Government has to select only persons with integrity and competence for appointment as Chairman of the Public Service Commission, because the discretion vested in the State Government under Article 316 of the Constitution is impliedly limited by the purposes for which the discretion is vested and the purposes are discernible from the functions of the Public Service Commissions enumerated in Article 320 of the Constitution. Under clause (1) of Article 320 of the Constitution, the State Public Service Commission has the duty to conduct examinations for appointments to the services of the State. Under clause (3) of Article 320, the State Public Service Commission has to be consulted by the State Government on matters relating to recruitment and appointment to the civil services and civil posts in the State; on disciplinary matters affecting a person serving under the Government of a State in a civil capacity; on claims by and in respect of a person who is serving under the State Government towards costs of defending a legal proceeding; on claims for award of pension in respect of injuries sustained by a person while serving under the State Government and other matters. In such matters, the State Public Service Commission is expected to act with independence from the 6 State of Punjab v. Salil Sabhlok, (2013) 5 SCC 1 Writ Petition (Civil) No.289 of 2005 Page 12 of 27 State Government and with fairness, besides competence and maturity acquired through knowledge and experience of public administration."

Thereafter in paragraph 99 of the Report, it was said: (*Salil Sabhlok case*[20], SCC p. 52)

"99. While it is difficult to summarise the indicators laid down by this Court, it is possible to say that the two most important requirements are that personally the Chairperson of the Public Service Commission should be beyond reproach and his or her appointment should inspire confidence among the people in the institution. The first "quality" can be ascertained through a meaningful deliberative process, while the second "quality" can be determined by taking into account the constitutional, functional and institutional requirements necessary for the appointment."

CONCLUSIONS ON THE FIRST RELIEF

120. Therefore, the position as it stands today is this:

120.1 To become a Member of Parliament, a person should possess the qualifications mentioned in Article 84 of the Constitution;

120.2 To become a Member of Parliament, a person should not suffer any of the disqualifications mentioned in Article 102 of the Constitution;

120.3 The Constitution does not provide for any limitation in a Member of Parliament becoming a Minister, but certain implied limitations have been read into the Constitution by decisions rendered by this Court regarding an unelected person becoming a Minister;

120.4 One implied limitation read into the Constitution is that a person not elected to Parliament can nevertheless be appointed as a Minister for a period of six months;

120.5 Another implied limitation read into the Constitution is that though a person can be appointed as a Minister for a period of six months, he or she cannot repeatedly be so appointed;

120.6 Yet another implied limitation read into the Constitution is that a person otherwise not qualified to be elected as a Member of Parliament or disqualified from being so elected cannot be appointed as a Minister;

120.7 In other words, any person, not subject to any disqualification, can be appointed a Minister in the Central Government.

120.8 Given this position in law, is it necessary to read any other implied limitation in the Constitution concerning the appointment of a person as a Minister in the Government of India, particularly any implied limitation on the appointment of a person with a criminal background or having criminal antecedents?

ISSUE OF CRIMINAL ANTECEDENTS

121. The expression 'criminal antecedents' or 'criminal background' is extremely vague and incapable of any precise definition. Does it refer to a person accused (but not charged or convicted) of an offence or a person charged (but not convicted) of an offence or only a person convicted of an offence? No clear answer was made available to this question, particularly in the context of the presumption of innocence that is central to our criminal jurisprudence. Therefore, to say that a person with criminal antecedents or a criminal background ought not to be elected to the Legislature or appointed a Minister in the Central Government is really to convey an imprecise view.

122. The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offence – be it in the form of an off-the-cuff allegation or an allegation in the form of a First Information Report or a complaint or an accusation in a final report under Section 173 of the Criminal Procedure Code or even on charges being framed by a competent Court. The reason for this is fundamental to criminal jurisprudence, the rule of law and is quite simple, although it is often forgotten or overlooked – a person is innocent until proven guilty. This would apply to a person accused of one or multiple offences. At law, he or she is not a criminal – that person may stand 'condemned' in the public eye, but even that does not entitle anyone to brand him or her a criminal. Consequently, merely because a First Information Report is lodged against a person or a criminal complaint is filed against him or her or even if charges are framed against that person, there is no bar to that person being elected as a Member of Parliament or being appointed as a Minister in the Central Government.

123. Parliament has, therefore, in its wisdom, made a distinction between an accused person and a convict. For the purposes of the election law, an accused person is as much entitled to be elected to the Legislature as a person not accused of any offence. But, Parliament has taken steps to ensure that at least some categories of convicted persons are disqualified from being elected to the Legislature. A statutory disqualification is to be found in Section 8 of the Representation of the ***People Act, 1951***[75]. The adequacy of the restrictions placed by this provision is arguable.

75 **8. Disqualification on conviction for certain offences.**—(1) A person convicted of an offence punishable under—

(a) Section 153-A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171-E (offence of bribery) or Section 171-F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376-A or Section 376-B or Section 376-C or Section 376-D (offences relating to rape) or Section 498-A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) Sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

For example, a disqualification under this Section is attracted only if the sentence

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) Section 7 (offence of contravention of the provisions of Sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) Section 125 (offence of promoting enmity between classes in connection with the election) or Section 135 (offence of removal of ballot papers from polling stations) or Section 135-A (offence of booth capturing) or clause (a) of sub-section (2) of Section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act, or

(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991, or

(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or Section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971) or,

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002); shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Held unconstitutional in Lily Thomas v. Union of India, (2013) 7 SCC 653 Notwithstanding anything in subsection (1), sub-section (2) or sub-section (3) a disqualification under either sub section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be bought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

awarded to a convict is less than 2 years imprisonment. This raises an issue: What if the offence is heinous (say an attempt to murder punishable under Section 307 of the Indian Penal Code (IPC) or kidnapping punishable under Section 363 of the IPC or any other serious offence not attracting a minimum punishment) and the sentence awarded by the Court is less than 2 years imprisonment. Can such a convict be a member of a Legislature? The answer is in the affirmative. Can this Court do anything about this, in the form of framing some guidelines?

124. In ***Municipal Committee, Patiala***[76] this Court referred to Parent of a student of Medical College[77] and held that legislation is in the domain of the Legislature. It was said:

> *"It is so well settled and needs no restatement at our hands that the legislature is supreme in its own sphere under the Constitution subject to the limitations provided for in the Constitution itself. It is for the legislature to decide as to when and in what respect and of what subject-matter the laws are to be made. It is for the legislature to decide as to the nature of operation of the statutes."*

125. More recently, ***V.K. Naswa***[78] referred to a large number of decisions of this Court and held that the Court cannot legislate or direct the Legislature to enact a law. It was said: (SCC p. 547, para 18)

> *"18. Thus, it is crystal clear that the court has a very limited role and in exercise of that, it is not open to have judicial legislation. Neither the court can legislate, nor has it any competence to issue delivered by a Bench of three learned Judges. directions to the legislature to enact the law in a particular manner."*

126. However, a discordant note was struck in ***Gainda Ram***[79] wherein this Court issued a direction to the Legislature to enact legislation before a particular date. It was so directed in paragraphs 70 and 78 of the Report in the following words:

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

76 Municipal Committee, Patiala v. Model Town Residents Association, (2007) 8 SCC 669

77 State of Himachal Pradesh v. Parent of a student of Medical College, (1985) 3 SCC 169. This was a judgment

78 V.K. Naswa v. Union of India, (2012) 2 SCC 542

79 Gainda Ram v. MCD, (2010) 10 SCC 715. This was a judgment delivered by a Bench of two learned Judges.

"70. This Court, therefore, disposes of this writ petition and all the IAs filed with a direction that the problem of hawking and street vending may be regulated by the present schemes framed by NDMC and MCD up to 30-6-2011. Within that time, the appropriate Government is to legislate and bring out the law to regulate hawking and hawkers' fundamental right. Till such time the grievances of the hawkers/vendors may be redressed by the internal dispute redressal mechanisms provided in the schemes.

78. However, before 30-6-2011, the appropriate Government is to enact a law on the basis of the Bill mentioned above or on the basis of any amendment thereof so that the hawkers may precisely know the contours of their rights. This Court is giving this direction in exercise of its jurisdiction to protect the fundamental rights of the citizens."80

127. The law having been laid down by a larger Bench than in Gainda Ram it is quite clear that the decision, whether or not Section 8 of the Representation of the People Act, 1951 is to be amended, rests solely with Parliament.

128. Assuming Parliament does decide to amend Section 8 of the Representation of the People Act, 1951 the content of the amended Section cannot be decided easily. Apart from the difficulty in fixing the quantum of sentence (adverted to above), there are several other imponderables, one of them being the nature of the offence. It has been pointed out by Rodney Brazier in "Is it a constitutional issue: fitness for ministerial office in the 1990s"[81]that there are four categories of offences. The learned author says:

"But four types of crime may be distinguished. First, minor convictions would not count against a politician's worthiness for office. Minor driving offences, for example, are neither here nor there. Secondly, and at the other extreme, convictions for offences involving moral turpitude would dash any ministerial career. No one could remain in the Government who had been convicted of any offence of corruption, dishonesty, serious violence, or sexual misconduct. Thirdly, and most difficult, are offences the seriousness of which turn on the facts. A conviction for (say) assault, or driving with excess alcohol in the blood, could present a marginal case which would turn on its own facts. Fourthly, offences committed from a political motive might

80 12 The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill was eventually passed and notified as an Act in 2014.

81 Public Law 1994, Aut, 431 45

be condoned. Possibly a person who had refused to pay the poll tax might be considered fit."

129. Therefore, not only is the quantum of sentence relevant but the nature of the offence that might disqualify a person frombecoming a legislator is equally important. Perhaps it is possible to make out an exhaustive list of offences which, if committed and the accused having been found guilty of committing that offence, can be disqualified from contesting an election. The offences and the sentence to be awarded for the purpose of disqualifying a person from being elected to a Legislature are matters that Parliament may like to debate and consider, if at all it is felt necessary. Until then, we must trust the watchful eye of the people of the country that the elected representative of the people is worthy of being a legislator. Thereafter we must trust the wisdom of the Prime Minister and Parliament that the elected representative is worthy of being a Minister in the Central Government. In this context, it is appropriate to recall the words of Dr. Ambedkar in the Constituent Assembly on 30th December, 1948. He said:

"His [Hon'ble K.T. Shah] last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it not desirable, is it not sufficient that we should trust the Prime Minister, the Legislature and the public at large watching the actions of the Ministers and the actions of the legislature to see that no such infamous thing is done by either of them? I think this is a case which may eminently be left to the good-sense of the Prime Minister and to the good sense of the Legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary."[82]

130. That a discussion is needed is evident from the material placed by the learned Additional Solicitor General. He referred to the 18th Report presented to the Rajya Sabha on 15th March, 2007 by the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law And Justice on Electoral Reforms (Disqualification of Persons from Contesting Elections on Framing of Charges Against Them for Certain Offences). The Report acknowledges the criminalization of our polity and the necessity of cleansing the political climate and had this to say:

82 Constituent Assembly Debates, Volume VII

"At the same time, the Committee is deeply conscious of the criminalization of our polity and the fast erosion of confidence of the people at large in our political process of the day. This will certainly weaken our democracy and will render the democratic institutions sterile. The Committee therefore feels that politics should be cleansed of persons with established criminal background. The objective is to prevent criminalisation of politics and maintain probity in elections. Criminalization of politics is the bane of society and negation of democracy. But the arguments against the proposal of the Election Commission are overwhelming. As stated in the foregoing paras the Courts frame charges even when they are conscious that the case is ultimately bound to fail. Appreciation of evidence at the stage of framing charges being more or less prohibited, charges are still framed even when the court is convinced that the prosecution will never succeed. There are many glaring illustrations which are of common knowledge and any criminal lawyer can multiply instances of such nature. Hence the proposal can not be accepted in its present form as the country has witnessed in the past misuse of MISA, TADA, POTA etc."

131. On the issue of criminalization of politics, the learned Additional Solicitor General also referred to the 244th Report of the Law Commission of India on "Electoral Disqualifications" presented in February, 2014. Though the Report concerns itself primarily with the disqualification to be a member of a Legislature, it does give some interesting statistics about the elected representatives of the people in the following words:

"In the current Lok Sabha, 30% or 162 sitting MPs have criminal cases pending against them, of which about half i.e. 76 have serious criminal cases. Further, the prevalence of MPs with criminal cases pending has increased over time. In 2004, 24% of Lok Sabha MPs had criminal cases pending, which increased to 30% in the 2009 elections.

The situation is similar across states with 31% or 1,258 out of 4,032 sitting MLAs with pending cases, with again about half being serious cases. Some states have a much higher percentage of MLAs with criminal records: in Uttar Pradesh, 47% of MLAs have criminal cases pending. A number of MPs and MLAs have been accused of multiple counts of criminal charges. In a constituency of Uttar Pradesh, for example, the MLA has 36 criminal cases pending including 14 cases related to murder.

From this data it is clear that about one-third of elected candidates at the Parliament and State Assembly levels in India have some form of criminal taint. Data elsewhere suggests that one-fifth of MLAs have pending cases which have proceeded to the stage of charges being framed against them by a court at the time of their election. Even more disturbing is the finding that the percentage of winners with criminal cases pending is higher than the percentage of candidates without such backgrounds. While only 12% of candidates with a "clean" record win on average, 23% of candidates with some kind of criminal record win. This means that candidates charged with a crime actually fare better at elections than 'clean' candidates. Probably as a result, candidates with criminal cases against them tend to be given tickets a second time. Not only do political parties select candidates with criminal backgrounds, there is evidence to suggest that untainted representatives later become involved in criminal activities. The incidence of criminalisation of politics is thus pervasive making its remediation an urgent need."

132. While it may be necessary, due to the criminalization of our polity and consequently of our politics, to ensure that certain persons do not become Ministers, this is not possible through guidelines issued by this Court. It is for the electorate to ensure that suitable (not merely eligible) persons are elected to the Legislature and it is for the Legislature to enact or not enact a more restrictive law.

CONCLUSIONS ON THE SECOND RELIEF

133. The discussion leads to the following conclusions:

133.1 To become a legislator and to continue as a legislator, a person should not suffer any of the disqualifications mentioned in Section 8 of the Representation of the People Act, 1951;

133.2 There does seem to be a gap in Section 8 of the Representation of the People Act, 1951 inasmuch as a person convicted of a heinous or a serious offence but awarded a sentence of less than two years imprisonment may still be eligible for being elected as a Member of Parliament;

133.3 While a debate is necessary for bringing about a suitable legislation disqualifying a person from becoming a legislator, there are various factors that need to be taken into consideration;

133.4 That there is some degree of criminalization of politics is quite evident;

133.5 It is not for this Court to lay down any guidelines relating to who should or should not be entitled to become a legislator or who should or should not be appointed a Minister in the Central Government;

134. The range of persons who may be elected to a Legislature is very wide and amongst those, who may be appointed a Minister in the Central Government is also very wide, as mentioned above. Any legislator or non-legislator can be appointed as a Minister but must quit as soon as he or she earns a disqualification either under the Constitution or under Section 8 of the Representation of the People Act, 1951.[14] In *B.P. Singhal*[74] this Court observed that "a Minister is hand-picked member of the Prime Minister's team. The relationship between the Prime Minister and a Minister is purely political."

135. In addition to the above, how long a Minister should continue in office is best answered by the response to a question put to the British Prime Minister John Major who was asked to "list the circumstances which render Ministers unsuitable to retain office." His written reply given to the House of Commons on 25th January, 1994 was:

> *"There can be a variety of circumstances but the main criterion should be whether the Minister can continue to perform the duties of office effectively."*[83]

136. This being the position, the burden of appointing a suitable person as a Minister in the Central Government lies entirely on the shoulders of the Prime Minister and may eminently be left to his or her good sense. This is what our Constitution makers intended, notwithstanding the view expressed by Shri H.V. Kamath in the debate on 30th December, 1948. He said:

> *"My Friend, Prof. Shah, has just moved amendment No.1300 comprising five sub-clauses. I dare say neither Dr. Ambedkar nor any of my other honourable Friends in this House will question the principle which is sought to be embodied in Clause (2E) of amendment No. 1300 moved by Prof. Shah. I have suggested my amendment No. 46 seeking to delete all the words occurring after the words "moral turpitude" because I think that bribery and corruption are offences which involve moral turpitude. I think that moral turpitude covers bribery, corruption and many other cognate offences as well. Sir, my friends here will, I am sure, agree with me that it will hardly redound to the credit of any government if that government includes in its fold any minister who has had a shady past or about whose character or*

83 http://hansard.millbanksystems.com/written answers/1994/jan/25/ministers unsuitability for office#S6CV0236P0 19940125 CWA 172

*integrity there is any widespread suspicion. I hope that no such event or occurrence will take place in our country, but some of the recent events have created a little doubt in my mind. I refer, Sir, to a little comment, a little article, which appeared in the Free Press Journal of Bombay dated the 8th September 1948 relating to the **** Ministry. The relevant portion of the article runs thus:*

*"The Cabinet (the * * * * Cabinet) includes one person who is a convicted black marketeer, and although it is said that his disabilities, resulting from his conviction in a Court of Law, which constituted a formidable hurdle in the way of his inclusion in the interim Government, were graciously removed by the Maharaja."*[82]

137. In this respect, the Prime Minister is, of course, answerable to Parliament and is under the gaze of the watchful eye of the people of the country. Despite the fact that certain limitations can be read into the Constitution and have been read in the past, the issue of the appointment of a suitable person as a Minister is not one which enables this Court to read implied limitations in the Constitution.

EPILOGUE

138. It is wise to remember the words of Dr. Ambedkar in the Constituent Assembly on 25th November, 1949. He had this to say about the working of our Constitution:

"As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr. T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass

any judgement upon the Constitution without reference to the part which the people and their parties are likely to play."[84]

139. This sentiment was echoed in the equally memorable words of Dr. Rajendra Prasad on 26th November, 1949. He had this to say: (CAD Vol. XI, p. 993)

"Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provision in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them."[71]

140. The writ petition is disposed of but with no order as to costs. It must, however, be stated that all learned counsels appearing in the case have rendered very useful and able assistance on an issue troubling our polity.

Kurian Joseph, J. ***(concurring)*** I agree with the beautiful and erudite exposition of law made by my esteemed brother. Yet why to pen something more, one may naturally ask. The only answer is: in Kerala, there is a saying: when you make a special tea, even if you add a little more milk, don't reduce even a bit of sugar!

142. The surviving prayer in the public interest litigation reads as follows:

"(c) Issue appropriate writ/writs, order/orders, direction/directions, including the writ of mandamus and frame possible guidelines, for appointment of Minister for the UOI as well as for the State, especially, in view of the provisions, terms of schedule III, Article 75(4), 164(3), basic features, aims and objects of the Constitution etc. as the Hon'ble Court may deem fit and proper for the perseverance and protection of the Constitution of India in both letters and spirit."

143. Court is the conscience of the Constitution of India. Conscience is the moral sense of right and wrong of a person (Ref.: Oxford English Dictionary). Right

84 http://parliamentofindia.nic.in/ls/debates/vol11p11.htm

or wrong, for court, not in the ethical sense of morality but in the constitutional sense. Conscience does not speak to endorse one's good conduct; but when things go wrong, it always speaks; whether you listen or not. It is a gentle and sweet reminder for rectitude. That is the function of conscience. When things go wrong constitutionally, unless the conscience speaks, it is not good conscience; it will be accused of as numb conscience.

144. One cannot think of the Constitution of India without the preambular principle of democracy and good governance. Governance is mainly in the hands of the Executive. The executive power of the Union under Article 53 and that of the States under Article 154 vests in the President of India and the Governor of the State, respectively. Article 74 for the Union of India and Article 163 for the State have provided for the Council of Ministers to aid and advise the President or the Governor, as the case may be. The executive power extends to the respective legislative competence.

145. Before entering office, a Minister has to take oath of office (Article 75/164). In form, except for the change in the words 'Union' or particular 'State', there is no difference in the form of oath. Ministers take oath to … "faithfully and conscientiously discharge …" their duties and …. "do right to all manner of people in accordance with Constitution and the law, without fear or favour, affection or ill-will".

146. Allegiance to the Constitution of India, faithful and conscientious discharge of the duties, doing right to people and all these without fear or favour, affection or ill-will, carry heavy weight. 'Conscientious' means "wishing to do what is right, relating to a person's conscience" (Ref.: Concise Oxford English Dictionary). The simple question is, whether a person who has come in conflict with law and, in particular, in conflict with law on offences involving moral turpitude and laws specified by the Parliament under Chapter III of The Representation of the People Act, 1951, would be in a position to conscientiously and faithfully discharge his duties as Minister and that too, without any fear or favour?

147. When does a person come in conflict with law? No quarrel, under criminal jurisprudence, a person is presumed to be innocent until he is convicted. But is there not a stage when a person is presumed to be culpable and hence called upon to face trial, on the court framing charges?

148. Under Section 228 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.PC'), charge is framed by the court only if the Judge (the Magistrate – under Section 240 Cr.PC) is of the opinion that there is ground for presumption that

the accused has committed an offence, after consideration of opinion given by the police under Section 173(2) Cr.PC (challan/police charge-sheet) and the record of the case and documents. It may be noted that the prosecutor and the accused person are heard by the court in the process. Is there not a cloud on his innocence at that stage? Is it not a stage where his integrity is questioned? If so, is it not a stage where the person has come in conflict with law, and if so, is it desirable in a country governed by rule of law to entrust the executive power with such a person who is already in conflict with law? Will any reasonably prudent master leave the keys of his chest with a servant whose integrity is doubted? It may not be altogether irrelevant to note that a person even of doubtful integrity is not appointed in the important organ of the State which interprets law and administers justice; then why to speak of questioned integrity! What to say more, a candidate involved in any criminal case and facing trial, is not appointed in any civil service because of the alleged criminal antecedents, until acquitted.

149. Good governance is only in the hands of good men. No doubt, what is good or bad is not for the court to decide: but the court can always indicate the constitutional ethos on goodness, good governance and purity in administration and remind the constitutional functionaries to preserve, protect and promote the same. Those ethos are the unwritten words in our Constitution. However, as the Constitution makers stated, there is a presumption that the Prime Minister/Chief Minister would be well advised and guided by such unwritten yet constitutional principles as well. According to Dr. B. R. Ambedkar, as specifically referred to by my learned brother at pargraph-70 of the leading judgment, such things were only to be left to the good sense of the Prime Minister, and for that matter, the Chief Minister of State, since it was expected that the two great constitutional functionaries would not dare to do any infamous thing by inducting an otherwise unfit person to the Council of Ministers. It appears, over a period of time, at least in some cases, it was only a story of great expectations. Some of the instances pointed out in the writ petition indicate that Dr. Ambedkar and other great visionaries in the Constituent Assembly have been bailed out. Qualification has been wrongly understood as the mere absence of prescribed disqualification. Hence, it has become the bounden duty of the court to remind the Prime Minister and the Chief Minister of the State of their duty to act in accordance with the constitutional aspirations. To quote Dr. Ambedkar: (CAD p. 975)

> *"... However, good a Constitution may be, it is sure to turn out bad because those who are called to work it happen to be a bad lot. However, bad a Constitution may be, it may turn out to be good if those who are called to*

work it happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution."

150. Fortunately for us, our Constitution has stood the test of time and is acclaimed to be one of the best in the world. Problem has been with the other part, though sporadically. Kautilya, one of the great Indian exponents of art of government, has dealt with qualification of king and his councillors at Chapter IX in Arthasastra, said to be compiled between BC 321-296. To quote relevant portion:

"CHAPTER IX

THE CREATION OF COUNCILLORS AND PRIESTS

NATIVE, born of high family, influential, well trained in arts, possessed of foresight, wise, of strong memory, bold, eloquent, skilful, intelligent, possessed of enthusiasm, dignity and endurance, pure in character, affable, firm in loyal devotion, endowed with excellent conduct, strength, health and bravery, free from procrastination and ficklemindedness, affectionate, and free from such qualities as excite hatred and enmitythese are the qualifications of a ministerial officer."

151. The attempt made by this court in the above background history of our country and Constitution is only to plug some of the bleeding points in the working of our Constitution so that the high constitutional functionaries may work it well and not wreck it. Beauty of democracy depends on the proper exercise of duty by those who work it.'

152. No doubt, it is not for the court to issue any direction to the Prime Minister or the Chief Minister, as the case may be, as to the manner in which they should exercise their power while selecting the colleagues in the Council of Ministers. That is the constitutional prerogative of those functionaries who are called upon to preserve, protect and defend the Constitution. But it is the prophetic duty of this Court to remind the key duty holders about their role in working the Constitution. Hence, I am of the firm view, that the Prime Minister and the Chief Minister of the State, who themselves have taken oath to bear true faith and allegiance to the Constitution of India and to discharge their duties faithfully and conscientiously, will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed by a criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Chapter III of The Representation of the People Act, 1951.

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(2012) 8 Supreme Court Cases 1

Mehmood Nayyar Azam v. State of Chhattisgarh

(Before K.S.P. Radhakrishnan and Dipak Misra, JJ.)

Mehmood Nayyar Azam ... Appellant;
Versus
State Of Chhattisgarh And Others ... Respondents.

Civil Appeal No. 5703 of 2012†**,**
decided on August 3, 2012

A. **Constitution of India — Arts. 21, 19, 14 and 32 — Custodial humiliation and mental torture — Compensation for — When can be awarded and quantum thereof — Relationship with claim for compensation for defamation — Appellant, a doctor being falsely implicated in multiple criminal cases for helping weaker sections of society against local coal mafia and others — In police custody, appellant being photographed with a placard, wherein self-humiliating words were written — Said photographs being circulated amongst general public and used in revenue proceedings — High Court finding that appellant was harassed and thus, was entitled to compensation — High Court directing State Government to determine compensation and award the same, which failing to do so — When matter raised in Supreme Court, State Government given another chance to award compensation but to no avail — State Government denying compensation on ground that it was a case of defamation which could only be determined by a competent court — Thus appellant denied compensation for 19 yrs — On facts, appellant, held, entitled to Rs 5 lakhs as compensation for custodial humiliation — State Government directed to award the same expeditiously within six weeks and recover it from salary of officials concerned — Further held, the issue was not whether it was a case of defamation or not — Issue was of custodial torture and humiliation affecting rights under Art. 21 — For purpose of said compensation, torture may not necessarily be only physical — It can be mental and psychological torture calculated to create fear to submit to police demands — Rule of Law — Penal Code, 1860, Ss. 499 to 502**

B. **Constitution of India — Arts. 21 and 19 — Held, right to reputation is also a facet under Art. 21 — Rationale for — Rule of Law — Penal Code, 1860, Ss. 499 to 502**

† Arising out of SLP (Crl) No. 34702 of 2010. From the Judgment and Order dated 3-8-2010 of the High Court of Chhattisgarh at Bilaspur in WP No. 1156 of 2001

C. **Constitution of India — Arts. 21, 19, 14 and 32 — Custodial humiliation and mental torture — Compensation for — Rationale why compensation should be awarded for mental torture — Meanings of terms, "torture", "harassment", "inhuman torture" and "mental and psychological torture" — How psychological/ mental torture severely affects a man's life, and thereby denying freedom under Art. 21 — Rule of Law — Criminal Procedure Code, 1973 — Ss. 163, 154, 155 and 157 — Evidence Act, 1872 — S. 24 — Human and Civil Rights — Right against cruel, inhuman or degrading treatment or torture**

D. **Constitution of India — Arts. 21, 19, 14 and 32 — Custodial torture — Compensation for, whether available to convicts, undertrials and detenus — Right under Art. 21, held, cannot be kept in abeyance for convicts, undertrials and prisoners — Allowing police to violate fundamental rights of such persons would amount to anarchy and lawlessness, which cannot be permitted in a civilized society — Resultant duties of police officials (custodians of law) in this regard, clarified — Rule of Law — Police — Misconduct**

In the present case, the appellant doctor who was spreading awareness against the exploitation of weaker and marginalised sections of society became a victim of the local coal mafia, police and persons whose interests were being affected thereby. Multiple criminal cases were lodged against the doctor and he was admittedly humiliated in police custody. Pursuant to the intervention by the High Court, departmental proceedings were initiated and the erring officials were punished. The High Court in its final order referred the matter to the Chief Secretary of the State for grant of compensation. Till the present appeal i.e. after 19 years, no compensation had been paid to the appellant even though the Supreme Court initially gave an opportunity to the State Government to consider the issue of compensation.

Allowing the appeal, the Supreme Court

Held :

In the present case the writ court is not concerned with defamation as postulated under Section 499 IPC. The writ court is really concerned with how in a country governed by the rule of law and where Article 21 of the Constitution is treated to be sacred, the dignity and social reputation of a citizen has been affected. (Paras 2, 11 and 39)

Mehmood Nayyar Azam v. State of Chhattisgarh, SLP (C) No. 34702 of 2010, decided on 17-2-2012 (SC), *referred to*

Clearly and admittedly the appellant was arrested in respect of the alleged offence under IPC and the Electricity Act, 2003. There was a direction by the Magistrate for judicial remand and thereafter instead of taking him to jail the next day, he was brought to the police station. Self-humiliating words were written on the placard and he was asked to hold it and photographs were taken. The photographs were circulated in general public and were also filed by one of the respondents in a revenue proceeding. The High Court in categorical terms has found that the appellant was harassed. (Para 16)

Any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for the law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen, for a citizen does not shed off his fundamental right to life, the moment a policeman arrests him. The right to life of a citizen cannot be put in abeyance on his arrest. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. (Paras 19 to 21)

D.K. Basu v. Stare of W.B., (1997) 1 SCC 416 : 1997 SCC (Cri) 92; *Joginder Kumar v. Stare of U.P.,* (1994) 4 SCC 260 : 1994 SCC (Cri) 1172, *affirmed and followed*

The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment. The accused in custody can be put under tremendous psychological pressure by cruel, inhuman and degrading treatment. Police officers should have the greatest regard for personal liberty of citizens as they are the custodians of law and order and, hence, they should not flout the law by stooping to bizarre acts of lawlessness. (Paras 22 and 24)

Sunil Gupta v. State of M.P., (1990) 3 SCC 119 : 1990 SCC (Cri) 440; B*him Singh v. State of J&K,* (1985) 4 SCC 677 : 1986 SCC (Cri) 47; *Francis Coralie Mullin v. UT of Delhi,* (1981) 1 SCC 608 : 1981 SCC (Cri) 212; *Kharak Singh v. State of U.P.,* AIR 1963 SC 1295 : (1963) 2 Cri U 329 : (1964) 1 SCR 332; *Munn v. Illinois,* 24 L Ed 77 : 94 US 113 (1876); *D.K. Basu v. State of W.B.,* (1997) 1 SCC 416 : 1997 SCC (Cri) 92, *relied on*

P. Ramanatha Aiyar's Law Lexicon, 2nd Edn., referred to

Inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain.

It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience. Torture is not merely physical but may even consist of mental and psychological torture calculated to create fear to submit to the demands of the police. Right to reputation is a facet of the right to life of a citizen under Article 21 of the Constitution. Any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of the law protects the dignity of a citizen in a society governed by law. An investigator of a crime is required to possess the qualities of patience and perseverance. A citizen while in custody is not denuded of his fundamental rights under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental rights is curtailed but his basic human rights are not crippled so that police officers can treat him in an inhuman manner. On the contrary, they are under an obligation to protect his human rights and prevent all forms of atrocities. A balance has to be struck. (Paras 25 to 38)

Arvinder Singh Bagga v. Stare of U.P., (1994) 6 SCC 565 : 1995 SCC (Cri) 29; *Kiran Bedi v. Committee of Inquiry,* (1989) 1 SCC 494; *D.F. Marion v. Davis*, 217 Ala 16 : 114 So 357 : 55 ALR 171 (1927); *Port of Bombay v. Dilipkumar Raghavendranath Nadkarni,* (1983) 1 SCC 124 : 1983 SCC (L&S) 61; *Selvi v. State ofKarnataka,* (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1; *Vishwanath Agrawal v. Sarla Vishwanath Agrawal,* (2012) 7 SCC 288; *Nandini Satpathy v. P.L. Dani,* (1978) 2 SCC 424 : 1978 SCC (Cri) 236; *Delhi Judicial Service Assn. v. State of Gujarat,* (1991) 4 SCC 406; *D.K. Basu v. State ofW.B.,* (1997) 1 SCC 416 : 1997 SCC (Cri) 92, *relied on*

Admittedly, the appellant has been humiliated. Such treatment is basically inhuman and causes mental trauma. Any psychological torture inflicts immense mental pain. A mental suffering at any age in life may have a nightmarish effect on the victim. The hurt person develops a sense of insecurity, helplessness and his self-respect gets gradually atrophied. When dignity is lost, the breath of life goes into oblivion. In a society governed by the rule of law where humanity has to be a laser beam, as our compassionate Constitution* has so emphasised, police authorities do not have the power or prowess to vivisect and dismember the same. The appellant was tortured while he was in custody. When there is contravention of human rights, the inherent concern as envisaged in Article 21 springs to life and enables the citizen to seek relief by taking recourse to public law remedy. (Paras 40 to 42)

Jennison v. Baker, (1972) 2 QB 52 : (1972) 2 WLR 429 : (1972) 1 All ER 997 (CA); *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527; *Sube Singh v. State ofHaryana,* (2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54; *Hardeep Singh v. State of M.P.,* (2012) 1 SCC 748 : (2012) 1 SCC (Cri) 684, *relied on*

Kaplan and Sadock's Synopsis of Psychiatry, referred to

The appellant had undergone mental torture at the hands of insensible police officials. He might have agitated to ameliorate the cause of the poor and the downtrodden, but, the social humiliation that has been meted out to him is quite capable of destroying the heart of his philosophy. It has been said that philosophy has the power to sustain a man's courage. But courage is based on self-respect and when self-respect is dented, it is difficult even for a very strong-minded person to maintain that courage. The initial invincible mind paves the path of corrosion. As is perceptible, the mindset of the protectors of the law appears to cause torment and insult and tyrannise the man who is helpless in custody. There can be no trace of doubt that he is bound to develop stress disorder and anxiety which destroy the brightness and strength of the will power. It has been said that anxiety and stress are slow poisons. When torment is added, it creates commotion in the mind and the slow poisons get activated. The inhuman treatment can be well visualised when the appellant came out from custody and witnessed his photograph being circulated with the self-condemning words written on it. This withers away the very essence of life as enshrined under Article 21 of the Constitution. Regard being had to the various aspects that have been analysed and taking note of the totality of facts and circumstances, a sum of Rs 5 lakhs (Rupees five lakhs only) should be granted towards compensation to the appellant. The said amount shall be paid by the respondent State within a period of six weeks and be realised from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State. (Para 48)

Nilabati Behera v. State of Orissa, (1993) 2 SCC 746 : 1993 SCC (Cri) 527; *Sube Singh v. State of Haryana,* (2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54; *Hardeep Singh v. State of M.P.,* (2012) 1 SCC 748 : (2012) 1 SCC (Cri) 684, *applied*

[**Ed.:** The compensation that is awarded in public law is summary in nature and does not prevent the claimant from recovering full civil damages in tort for the same wrong, though of course the sum awarded in public law would be reduced from the amount finally awarded in a suit for compensation. In-this case, a suit for defamation, wrongful imprisonment, malicious prosecution, etc. would still lie, subject to a deduction of Rs 5 lakhs from any sum that may be decreed. See MCD v. Uphaar Tragedy Victims Assn., (2011) 14 SCC 481, especially paras 62 to 68.]

SS-D/50280/CVRL

Advocates who appeared in this case:

Niraj Sharma, Advocate, for the Appellant;

Dr Rajesh Pandey, Mahesh Pandey, Ms Mridula Ray Bharadwaj, Atul Jha, Sandeep Jha, Dharmendra Kr. Sinha, Arvind Kumar and Jogy Scaria, Advocates, for the Respondents.

Chronological list of cases cited on page(s)

1.	(2012) 7 SCC 288, Vishwanath Agrawal v. Sarla Vishwanath Agrawal	15c-d
2.	(2012) 1 SCC 748 : (2012) 1 SCC (Cri) 684, Hardeep Singh v. State of M.P.	19d, 19g-h
3.	SLP (C) No. 34702 of 2010, decided on 17-2-2012 (SC), Mehmood Nayyar Azam v. State of Chhattisgarh	9b
4.	(2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1, Selvi v. State of Karnataka	14f, 15b-c
5.	(2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54, Sube Singh v. Scare of Haryana	19b
6.	(1997) 1 SCC 416 : 1997 SCC (Cri) 92, D.K. Basu v. Stare of W.B.	11b, 11f-g, 12a-b, 12e, 13g-h, 16e-f
7.	(1994) 6 SCC 565 : 1995 SCC (Cri) 29, Arvinder Singh Bagga v. State of U.P.	14c
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9.	(1993) 2 SCC 746 : 1993 SCC (Cri) 527, Nilabati Behera v. State of Orissa	18b, 18e
10.	(1991) 4 SCC 406, Delhi Judicial Service Assn. v. State of Gujarat	16a
11.	(1990) 3 SCC 119 : 1990 SCC (Cri) 440, Sun/7 Gupta v. Stare of M.P.	13b-c
12.	(1989) 1 SCC 494, Kiran Bedi v. Committee of Inquiry	14d, 14d-e
13.	(1985) 4 SCC 677 : 1986 SCC (Cri) 47, Bhim Singh v. State of J&K	13e-f
14.	(1983) 1 SCC 124 : 1983 SCC (L&S) 61, Port of Bombay v. Dilipkumar Raghavendranath Nadkarni	14e-f
15.	(1981) 1 SCC 608 : 1981 SCC (Cri) 212, Francis Coralie Mullin v. UT of Delhi	13g
16.	(1978) 2 SCC 424 : 1978 SCC (Cri) 236, Nandini Satpathy v. P.L Dani	16a
17.	(1972) 2 QB 52 : (1972) 2 WLR 429 : (1972) 1 All ER 997 (CA), Jennison v. Baker	17 g
18.	AIR 1963 SC 1295 : (1963) 2 Cri U 329 : (1964) 1 SCR 332, Kharak Singh v. State of U.P.	14a
19.	217 Ala 16 : 114 So 357 : 55 ALR 171 (1927), D.F. Marion v. Davis	14d-e
20.	24 L Ed 77 : 94 US 113 (1876), Munn v. Illinois	14a

The Judgment of the Court was delivered by

Dipak Misra , J. — Leave granted. Albert Schweitzer*, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is

* **Ed.** Albert Schweitzer was awarded the Nobel Prize for Peace in 1952

insegragably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is paralysed. There are some megalomaniac officers who conceive the perverse notion that they are the `Law' forgetting that law is the science of what is good and just and, in very nature of things, protective of a civilized society. Reverence for the nobility of a human being has to be the corner stone of a body polity that believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous presence, and the majesty and sacrosanctity dignity cannot be allowed to be crucified in the name of some kind of police action.

2. The aforesaid prologue gains signification since in the case at hand, a doctor, humiliated in custody, sought public law remedy for grant of compensation and the High Court, despite no factual dispute, has required him to submit a representation to the State Government for adequate relief pertaining to grant of compensation after expiry of 19 years with a further stipulation that if he is aggrieved by it, he can take recourse to requisite proceedings available to him under law. We are pained to say that this is not only asking a man to prefer an appeal from Caesar to Caesar's wife but it also compels him like a cursed Sisyphus** to carry the stone to the top of the mountain wherefrom the stone rolls down and he is obliged to repeatedly perform that futile exercise.

3. The factual matrix as uncurtained is that the appellant, an Ayurvedic Doctor with B.A.M.S. degree, while practising in West Chirmiri Colliery, Pondi area in the State of Chhattisgarh, used to raise agitations and spread awareness against exploitation of people belonging to weaker and marginalized sections of the society. As a social activist, he ushered in immense awareness among the down-trodden people which caused discomfort to the people who had vested interest in the coal mine area. The powerful coal mafia, trade union leaders, police officers and other persons who had fiscal interest felt disturbed and threatened him with dire consequences and pressurized him to refrain from such activities. Embedded to his committed stance,

** **Ed.** In Greek mythology Sisphus was the King of Corinth who was punished by the Gods by being compelled to roll a huge stone up a hill, only to watch it roll back down and repeat the exercise forever, thus consigning him to an eternity of useless efforts and uneding frustration.

the petitioner declined to succumb to such pressure and continued the activities. When the endeavor failed to silence and stifle the agitation that was gaining strength and momentum, a consorted maladroit effort was made to rope him in certain criminal offences.

4. As the factual narration further unfolds, in the initial stage, cases under Section 110/116 of the Criminal Procedure Code were initiated and thereafter crime No. 15/92 under Section 420 of the Indian Penal Code (for short 'the IPC') and crime No. 41/92 under Sections 427 and 379 of the IPC were registered. As the activities gathered further drive and became more pronounced, crime No. 62/90 was registered for an offence punishable under Section 379 of the IPC for alleged theft of electricity. In the said case, the appellant was taken into custody.

5*.** Though he was produced before the Magistrate on 22.9.1992 for judicial remand and was required to be taken to Baikunthpur Jail, yet by the time the order was passed, as it was evening, he was kept in the lock up at Manendragarh Police Station. On 24.9.1992, he was required to be taken to jail but instead of being taken to the jail, he was taken to Pondi Police Station at 9.00 a.m. At the police station, he was abused and assaulted. As asseverated, the physical assault was the beginning of ill-treatment. Thereafter, the SHO and ASI, the respondent Nos. 3 and 4, took his photograph compelling him to hold a placard on which it was written :-

> *"Main Dr. M.N. Azam Chhal Kapti Evam Chor Badmash Hoon". (I, Dr. M. N. Azam, am a cheat, fraud, thief and rascal).*

6*.** Subsequently, the said photograph was circulated in general public and even in the revenue proceeding, the respondent No. 5 produced the same. The said atrocities and the torture of the police caused tremendous mental agony and humiliation and, hence, the petitioner submitted a complaint to the National Human Rights Commission who, in turn, asked the Superintendant of Police, District Koria to submit a report. As there was no response from the 2nd respondent the Commission again required him to look into the grievances and take proper action. When no action was taken by the respondent or the police, the petitioner was compelled to invoke the extraordinary jurisdiction of the High Court of Judicature at Bilaspur, Chattisgarh with a prayer for punishing the respondent Nos. 4, 5 & 7 on the foundation that their action was a complete transgression of human rights which affected his fundamental right especially his right to live with dignity as enshrined under Article 21 of the Constitution. In the Writ Petition, prayer was made for awarding compensation to the tune of Rs. 10 lakhs.

*** **Ed.** Paras 5 and 6 corrected vide Official Corrigendum No. F.3/Ed. B.J./47/2012 dated 13-8-2012.

7. After the return was filed, the learned single Judgepassed a detailed order on 3.1.2003 that the Chief Secretary and the Director General of Police should take appropriate steps for issue of direction to the concerned authorities to take appropriate action in respect of the erring officers. Thereafter, some developments took place and on 24.3.2005, the Court recorded that the writ petitioner was arrested on 22.9.1992 and his photograph was taken at the police station. The learned single Judge referred to Rule 1 of Regulation 92 of Chhattisgarh Police Regulations which lays down that no Magistrate shall order photograph of a convict or other person to be taken by the police for the purpose of Identification under Prisoners Act, 1920, unless he is satisfied that such photograph is required for circulation to different places or for showing it for the purpose of identification to a witness who cannot easily be brought to a test identification at the place where the investigation is conducted or that photograph is required to be preserved as a permanent record. Thereafter, the learned single Judge proceeded to record that not only the photograph of the writ petitioner had been taken with the placard but had also been circulated which had caused great mental agony and trauma to his school going children. Thereafter, he referred to Regulation 737 of the Chhattisgarh Police Regulations which relates to action to be taken by the superior officer in respect of an erring officer who ill-treats an accused.

8. After referring to various provisions, the learned single Judge called for a report from the Chief Secretary. On 18.11.2005, the Court was apprised that despite several communications, the Chief Secretary had not yet sent the report. Eventually, the report was filed stating that the appellant was involved in certain cases including grant of bogus medical certificate and regard being had to the directions issued in 1992 that the photograph of the offender should be kept on record, the same was taken and affixed against his name and after 7.9.1992, it was removed from the records. It was also stated that the Sub-Inspector had been imposed punishment of "censure" by the Superintendent of Police on 19.11.2001. It was also set forth that on 3.5.2003, a charge-sheet was served on all the erring officers and a departmental enquiry was held and in the ultimate eventuate, they had been imposed major penalty of withholding of one annual increment with cumulative effect for one year commencing 27.5.2004. That apart, on 19.7.2005, a case had been registered under Section 29 of the Police Act against the erring officers.

9. It is apt to note here that when the matter was listed for final hearing for grant of compensation, the learned single Judge referred the matter to be heard by a Division Bench. The Division Bench referred to the prayer clause and various orders passed

by the learned single Judge and eventually directed the appellant to submit a representation to the Chief Secretary for grant of compensation.

10. We think it appropriate to reproduce the relevant paragraphs of the order passed by the Division Bench: -

> *"4. Learned counsel for the petitioner submits that during the pendency of the writ petition, Relief Clause No. 7.3 was fulfilled under the directions of this court and now only the compensation part, as claimed in Relief Clause No. 7.5A, remained there.*
>
> *5. In the instant case, it is an admitted position that the respondent State authorities have taken cognizance of the harassment meted out to the petitioner by the erring personnel of the police department and initiated departmental enquiry against them in which they were found guilty and punishment has also been awarded to them."*

11. After issuing notice, this Court, on 17.2.2012[1], thought it apposite that the appellant should submit a representation within a week which shall be considered by the respondents within four weeks therefrom. In pursuance of the aforesaid order, the appellant submitted a representation which has been rejected on 19.3.2012 by the OSD/Secretary, Government of Chhattisgarh, Home (Police) Department. In the rejection order, it has been stated as follows: -

> *"In the aforesaid cases, the arrest and the action regarding submission of chargesheet in the Hon'ble Court was in accordance with law. (2) On 24.9.92 the police officers taking your photograph and writing objectionable words thereon was against the legal procedure. Considering this, action was taken against the concerned guilty police officers in accordance with law and two police officers were punished.*
>
> *(3) In your representation, compensation has been demanded on the following two grounds:*
>
> *A. Defamation was caused due to the police officers taking photograph.*
>
> *B. Your wife became unwell mentally. She is still unwell.*
>
> *C. Difficulty in marriage of daughter.*
>
> *Regarding the aforesaid grounds, the actual position is as follows:*

1 Mehmood Nayyar Azam v. State of Chhattisgarh, SLP (C) No. 34702 of 2010, decided on 17-2-1012 (SC)

A. Defamation is such a subject, the decision on which is within jurisdiction of the competent court. No decision pertaining to defamation has been received from the court of competent jurisdiction. Therefore, it would not be proper for the State Government to take a decision in this regard.

B. Regarding mental ailment of your wife, no such basis has been submitted by you, on the basis of which any conclusion may be drawn.

C. On the point of there being no marriage of children also no such document or evidence has been produced by you before the Government along with the representation, on the basis of which any decision may be taken.

Therefore, in the light of the above, the State Government hereby rejects your representation and accordingly decides your representation."

12. Mr. Niraj Sharma, learned counsel appearing for the appellant, submitted that when the conclusion has been arrived at that the appellant was harassed at the hands of the police officers and in the departmental enquiry they have been found guilty and punished, just compensation should have been awarded by the High Court. It is further urged by him that this Court had directed to submit a representation to grant an opportunity to the functionaries of the State to have a proper perceptual shift and determine the amount of compensation and grant the same, but the attitude of indifference reigned supreme and no fruitful result ensued. It is canvassed by him that it would not only reflect the non-Page concern for a citizen who has been humiliated at the police station, but, the manner in which the representation has been rejected clearly exhibits the imprudent perception and heart of stone of the State.

13. Mr. Sharma argued that the reasons ascribed by the State authority that defamation is such a subject that the issue of compensation has to be decided by the competent court and in the absence of such a decision, the Government cannot take a decision as regards the compensation clearly reflects the deliberate insensitive approach to the entire fact situation inasmuch as the High Court, in categorical terms, had found that the allegations were true and the appellant was harassed and thereby it did tantamount to custodial torture and there was no justification to adopt a hypertechnical mode to treat it as a case of defamation in the ordinary sense of the term and requiring the appellant to take recourse to further adjudicatory process and obtain a decree from the civil court.

14. Mr. Atul Jha, learned counsel appearing for the State, has supported the order of the High Court as well as the order passed by the competent authority of the State who

has rejected the representation on the foundation that when the appellant puts forth a claim for compensation on the ground of defamation, he has to take recourse to the civil court and, therefore, no fault can be found with the decision taken either by the High Court or the subsequent rejection of the representation by the authority of the State.

15. The learned counsel appearing for the private respondents has submitted that they have already been punished in a disciplinary proceeding and, therefore, the question of grant of compensation does not arise and even if it emerges, the same has to be determined by the civil court on the base of evidence adduced to establish defamation.

16. At the very outset, we are obliged to state that five aspects are clear as day and do not remotely admit of any doubt. First, the appellant was arrested in respect of the alleged offence under Indian Penal Code, 1860 and the Electricity Act, 2003; second, there was a direction by the Magistrate for judicial remand and thereafter instead of taking him to jail the next day he was brought to the police station; third, self-humiliating words were written on the placard and he was asked to hold it and photographs were taken; and fourth, the photographs were circulated in general public and were also filed by one of the respondents in a revenue proceeding; and five, the High Court, in categorical terms, has found that the appellant was harassed.

17. In the aforesaid backdrop, the singular question required to be posed is that whether the appellant should be asked to initiate a civil action for grant of damages on the foundation that he has been defamed or this Court should grant compensation on the bedrock that he has been harassed in police custody.

18. At this juncture, it is condign to refer to certain authorities in the field. In ***D.K. Basu v. State of W.B.***[2] it has been held thus: -

> *"10. "Torture" has not been defined in the Constitution or in other penal laws. "Torture" of a human being by another human being is essentially an instrument to impose the will of the "strong" over the "weak" by suffering. The word torture today has become synonymous with the darker side of human civilization.*
>
> *"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing*

2 AIR 1997 SC 610 : (1997) 1 SCC 416 : 1997 SCC (Cri) 92

as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

- Adriana P. Bartow

11. No violation of any one of the human rights has been the subject of so many Conventions and Declarations as "torture" – all aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward – flag of humanity must on each such occasion fly halfmast.

12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lockup. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law."

19. We have referred to the aforesaid paragraphs to highlight that this Court has emphasized on the concept of mental agony when a person is confined within the four walls of police station or lock-up. Mental agony stands in contradistinction to infliction of physical pain. In the said case, the two-Judge Bench referred to Article 5 of the Universal Declaration of Human Rights, 1948 which provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Thereafter, the Bench adverted to Article 21 and proceeded to state that the expression "life or personal liberty" has been held to include the right to live with human dignity and thus, it would also include within itself a guarantee against torture and assault by the State or its functionaries. Reference was made to Article 20(3) of the Constitution which postulates that a person accused of an offence shall not be compelled to be a witness against himself.

20. It is worthy to note that in the case of *D.K. Basu*[2], the concern shown by this Court in ***Joginder Kumar v. State of U.P.***[3] was taken note of. In Joginder Kumar's case, this Court voiced its concern regarding complaints of violation of human rights during and after arrest. It is apt to quote a passage from the same: (Joginder Kumar case[3], SCC pp. 263-64, paras 8-9)

3 (1994) 4 SCC 260

"8. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider… "

21. After referring to the case of *Joginder Kumar*[3], A.S. Anand, J. (as his Lordship then was), dealing with the various facets of Article 21 in *D.K. Basu case*[2], stated that any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilized nation can permit that to happen, for a citizen does not shed off his fundamental right to life, the moment a policeman arrests him. The right to life of a citizen cannot put in abeyance on his arrest. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

22. At this juncture, it becomes absolutely necessary to appreciate what is meant by the term "harassment". In P. Ramanatha Aiyar's Law Lexicon, Second Edition, the term "harass" has been defined, thus: -

"Harass. "injure" and "injury" are words having numerous and comprehensive popular meanings, as well as having a legal import. A line may be drawn between these words and the word "harass" excluding the latter from being comprehended within the word "injure" or "injury". The synonyms of "harass" are: To weary, tire, perplex, distress tease, vex, molest, trouble, disturb. They all have relation to mental annoyance, and a troubling of the spirit."

The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment. The accused in custody can be put under tremendous psychological pressure by cruel, inhuman and degrading treatment.

23. At this juncture, we may refer with profit to a two-Judge Bench decision in ***Sunil Gupta and others v. State of Madhya Pradesh***[4]. The said case pertained to handcuffing where the accused while in judicial custody were being escorted to court from jail and bound in fetters. In that context, the Court stated that (SCC p. 129, para 23) "the escort party should record reasons for doing so in writing and intimate the court so that the court, considering the circumstances may either approve or disapprove the action of the escort party and issue necessary directions." The Court further observed that when the petitioners who had staged 'Dharna' for public cause and voluntarily submitted themselves for arrest and who had no tendency to escape, had been subjected to humiliation by being handcuffed, such act of the escort party is against all norms of decency and is in utter violation of the principle underlying Article 21 of the Constitution of India. The said act was condemned by this Court to be arbitrary and unreasonably humiliating towards the citizens of this country with the obvious motive of pleasing 'someone'.

24. In ***Bhim Singh, MLA v. State of J & K***[5], this Court expressed the view that the police officers should have greatest regard for personal liberty of citizens as they are the custodians of law and order and, hence, they should not flout the law by stooping to bizarre acts of lawlessness. It was observed that custodians of law and order should not become depredators of civil liberties, for their duty is to protect and not to abduct.

25. It needs no special emphasis to state that when an accused is in custody, his Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatosed. The right to life is enshrined in Article 21 of the Constitution and a fortiorari, it includes the right to live with human dignity and all that goes along with it. It has been so stated in ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others***[6] and *D.K. Basu*[2].

4 (1990) 3 SCC 119

5 (1985) 4 SCC 677

6 (1981) 1 SCC 608

26. In ***Kharak Singh v. State of U. P.,***[7] this court approved the observations of Field, J. in ***Munn v. Illinois***[8]: (*Kharak Singh Case*[7], AIR p. 1301, para 15)

> *"15. ... By the term "life" as here [Article 21] used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed."*

27. It is apposite to note that inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience.

28. In ***Arvinder Singh Bagga v. State of U.P. and others***[9], it has been opined that torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to submit to the demands of the police.

29. At this stage, it is seemly to refer to the decisions of some of the authorities relating to a man's reputation which forms a facet of right to life as engrafted under Article 21 of the Constitution.

30. In ***Kiran Bedi v. Committee of Inquiry***[10], this Court reproduced an observation from the decision in ***D. F. Marion v. Davis***[11]: (Kiran Bedi case[10], SCC p.515, para 25)

> *"25. ... The right to enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property."*

31. In ***Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and others***[12], it has been ruled that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.

32. In ***Selvi v. State of Karnataka***[13], while dealing with the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and

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7 (1964) 1 SCR 332
8 (1877) 94 US 113
9 AIR 1995 SC 117
10 (1989) 1 SCC 494
11 55 ALR 171
12 (1983) 1 SCC 124
13 AIR 2010 SC 1974

the Brain Electrical Activation Profile test for the purpose of improving investigation efforts in criminal cases, a three-Judge Bench opined that the compulsory administration of the impugned techniques constitute 'cruel, inhuman or degrading treatment' in the context of Article 21. Thereafter, the Bench adverted to what is the popular perception of torture and proceeded to state as follows: (SCC p. 376, para 244)

> *"244. ... The popular perceptions of terms such as 'torture' and 'cruel, inhuman or degrading treatment' are associated with gory images of blood-letting and broken bones. However, we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. [A similar conclusion has been made in the following paper: Marcy Strauss, 'Criminal Defence in the Age of Terrorism – Torture', 48 New York Law School Law Review 201-274 (2003/2004)]."*

33. After so stating, the Bench in its conclusion recorded as follows: (Selvi case[13], SCC p. 382, para 263)

> *"263. ... We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms."*

34. Recently in ***Vishwanath S/o Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal***[14], although in a different context, while dealing with the aspect of reputation, this Court has observed as follows: (SCC p. 307, para 55)

> *"55. ... reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."*

35. We have referred to these paragraphs to understand how with the efflux of time, the concept of mental torture has been understood throughout the world, regard being had to the essential conception of human dignity.

36††. From the aforesaid discussion, there is no shadow of doubt that any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects

14 2012 (6) SCALE 190

† † Ed.: Para 36 corrected vide Official Corrigendum No. F.3/Ed.B.J./47/2012 dated 13-8-2012.

the dignity of a citizen in a society governed by law. It cannot be forgotten that the Welfare State is governed by rule of law which has paramountcy. It has been said by Edward Biggon "the laws of a nation form the most instructive portion of its history." The Constitution as the organic law of the land has unfolded itself in manifold manner like a living organism in the various decisions of the court about the rights of a person under Article 21 of the Constitution of India. When citizenry rights are sometimes dashed against and pushed back by the members of City Halls, there has to be a rebound and when the rebound takes place, Article 21 of the Constitution springs up to action as a protector. That is why, an investigator to a crime is required to possess the qualities of patience and perseverance as has been stated in ***Nandini Sathpaty v. P. L. Dani***[15].

37. In ***Delhi Judicial Services Association v. State of Gujarat***[16], while dealing with the role of police, this Court condemned the excessive use of force by the police and observed as follows: (SCC pp. 454-55, para 39)

> *"39. The main objectives of police is to apprehend offenders, to investigate crimes and to prosecute them before the courts and also to prevent commission of crime and above all to ensure law and order to protect citizens' life and property. The law enjoins the police to be scrupulously fair to the offender and the Magistracy is to ensure fair investigation and fair trial to an offender. The purpose and object of Magistracy and police are complementary to each other. It is unfortunate that these objectives have remained unfulfilled even after 40 years of our Constitution. Aberrations of police officers and police excesses in dealing with the law and order situation have been subject of adverse comments from this Court as well as from other courts but it has failed to have any corrective effect on it. The police has power to arrest a person even without obtaining a warrant of arrest from a court. The amplitude of this power casts an obligation on the police and it must bear in mind, as held by this Court that if a person is arrested for a crime, his constitutional and fundamental rights must not be violated."*

38. It is imperative to state that it is the sacrosanct duty of the police authorities to remember that a citizen while in custody is not denuded of his fundamental right under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner.

15 AIR 1978 SC 1025

16 (1991) 4 SCC 406

On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities. We may hasten to add that a balance has to be struck and, in this context, we may fruitfully quote a passage from *D. K. Basu*[2]: (SCC pp. 343-35, para 33)

> *"33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the Courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. … …. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated-indeed subjected to sustain and scientific interrogation-determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplishes, weapons etc. His constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal."*
>
> *(Emphasis in original)*

39[†‡]**.** In the case at hand, the appellant, while in custody, was compelled to hold a placard in which condemning language was written. He was photographed with the said placard and the photograph was made public. It was also filed in a revenue proceeding by the 5th respondent. The High Court has recorded that the competent authority of the State has conducted an enquiry and found the erring officers to be guilty. The High Court has recorded the findings in the favour of the appellant but left him to submit a representation to the concerned authorities. This Court, as has been indicated earlier, granted an opportunity to the State to deal with the matter in an appropriate manner but it rejected the representation and stated that it is not a case of defamation. We may at once clarify that we are not at all concerned with defamation as postulated under Section 499 of the IPC. We are really concerned how in a country governed by rule of law and where Article 21 of the Constitution is treated to be sacred, the dignity and social reputation of a citizen has been affected.

†‡ Ed.: Paras 39 and 40 corrected vide Official Corrigendum No. F.3/Ed.B.J./47/2012 dated 13-8-2012.

40[†‡]**.** As we perceive, from the admitted facts borne out on record, the appellant has been humiliated. Such treatment is basically inhuman and causes mental trauma. In "Kaplan & Sadock's Synopsis of Psychiatry", while dealing with torture, the learned authors have stated that intentional physical and psychological torture of one human by another can have emotionally damaging effects comparable to, and possibly worse than, those seen with combat and other types of trauma. Any psychological torture inflicts immense mental pain. A mental suffering at any age in life can carry the brunt and may have nightmarish effect on the victim. The hurt develops a sense of insecurity, helplessness and his self-respect gets gradually atrophied. We have referred to such aspects only to highlight that in the case at hand, the police authorities possibly have some kind of sadistic pleasure or to "please someone" meted out the appellant with this kind of treatment.

41. It is not to be forgotten that when dignity is lost, the breath of life gets into oblivion. In a society governed by rule of law where humanity has to be a laser beam, as our compassionate constitution has so emphasized, the police authorities cannot show the power or prowess to vivisect and dismember the same. When they pave such path, law cannot become a silent spectator. As Pithily stated in ***Jennison v. Baker***[17]:(QB p. 66 H)

> *"... 'The law should not be seen to sit by limply, while those who defy if go free, and those who seek its protection lose hope.'" (All ER p. 1006d)*

42. Presently, we shall advert to the aspect of grant of compensation. The learned counsel for the State, as has been indicated earlier, has submitted with immense vehemence that the appellant should sue for defamation. Our analysis would clearly show that the appellant was tortured while he was in custody. When there is contravention of human rights, the inherent concern as envisaged in Article 21 springs to life and enables the citizen to seek relief by taking recourse to public law remedy.

43. In this regard, we may fruitfully refer to ***Nilabati Behera v. State or Orissa***[18] wherein it has been held thus: (SCC pp. 762-63, para 17)

> *"17. ... A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages*

17 (1972) 1 All ER 997, 1006

18 (1993) 2 SCC 746

for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution."

44. Dr. A.S. Anand J., (as his Lordship then was), in his concurring opinion, expressed that: (*Nilabati case*[18], SCC pp. 768-69, para 34)

34. ... the relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts for established infringement of the indefeasible right guaranteed under Article 21 is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

45. In ***Sube Singh v. State of Haryana***[19], a three-Judge Bench of the Apex Court, after referring to its earlier decisions, has opined as follows: (SCC pp. 198-99, para 38)

> *"38. It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of Code of Civil Procedure."*

46. At this stage, we may fruitfully refer to the decision in ***Hardeep Singh v. State of Madhya Pradesh***.[20] The appellant therein was engaged in running a coaching centre where students were given tuition to prepare for entrance test for different professional courses. On certain allegation, he was arrested and taken to police station where he was handcuffed by the police without there being any valid reason. A number of daily newspapers published the appellant's photographs and on seeing his photograph in handcuffs, the appellant's elder sister was so shocked that she expired. After a long and delayed trial, the appellant, Hardeep Singh, filed a writ petition before the High Court of Madhya Pradesh at Jabalpur that the prosecution purposefully caused delay in conclusion of the trial causing harm to his dignity and reputation. The learned single Judge, who dealt with the matter, did not find any ground to grant compensation. On an appeal being preferred, the Division Bench observed that an expeditious trial ending in acquittal could have restored the appellant's personal dignity but the State instead of taking prompt steps to examine the prosecution witnesses delayed the trial for five long years. The Division Bench further held there was no warrant for putting the handcuffs on the appellant which adversely affected his dignity. Be it noted, the Division Bench granted compensation of Rs. 70,000/-.

47. This Court, while dealing with the facet of compensation, held thus: (*Hardeep Singh case*[20], SCC pp. 752-53, para 17)

> *"Coming, however, to the issue of compensation, we find that in light of the findings arrived at by the Division Bench, the compensation of Rs. 70,000/- was too small and did not do justice to the sufferings and humiliation*

19 AIR 2006 SC 1117

20 (2012) 1 SCC 748

undergone by the appellant. In the facts and circumstances of the case, we feel that a sum of Rs. 2,00,00/- (Rupees Two Lakhs) would be an adequate compensation for the appellant and would meet the ends of justice. We, accordingly, direct the State of Madhya Pradesh to pay to the appellant the sum of Rs. 2,00,000/-(rupees Two Lakhs) as compensation. In case the sum of Rs.70,000/- as awarded by the High Court, has already been paid to the appellant, the State would naturally pay only the balance amount of Rs.1,30,000/- (Rupees One Lakh thirty thousand)".

Thus, suffering and humiliation were highlighted and amount of compensation was enhanced.

48‡‡**.** On a reflection of the facts of the case, it is luculent that the appellant had undergone mental torture at the hands of insensible police officials. He might have agitated to ameliorate the cause of the poor and the downtrodden, but, the social humiliation that has been meted out to him is quite capable of destroying the heart of his philosophy. It has been said that philosophy has the power to sustain a man's courage. But courage is based on self-respect and when self-respect is dented, it is difficult even for a very strong minded person to maintain that courage. The initial invincible mind paves the path of corrosion. As is perceptible, the mindset of the protectors of law appears to cause torment and insult and tyrannize the man who is helpless in custody. There can be no trace of doubt that he is bound to develop stress disorder and anxiety which destroy the brightness and strength of the will power. It has been said that anxiety and stress are slow poisons. When torment is added, it creates commotion in the mind and the slow poisons get activated. The inhuman treatment can be well visualized when the appellant came out from custody and witnessed his photograph being circulated with the self-condemning words written on it. This withers away the very essence of life as enshrined under Article 21 of the Constitution. Regard being had to the various aspects which we have analysed and taking note of the totality of facts and circumstances, we are disposed to think that a sum of Rs.5.00 lacs (Rupees five lacs only) should be granted towards compensation to the appellant and, accordingly, we so direct. The said amount shall be paid by the respondent State within a period of six weeks and be realized from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State.

47. Consequently, the appeal is allowed to the extent indicated above. However, in the facts and circumstances of the case, there shall be no order as to costs.

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‡‡ **Ed.:** Paras 40 corrected vide Official Corrigendum No. F.3/Ed.B.J./47/2012 dated 13-8-2012.

(2013) 4 Supreme Court Cases 244

Sooguru Subrahmanyam v. State of A.P.

(Before K.S.P. Radhakrishnan and Dipak Misra, JJ.)

Sooguru Subrahmanyam ... Appellant;
Versus
State of Andhra Pradesh ... Respondent.

Criminal Appeal No. 164 of 2008†,
decided on April 4, 2013

Criminal Trial — Circumstantial evidence — Murder of wife by suffocation upon suspicion of infidelity — Unbroken chain of circumstances established beyond reasonable doubt, consistent with singular hypothesis of guilt of accused and totally inconsistent with his innocence — Conviction confirmed — Penal Code, 1860, S. 302

The appellant-accused, the husband of the deceased, suspected that his wife had developed an illicit intimacy with his neighbour I, living in the next portion of his rented house. This led to differences between the couple, which grew to bitterness, resulting in severe quarrels during nights. Eventually, the appellant allegedly committed murder of his wife by suffocating her to death with a pillow, in his house. The trial court noted the fact that there was no direct evidence to prove involvement of the appellant in the crime. But it took note of a series of facts, namely, that the death was homicidal and not suicidal; that the deceased was in the house of the appellant and her dead body was found in the house; that the house was locked from outside and the appellant had absconded; that there was no complaint by the appellant with regard to the death of his wife; that cross-examination of hostile witnesses [PW 1 (landlady, who lodged FIR) and PWs 2 to 5 and 7 (neighbours)] indicated that the deceased and the appellant were staying together; that the testimony of PWs 8 and 9 (younger sister and another relative of the deceased, respectively) clearly established that the appellant was suspecting the character of the deceased and had picked up quarrels alleging illicit intimacy with another person. Accordingly, the trial court, relying on the cumulative effect of all the circumstances, convicted the appellant under Section 302 IPC, which was upheld by the High Court.

Dismissing the appeal, the Supreme Court

† From the Judgment and Order dated 28-8-2006 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Crl. A. No. 1478 of 2004

Held :

The evidence on record clearly shows that the premises had been taken on rent by the appellant and / from PW 1 (landlady). That there was a commotion in the rented portion of the house in the morning, and PW 1 had lodged an FIR. The police arrived and found the house of the appellant locked from outside and it was broken open in presence of the witnesses and the dead body of the deceased was found on the ground with a pillow on her face. It is worthwhile to note that the appellant did not take the plea of alibi and on the contrary, the factum of his abscondence has been proved. Under these circumstances, the cumulative effect is that the appellant was present in the house when the death of his wife occurred. The suggestion of rape and murder which was put in the form of a violent sexual act has been found to be untrue on the basis of medical evidence and there is no reason to differ with the said finding. The appellant had no explanation as to where he was on the fateful night and how the door was locked from outside. He had absconded himself for long. He had not taken any step to report the unnatural death of his wife. Thus, the irresistible and inescapable conclusion is that the appellant is the culprit in committing the murder of his wife. (Paras 13 to 24)

Nathuni Yadavv. State of Bihar, (1998) 9 SCC 238 : 1998 SCC (Cri) 992; *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116 : 1984 SCC (Cri) 487; *Padala Veera Reddy v. State of A.P.*, 1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407; *Balwinder Singh v. State of Punjab*, 1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59; *Harishchandra Ladaku Thange v. State of Maharashtra*, (2007) 11 SCC 436 : (2008) 1 SCC (Cri) 755; *Jagroop Singh v. State of Punjab*, (2012) 11 SCC 768 : (2013) 1 SCC (Cri) 1136, *relied on Sooguru Subrahmanyam v. State of A.P.*, (2006) 3 AP U 377, *affirmed*

R. v. Palmer, CCC May 1856 at p. 308, cited

Appeal dismissed Y-D/51577/CR

Advocates who appeared in this case:

Ashok Kr. Sharma and Avinash Kr. Jain, Advocates, for the Appellant;

Shishir Pinaki, D. Mahesh Babu and Mayur Shah, Advocates, for the Respondent.

Chronological list of cases cited on page(s)

1.	(2012) 11 SCC 768 : (2013) 1 SCC (Cri) 1136, Jagroop Singh v. State of Punjab	251g
2.	(2007) 11 SCC 436 : (2008) 1 SCC (CriJ 755, Harishchandra Ladaku Thange v. State of Maharashtra	25 lg
3.	(2006) 3 AP U 377, Sooguru Subrahmanyam v. State of A.P.	247b-c
4.	(1998) 9 SCC 238 : 1998 SCC (Cri) 992, Nathuni Yadav v. State of Bihar	250g-h

5. 1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59,
Balwinder Singh v. State of Punjab 251 f-g

6. 1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407,
Padala Veera Reddy v. State of A.P. 251f-g

7. (1984) 4 SCC 116 : 1984 SCC (Cri) 487,
Sharad Birdhichand Sarda v. State of Maharashtra 251 f-g

8. CCC May 1856 at p. 308, R. v. Palmer 251a-b

The Judgment of the Court was delivered by

Dipak Misra, J. — The accused-appellant had entered into wedlock with Nagamani, the deceased, on 30.4.1998 and for some time, they lived in marital bliss at Hindupur. After four months, the needs of life compelled the couple to shift to Srikalahasti where the father of the deceased was working. The experience of life not being satisfactory hardly after eight months, at the insistence of the wife, they shifted back to Hindupur. The shifting to Hindupur did not bring satisfaction as expected and hence, eventually, they shifted to Madanapalle town where the accused was working prior to the marriage.

2. As the prosecution story further unfurls, at the time of occurrence, i.e., on 17.10.2000, the accused was staying in the rented portion of the house belonging to Dhanalakshmi, PW-1. The other portion was occupied by one Imamvalli, father of S. Syed Basha, PW-5. Imamvalli was staying with his children and his wife was away at Quwait and the proximity of stay, as alleged by the prosecution, gradually developed to an illicit intimacy between him and the deceased. Twelve days prior to the incident, the deceased was found in the company of Imamvalli in an auto-rickshaw by the accused, who dragged him out from the auto-rickshaw and assaulted him. The accused took the deceased to the house and warned her. The differences between the couple grew to bitterness which resulted in severe quarrels during nights.

3. On 16.10.2000, there was a quarrel and, as the prosecution version proceeds, the accused had expressed his agony and anger before Pavankumar, PW-7, that if the deceased did not discontinue her illicit relationship, he might be compelled to send her back to her matrimonial home or get rid of her.

4. As the version of the prosecution has been further depicted, on 17.10.2000, about 6.30 a.m., the deceased was found dead in the house and the doors were locked from outside. PW-1, the landlady, lodged an FIR and a crime was registered. During the course of investigation, the lock of the room was opened by PW-13, the Investigating Officer, in the presence of one Babu Naidu, PW-12, and another. The

further investigation led to seizure of incriminating material from the scene of the offence. Thereafter, inquest was held over the dead body of the deceased and it was sent for post mortem. The investigating agency examined number of witnesses and after completing the investigation, placed the charge-sheet for an offence punishable under Section 302 of the Indian Penal Code (for short "the IPC") against the accused-husband before the competent court which, in turn, committed the matter for trial to the Court of Session.

5. The accused abjured his guilt and pleaded false implication and claimed to be tried.

6. The prosecution, in order to substantiate the offence as alleged against the accused, examined as many as 15 witnesses, got 29 documents exhibited and 15 material objects marked. PWs-1 to 5 and 7 turned hostile and they were cross-examined by the prosecution. PW-1 was the landlady who had lodged the FIR, Ext.-1, and PWs-2 to 5 and 7 were the neighbours and all of them resiled from their original version.

7. The learned trial Judge took note of the fact that there was no direct evidence to prove the involvement of the accused in the crime, but taking note of the series of facts, namely, that the death was homicidal and not suicidal; that the deceased was in the house of the husband and her dead body was found in the house; that the house was locked from outside and the husband had absconded; that there was no complaint by the husband with regard to the death of his wife; that the cross-examination of the hostile witnesses would indicate that the deceased and the accused were staying together and the incident occurred as per the FIR, Ex. P-1; that the testimony of PWs-8 to 10 clearly established that the accused was suspecting the character of the deceased and had picked up quarrels alleging illicit intimacy with another person; that the suggestion on behalf of the accused that there was violent intercourse on the deceased was found to be false on the base of the evidence of PW-11, Dr. Paul Ravi Kumar; that from the evidence of PW-1, Dhanalakshmi, it was quite obvious that she was aware of the death of Nagamani before she gave the report; and that during the investigation, Exs. P-21 and P-22 were found in the house of the accused and Ex. P-21 which was disputed to have been written by him was found to be false in view of the evidence of PW-15, K. Vani Prasada Rao, the hand-writing expert who had clearly stated that the writings in Ex. P-21 were that of the accused and that the cumulative effect of all the circumstances did go a long way to show that the chain was complete to establish that it was the accused and the accused alone who had committed the crime and none else, and, accordingly, convicted him under Section 302 of the IPC and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.200/- in default, to suffer simple imprisonment for one month.

8. On appeal being preferred, the Division Bench of the High Court, appreciating the evidence brought on record, concurred[1] with the view of the learned trial Judge, regard being had to the circumstances which had been taken note of by him, especially that the premises was in exclusive possession of the accused; that the accused had lived with the deceased during that night; that the door was locked from outside; that the accused had absconded for a long time and, accordingly, gave the stamp of approval to the judgment of conviction and order of sentence of the learned trial Judge. Hence, the present appeal by way of special leave by the accused-appellant.

9. Mr. Ashok Kumar Sharma, learned counsel appearing for the appellant, in support of the appeal, has submitted that the trial court as well as the High Court has erroneously come to the conclusion that the chain of circumstances have proven the guilt of the accused though on a proper scrutiny of the evidence, it is perceivable that there are many a missing link in the version of the prosecution.

10. The learned counsel would submit that the very presence of the accused on the site and the foundation of the prosecution relating to harbouring of suspicion by the accused relating to the character of the wife are extremely doubtful and cannot, by proper appreciation of evidence, be said to have been proven. It is urged by him that the circumstances have been stretched to an unimaginable length on the basis of surmises and conjectures ignoring the relevant facets of the evidence, more importantly, that there was amicable relationship between the husband and wife and the same has been clearly borne out in the testimony of PWs 1 to 5 and 7. It is his further submission that when the neighbours have not supported the case of the prosecution, it was absolutely improper on the part of the learned trial Judge to ignore the compatible relationship between the accused and the deceased and accept the prosecution version of suspicion by the husband on the basis of some sketchy material on record to proceed to the ultimate conclusion for finding the accused guilty of the offence. That apart, submits the learned counsel that no motive has been exhibited to rope the appellant in the crime and convict him.

11. The learned counsel would emphatically put forth that the High Court has not appositely appreciated the evidence brought on record which amounts to failure of the legal obligation cast on the appellate Court and, therefore, both judgments of the appellate Court as well as of the trial Court deserve to be annulled and the appellant should be acquitted of the charge.

1 Sooguru Subrahmanyam v. State of A.P., (2006) 3 AP LJ 377

12. Mr. Shishir Pinaki, learned counsel for the State, resisting the aforesaid proponements of the learned counsel for the appellant, would contend that each ofthe circumstances has been properly weighed by the learned trial Judge and has been keenly scrutinized by the High Court and, hence, there is no perversity of approach to nullify the judgment of conviction. It is canvassed by him that the mere repetition by the neighbours that the husband and wife lived in an atmosphere of harmony and compatibility should not be given more credence than the testimony of the witnesses that there was suspicion in the mind of the husband, the presence of the husband in the house, his abscondence and absence of positive plea in the statement recorded under Section 313 of the Code of Criminal Procedure and the injuries found on the body of the deceased. The learned counsel would urge with immense conviction that the suspicion which was at the root of the crime, as the circumstances unfold, shows the ultimate causation of death in a violent manner by the accused.

13. To appreciate the rival submissions raised at the bar, it is obligatory to see the nature of the injuries sustained by the deceased and the opinion of the doctor on the same. PW-11, Dr. Paul Ravi Kumar, who had conducted the post mortem, has stated that he had found the following external and internal injuries on the dead body of the deceased: -

> *"**External injuries:***
>
> *There is bloody discharge coming out from both the nostrils. Tongue tip bluish in colour seen in between the upper and lower teeth. Lips blackish in colour with diffuse abrasions over both the lips. Nose bluish discolour tim present over right nostril, ears – bluish black discolour of the left pinna.*
>
> *1. An abrasion of 4 x 2 cm over left mandibular margin.*
>
> *2. An abrasion of ½ x ½ cm over left upper lid.*
>
> *3. An abrasion of 2 x ½ cm over right leg anterior aspect.*
>
> *4. A linear abrasion of 2 x 1/3 cm over dorsum of right foot.*
>
> ***Internal injuries:***
>
> *Neck – Hyoid normal, thyroid, cricoid cartligas normal, larynx – congested. Trache – Bronchi – normal. Lungs – Normal, cut section congested, stomach – normal and they are congested. Intestines distended gases, urinary bladder empty. Uterus – normal. Scalp:*

A diffuse contusion of 10 x 8 cm over left occipto-partial region. On reflexion of scalp a diffuse hematoma of 8 x 8 cm over left occipto partial region present. Skull, bones, base of the skull-normal. Meninges – normal, brain – normal size congested. Spine bones of the extremities – normal."

14. On the basis of the said injuries, he has expressed the opinion that the deceased had died of asphyxia as a result of smothering and the time of death was 36 to 40 hours prior to his examination. The aforesaid injuries and the opinion has clearly revealed that the death was homicidal. In examination-in-chief, he has deposed that the external injuries mentioned by him vide Ex. P-8 are possible when a person places a pillow on the face and presses and the result is struggle. In the cross-examination, it has been suggested to him that the injuries recorded by him could be possibly by participating in violent sexual intercourse but the same has been categorically denied. Thus, there can be no iota of doubt that the death was homicidal and not suicidal and further it was not a case of rape and murder.

15. Once it is held that the death was homicidal and the injuries were not the result of any violent sexual intercourse, the circumstances are to be scrutinized to see the complicity of the accused in the crime.

16. First, we shall advert to the issue whether the suspicion relating to the illicit relationship by the accused-appellant has been established. True it is, the neighbours, PWs-1 to 5, who have turned hostile, have stated that the husband and wife had an amicable relationship but the version of the other witnesses project otherwise. From the testimony of PW-8, Triveni, the younger sister of the deceased, it is apparent that on 1.10.2000, the deceased had come to their house at Hindupur and had told her that the accused was harassing her on the pretext that she had developed illicit relationship with someone and was not providing her food. She has deposed that she advised the deceased that quarrels are common in family life and she should adjust herself and, accordingly, she went back to her husband. In the cross-examination, nothing has been elicited to discredit her testimony.

17. PW-9, P. Gangappa, another relative of the deceased, has deposed about the deceased agonisedly describing before him the harassment meted out to her by her husband on the excuse that she had developed illicit intimacy with someone. There has been absolutely no cross-examination on this score.

18. In view of the aforesaid, we are disposed to think that the accused, for whatever reason, had garnered suspicion against the attitude and character of his wife. We may hasten to add that PW-7, who in his 161 Statement had stated that the accused

has told him about the anguish relating to his wife's character, though has turned hostile, yet the same would not make any difference to arrive at the conclusion on the basis of the evidence of PWs-8 and 9 that he had a suspicious mind as regards the character of his wife.

19. Presently, we shall proceed to consider certain other circumstances. It has been established on the basis of the material on record that the premises had been taken on rent by the accused and Imamvalli from the landlady, PW-1. PW-1 has admitted that she had given the accused a portion of the house on rental basis. PW-5, son of Imamvalli, has admitted that the accused and his wife were residing on rent in the next portion of their house. Thus, they were close neighbours. PW-1 in her evidence has stated that she was not aware if the deceased was alive or not. The learned trial Judge has commented on her conduct which we need not further expatiate. The fact remains that she has deposed that when she got up in the morning, she found that there was some commotion in the portion which she had given on rent and it was informed to her that someone had died. It is interesting to note that she has admitted the FIR Ex. P-1. In the cross-examination, she has also admitted that the contents of Ex. P-1 were read over and explained to her before she signed it. PW-5 has deposed that Nagamani, the deceased, had died about 6.30 a.m., when PW-1, the landlady, was shouting. PW-12, N. Babu Naidu, the councillor of 26th Ward, has stated that after coming to know about the death of the deceased, he went to her house and found it locked and the same was opened after the police came and the dead body was found on the ground with a pillow on her face. His testimony has gone undented, for nothing has been put to him in the cross-examination except that he was making efforts to oblige the police. It has come in the evidence of PW-13, the Investigating Officer, that the lock was broke open in the presence of the witnesses and the dead body was found in the room. He has spoken about the seizure of Ex. P-21, the writing of the accused on a book. In the cross-examination, apart from a singular question relating to the Inquest Report, nothing has been asked.

20. At this juncture, it is apt to note that PW-1, in the cross-examination, has stated that she had gone to Sai Baba Bhajan. The said aspect has not been believed by the learned trial Judge and we are inclined to think correctly. On the contrary, the circumstances have clearly established that she was in her house. The evidence on record clearly shows that there was a commotion in the morning, she had lodged the FIR, the police arrived and found the house locked from outside and it was broke open in the presence of the witnesses. It is worthwhile to note that the accused did not take the plea of alibi. On the contrary, the factum of abscondence has been proven. Under these circumstances, the cumulative effect is that the husband was present in the

house when the death of the wife occurred. The suggestion of rape and murder which has been put in the form of violent sexual act has been found to be untrue on the basis of medical evidence and there is no reason to differ with the said finding. The husband has not come with any explanation where he was on the fateful night and how the door was locked. As has been stated earlier, he had absconded for long. He has not taken any step to report the unnatural death of his wife. From the aforesaid aspects, the circumstances soundly establish that the deceased was with the accused during the night, there was a locking of the door from outside which could not have been done by anyone else except him and further he absconded from the scene of the crime and did not report to the police. Thus, the irresistible and inescapable conclusion is that the accused was the culprit in committing the murder of his wife.

21. Now, we may deal with the submission that the prosecution has not been able to prove any motive for the commission of the crime because the suspicion on the part of the husband has not been established. We have already recorded an affirmative finding on that score. However, we may, in this context, profitably refer to the pronouncement in ***Nathuni Yadav and others v. State of Bihar and another***[2] wherein a two-Judge Bench has laid down thus: -

> *"17. Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive.*
>
> *It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in R. v. Palmer*[3] *thus:*
>
> *"But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties."*
>
> *Though, it is a sound proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed*

2 (1998) 9 SCC 238 : 1998 SCC (Cri) 992

3 Shorthand Report at p. 308 CCC May 1856

unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant."

22. In the said case, it was also observed that in some cases, it may not be difficult to establish motive through direct evidence, while in some other cases, inferences from circumstances may help in discerning the mental propensity of the person concerned. In the case at hand, as is noticed, there is material on record which suggests that there was some ire that had swelled up in the mind of the accused to extinguish the life spark of the wife.

23. It is to be borne in mind that suspicion pertaining to fidelity has immense potentiality to commit irreversible wrongs as it corrupts the mind and corrodes the sense of rational thinking and further allows liberty to the mind to pave the path of evil. In fact, it brings in baseness. It quite often impures mind, takes it to the devil's den and leads one to do unjust acts than just deeds. In any case, it does not give licence to commit murder. Thus, the submission pertaining to the absence of motive has no substance.

24. In view of the aforesaid analysis, we conclude and hold that all the links in the chain of evidence are established beyond reasonable doubt and the established circumstances are consistent with the singular hypothesis that the accused is guilty of the crime and it is totally inconsistent with his innocence. We have said so on the basis of the pronouncements in ***Sharad Birdhichand Sarda v. State of Maharashtra***[4], ***Padala Veera Reddy v. State of Andhra Pradesh and ors.***[5], ***Balwinder Singh v. State of Punjab***[6], ***Harischandra Ladaku Thange v. State of Maharashtra***[7] and ***Jagroop Singh v. State of Punjab***[8].

25. Consequently, the appeal, being sans substratum, stands dismissed.

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4 AIR 1984 SC 1622
5 AIR 1990 SC 79
6 AIR 1996 SC 607
7 AIR 2007 SC 2957
8 AIR 2012 SC 2600

(2012) 12 Supreme Court Cases 274

K. Suresh v. New India Assurance Co. Ltd.

(Before K.S.P. Radhakrishnan and Dipak Misra, JJ.)

K. Suresh ... Appellant;
Versus
New India Assurance Company Limited And Another ... Respondents.

Civil Appeal No. 7603 of 2012[†],
decided on October 19, 2012

A. **Motor Vehicles Act, 1988 — Ss. 166, 168 and Sch. II — Accident claims — Grant of compensation — "Just compensation" — What is — Principles on basis of which to be determined, restated — Considerations in realm of speculation or fancy to be avoided though some guesswork or conjecture to limited extent is inevitable in absence of precise formula to determine quantum of compensation — Adjudicating authority has to keep in view sufferings of injured person, which include his inability to lead full life, his incapacity to enjoy normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned — Words and Phrases — "Just compensation" — Tort Law — Compensation/Damages — Quantum — Estimation — Degree of guesswork or conjecture permissible (Paras 2 to 10)**

B. **Motor Vehicles Act, 1988 — Ss. 166, 163-A, 168, 171 and Sch. II — Permanent disability — Compensation — Computation of — Headings under which compensation payable are: transport charges, extra nourishment, medical expenses, additional medical expenses, additional transport charges, pain and suffering/mental agony, loss of earning capacity and permanent disability — On facts held, amount on aforesaid scores in toto would be Rs 13,48,000 with interest @ 7.5% from date of application till date of payment considering 75% permanent disability suffered by victim and need for medical treatment in future — Finding of High Court that once compensation was awarded towards "permanent disability" no further amount could be awarded for "loss of earning capacity", is unsustainable — Tort Law — Workmen's Compensation Act, 1923, S. 4 (Paras 21 to 33)**

Davies v. Powell Duffryn Associated Collieries Ltd. (No. 2), 1942 AC 601 : (1942) 1 All ER 657 (HL); Jai Bhagwan v. Laxman Singh, (1994) 5 SCC 5; *H. West & Son Ltd. v. Shephard*, 1964 AC 326 : (1963) 2 WLR 1359 : (1963) 2 All ER 625 (HL); *Nagappa v. Gurudayal Singh*, (2003) 2 SCC 274 : 2003 SCC (Cri) 523; *C.K. Subramania Iyerv. T. Kunhikuttan Nair*, (1969) 3 SCC 64; *Yadava Kumar v. National Insurance Co. Ltd.*, (2010) 10 SCC 341 : (2010) 4 SCC (Civ) 168 : (2010) 3 SCC (Cri) 1285; *Concord of India Insurance Co. Ltd.*

v. Nirmala Devi, (1979) 4 SCC 365 : 1979 SCC (Cri) 996; *Helen C. Rebello v. Maharashtra SRTC*, (1999) 1 SCC 90 : 1999 SCC (Cri) 197; *Stare ofHaryana v. Jasbir Kaur*, (2003) 7 SCC 484 : 2003 SCC (Cri) 1671; *R.D. Hattangadi v. Pest Control (India) (P) Ltd.*, (1995) 1 SCC 551 : 1995 SCC (Cri) 250; *Arvind Kumar Mishra v. New India Assurance Co. Ltd.*, (2010) 10 SCC 254 : (2010) 4 SCC (Civ) 153 : (2010) 3 SCC (Cri) 1258; *Baker v. Willoughby*, 1970 AC 467 : (1970) 2 WLR 50 : (1969) 3 All ER 1528 (HL); *Laxman v. Oriental Insurance Co. Ltd.*, (2011) 10 SCC 756 : (2012) 3 SCC (Civ) 1095 : (2012) 1 SCC (Cri) 108, *relied on*

Ward v. James, (1966) 1 QB 273 : (1965) 2 WLR 455 : (1965) 1 All ER 563 (CA), *approved*

Lim Poh Choo v. Camden and Islington Area Health Authority, 1979 QB 196 : (1978) 3 WLR 895 : (1979) 1 All ER 332 (CA); *Cholan Roadways Corpn. Ltd. v. Ahmed Thambi*, (2006) 4 CTC 433; *Kerala SRTC v. Susamma Thomas*, (1994) 2 SCC 176 : 1994 SCC (Cri) 335, *referred to*

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New India Assurance Co. Ltd. v. K. Suresh, (2010) 1 TN MAC 113, *affirmed on this point*

New India Assurance Co. Ltd. v. K. Suresh, (2010) 1 TN MAC 113, *reversed on this point*

Appeal partly allowed P-D/51005/SVR

Advocates who appeared in this case:

Vipin Nair and Udayaditya Banerjee (for M/s Temple Law Firm), Advocates, for the Appellant;

Ms Aishwarya Bhati, Sanjay Mittal, Aditya Dhawan and Chander Shekhar Ashri, Advocates, for the Respondents.

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17. 1970 AC 467 : (1970) 2 WLR 50 : (1969) 3 All ER 1528 (HL), Baker v. Willoughby 283c
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The Judgment of the Court was delivered by

Dipak Misra , J. — Leave granted.

2. Despite many a pronouncement in the field, it still remains a challenging situation warranting sensitive as well as dispassionate exercise how to determine the incalculable sum in calculable terms of money in cases of personal injuries. In such assessment neither sentiments nor emotions have any role. It has been stated in ***Davies v. Powell Duffryn Associate Collieries Ltd.(No. 2)***[1] that it is a matter of Pounds, Shillings and Pence. There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity 'the Act') stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance.

3. In ***Jai Bhagwan v. Laxman Singh***[2], a three-Judge Bench of this Court, while considering the assessment of damages in personal-injury-actions, reproduced the following passage from the decision by the House of Lords in ***H.West & Son, Ltd. v. Shephard***[3] : (Shephard case[3], All ER p. 631 D-G)

> *"My Lords, the damages which are to be awarded for a tort are those which 'so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act' [Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna4]. The words 'so far as money can compensate' point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be*

1 1942 AC 601

2 (1994) 5 SCC 5

3 (1963) 2 All ER 625

4 (1926) All ER 124 : 1926 AC 655

that amounts which are awarded are to a considerable extent conventional."
(Jai Bhagwan case[2], SCC p.7, para 9)

4. In the said case in *Jai Bhagwan*[2] reference was made to a passage from Clerk and Lindsell on Torts (16th Edn.) which is apposite to reproduce as it relates to the awards for non-pecuniary losses: (SCC pp. 7-8, para 10)

> *"10. ... In all but a few exceptional cases the victim of personal injury suffers two distinct kinds of damage which may be classed respectively as pecuniary and non-pecuniary. By pecuniary damage is meant that which is susceptible of direct translation into money terms and includes such matters as loss of earnings, actual and prospective, and out-of-pocket expenses, while non-pecuniary damage includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life. In respect of the former, it is submitted, the court should and usually does seek to achieve restitutio in integrum in the sense described above, while for the latter it seeks to award 'fair compensation'. This distinction between pecuniary and non-pecuniary damage by no means corresponds to the traditional pleading distinction between 'special' and 'general' damages, for while the former is necessarily concerned solely with pecuniary losses — notably accrued loss of earnings and out-of-pocket expenses — the latter comprises not only non-pecuniary losses but also prospective loss of earnings and other future pecuniary damage."*

5. In this regard, we may refer with profit the decision of this Court in ***Nagappa v. Gurudayal Singh and others***[5] wherein the observations of Lord Denning M.R. in ***Lim Poh Choo v. Camden and Islington Area Health Authority***[6] were quoted with approval. They read thus: (Nagappa case[5], SCC p. 283, para 25)

> *"25. ... '... The practice is now established and cannot be gainsaid that, in personal injury cases, the award of damages is assessed under four main heads: first, special damages in the shape of money actually expended; second, cost of future nursing and attendance and medical expenses; third, pain and suffering and loss of amenities; fourth, loss of future earnings.' (Lim Poh Choo case[6], QB pp. 217-18 H-A)"*

6. While having respect for the conventional determination there has been evolution of a pattern and the same, from time to time, has been kept in accord with the

5 (2003) 2 SCC 274

6 (1979) 1 All ER 332

changes in the value of money. Therefore, in the case of ***Ward v. James***[7] it has been expressed thus: (All ER p. 573 E-G)

> *"(iii) Loss during his shortened span.— Although you cannot give a man so gravely injured much for his 'lost years', you can, however, compensate him for his loss during his shortened span, that is, during his expected 'years of survival'. You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to a back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

7. While assessing the damages there is a command to exclude considerations which are in the realm of speculation or fancy though some guess work or some conjecture to a limited extent is inevitable. That is what has been stated in ***C.K. Subramania Iyer v. T. Kunhikuttan Nair***[8]. Thus, some guess work, some hypothetical considerations and some sympathy come into play but, a significant one, the ultimate determination is to be viewed with some objective standards. To elaborate, neither the tribunal nor a court can take a flight in fancy and award an exorbitant sum, for the concept of conventional sum, fall of money value and reasonableness are to be kept in view. Ergo, in conceptual eventuality "just compensation" plays a dominant role.

8. The conception of "just compensation" is fundamentally concretized on certain well established principles and accepted legal parameters as well as principles of equity and good conscience. In ***Yadav Kumar v. Divisional Manager, National Insurance Company Limited and another***[9], a two-Judge Bench, while dealing with the facet of "just compensation", has stated thus: (SCC p. 345, para 15)

> *"15. It goes without saying that in matters of determination of compensation both the tribunal and the court are statutorily charged with a responsibility of fixing a "just compensation". It is obviously true that determination of*

7 (1965) 1 All ER 563

8 AIR 1970 SC 376

9 (2010) 10 SCC 341

just compensation cannot be equated to a bonanza. At the same time the concept of "just compensation" obviously suggests application of fair and equitable principles and a reasonable approach on the part of the tribunals and the courts. This reasonableness on the part of the tribunal and the court must be on a large peripheral field."

In ***Concord of India Insurance Co. Ltd. v. Nirmala Devi***[10] this Court has expressed thus: -

"The determination of the quantum must be liberal, not niggardly since the law values life and limb in free country in generous scales."

9. In ***Helen C. Rebello v. Maharashtra State Road Transport Corpn.***[11], while dealing with concept of "just compensation", it has been ruled that: (SCC p. 108, para 28)

"28. ... the word 'just', as its nomenclature, denotes equitability, fairness and reasonableness having large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just.

The field of wider discretion of the tribunal has to be within the said limitations. It is required to make an award determining the amount of compensation which in turn appears to be "just and reasonable", for compensation for loss of limbs or life can hardly be weighed in golden scales as has been stated in ***"State of Haryana v. Jasbir Kaur***[12].

10. It is noteworthy to state that an adjudicating authority, while determining quantum of compensation, has to keep in view the sufferings of the injured person which would include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned. Hence, while computing compensation the approach of the tribunal or a court has to be broad based. Needless to say, it would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation the fundamental criterion of "just compensation" should be inhered.

11. Keeping in view the aforesaid aspects we shall proceed to state the factual score. The factual matrix as unfurled, exposits that on 11.3.2002 about 4.00 p.m. the claimant-

10 (1979) 4 SCC 365

11 AIR 1998 SC 3191

12 (2003) 7 SCC 484

appellant (hereinafter referred to as 'the claimant) was hit from the behind by an auto bearing registration number TN-9 C 7755 which was driven in a rash and negligent manner and in the accident he sustained triple fracture in spinal cord, fracture in left leg neck of femur, fracture in right hand shoulder, deep cut and degloving injury over right left thigh bone and multiple injuries all over the body.

12. After the accident the claimant was admitted in M.R. Hospital where he availed treatment. After the treatment, the dislocation of the bones got reduced, pedical screws were inserted into pedicles of D11 vertebra and pedicle screws were passed into pedicles of L1 vertebra. Two screws on left thigh were fixed using a rod each. That apart, decompression of D12 vertebra was done and bone chips were placed in the intertransverse area on both sides. He was hospitalized for 28 days. The victim had numbness below the knee joint and was facing difficulty to stand and sit comfortably. As the evidence on record would reveal he has been constantly availing physiotherapy treatment facing difficulty in carrying out his normal activities. A disability certificate contained as Ex.P4 was filed before the tribunal which showed permanent disability at 75%.

13. The tribunal, as it appears from the award, had also assessed the permanent disability at 75% as fixed by PW-4, Dr. Thiagarajan. It had awarded Rs.25,00,000/- under various heads, namely, transport charges, extra nourishment, medical expenses, additional medical expenses, pain and sufferings suffered by family members of the claimant, mental agony, additional transport charges, inability of the appellant to participate in public functions, loss of marital life, pain and suffering, permanent disability and loss of earning capacity.

14. Before the High Court as serious objections were raised pertaining to percentage of disability, the claimant was referred to the Medical Board and it was found that he had compression fracture which had healed with persistence of pain in the back with root involvement causing grade IV power in left lower limb and, accordingly, the Board fixed the permanent disability at 40%. The High Court adverted to the concept of "just compensation" and opined that the quantum of damages fixed should be in proportionate to the injuries caused. It referred to certain authorities and opined that Rs.2,00,000/- towards medical expenses, Rs.5,000/- each for transport charges and extra nourishment, Rs.2,50,000/- towards pain and suffering, Rs.50,000/- for medical expenses and Rs.4,68,000/- towards loss of earning capacity would be the just amount of compensation. Thus, the total amount as determined by the High Court came to Rs.9,78,000/-. The High Court reduced the interest to 7.5% from 9% as granted by the tribunal. Be it noted, the said judgment and order dated 27.1.2010

passed by the High Court of Judicature at Madras in New India Assurance Co. Ltd. v. K. Suresh[13] whereby the High Court has reduced the compensation granted by the Motor Accident Claims Tribunal (II Small Causes Court), Chennai, on an application being moved under Section 166 of the Act is the subject-matter of challenge herein.

15. Mr. Vipin Nair, learned counsel appearing for the appellant, has contended that the High Court has erroneously held that there cannot be grant of compensation under two heads, namely, "permanent disability" and "loss of earning power". It is urged by him that the tribunal had correctly appreciated the evidence on record and fixed certain sum under various heads but the High Court on unacceptable reasons has deleted the same. It is also canvassed by him that the High Court without ascribing any cogent reasons has reduced the expenses for continuous treatment from Rs.2,00,000/- to Rs.50,000/- as a result of which the amount had been substantially reduced and the concept of "just compensation" has lost its real characteristics.

16. Ms. Aishwarya Bhati, learned counsel appearing for the respondent No. 1, supported the order passed by the High Court contending, inter alia, that the analysis made by the learned single Judge is absolutely flawless and the interference in the quantum cannot be faulted inasmuch as the tribunal has awarded a large sum on certain heads which are totally impermissible in law. It is also urged by her that certain sums had been allowed by the tribunal without any material on record and, therefore, the High Court has correctly interfered with the award.

17. The seminal issues that really emanate for consideration are whether the analysis made by the High Court in not granting compensation under certain heads and further reduing the amount on certain scores, are justified. Regard being had to the fundamental essence of "just compensation", we shall presently deal with the manner in which the High Court has dwelled upon various heads in respect of which the tribunal had granted certain sums towards compensation.

18. On a perusal of the order passed by the High Court, it is manifest that the High Court relying on certain authorities of the said court has expressed the view that once a particular amount has been awarded towards `permanent disability', no further amount can be awarded relating to `loss of earning capacity'.

19. The learned counsel for the appellant has commended us to the pronouncement of this Court in ***B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd.***[14], wherein the High Court had placed reliance on the Full Bench decision in

13 (2010) 1 TN MAC 113

14 (2011) 6 SCC 420 : (2011) 3 SCC (Civ) 343 (2011 2 SCC (Cri) 1002

Cholan Roadways Corporation Ltd. v. Ahmed Thambi[15]. This Court referred to the pronouncement in ***Ramesh Chandra v. Randhir Singh***[16], wherein it has been stated thus: (Ramesh Chandra case [16], SCC p. 726, para 7)

> *"7. With regard to ground 19 covering the question that the sum awarded for pain, suffering and loss of enjoyment of life, etc. termed as general damages should be taken to be covered by damages granted for loss of earnings is concerned that too is misplaced and without any basis. The pain and suffering and loss of enjoyment of life which is a resultant and permanent fact occasioned by the nature of injuries received by the claimant and the ordeal he had to undergo." (B. Lothandapan case14, SCC p. 424, para 14)*

20. In *Ramesh Chandra*[16] the learned Judges proceeded to address the issue of difficulty or incapacity to earn and how it stands on a different footing than pain and suffering affecting enjoyment of life and stated as under: (Ramesh Chandra case [16], SCC p. 726, para 7)

> *"7. ... The inability to earn livelihood on the basis of incapacity or disability which is quite different. The incapacity or disability to earn a livelihood would have to be viewed not only in praesenti but in futuro on reasonable expectancies and taking into account deprival of earnings of a conceivable period. This head being totally different cannot in our view overlap the grant of compensation under the head of pain, suffering and loss of enjoyment of life. One head relates to the impairment of person's capacity to earn, the other relates to the pain and suffering and loss of enjoyment of life by the person himself." (B. Kothandapani case[14], SCC p. 424, para 14)*
>
> *(emphasis in original)*

After referring to the said passage, the Bench in *B. Kothandapani case*[14] proceeded to state that it is true that compensation for loss of earning power/capacity has to be determined based on various aspects including permanent injury/disability, but at the same time, it cannot be construed that that compensation cannot be granted for permanent disability of any nature. It has been mentioned by way of an example that in a

> *"case of a non-earning member of a family who has been injured in an accident and sustained permanent disability due to amputation of leg or hand, it cannot be construed that no amount needs to be granted for*

15 (2006) 4 CTC 433 (Mad)

16 (1990) 3 SCC 723

permanent disability. It cannot be disputed that apart from the fact that the permanent disability affects the earning capacity of the person concerned, undoubtedly, one has to forego other personal comforts and even for normal avocation they have to depend on others."

21. In view of the aforesaid enunciation of law, the view of the High Court that no compensation can be granted towards permanent disability once compensation is computed for the loss of earning capacity and loss of future earnings is unsustainable. As is perceivable, the High Court has computed the loss of earning power at Rs.4,68,000/- instead of Rs.5,00,000/- as determined by the tribunal and deleted sum of Rs.3,00,000/- that was awarded by the tribunal towards permanent disability. In our considered opinion, total deletion is absolutely unjustified and, in fact, runs counter to the principles laid down by this Court in Ramesh Chandra (supra) and B. Kothandapani[14].

22. At this juncture, we think it seemly to state that it is a case where the victim has suffered serious injuries. As far as the injuries are concerned, there is concurrence of opinion by the tribunal as well as by the High Court. The High Court has only reduced the percentage of permanent disability on the basis of assessment made by the Medical Board as there was a serious cavil with regard to the said percentage.

23. While determining compensation payable to a victim of an accident the parameters which are to be kept in view have been succinctly stated in ***R.D. Hattangadi v. Pest Control (India) Pvt. Ltd. and others***[17]: (SCC p. 556, para 9)

"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas nonpecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal

17 (1995) 1 SCC 551

longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

24. In ***Arvind Kumar Mishra v. New India Assurance Company Limited and another***[18] a two-Judge Bench referred to the authority in ***Kerala SRTC v. Susamma Thomas***[19] and applied the principle of multiplier for future earnings in a case of permanent disability. We have referred to this decision solely for the purpose that multiplier principle has been made applicable to an application preferred under Section 166 of the Act.

25. In this context it is useful to refer to ***Raj Kumar v. Ajay Kumar and Another***[20], wherein a two-Judge Bench after referring to the award of compensation in personal injury cases reiterated the concepts of pecuniary damages (special damages) and non-pecuniary damages (general damages). The Bench referred to the decisions in *C.K. Subramania Iyer*[8], *R.D. Hattangadi*[17] and ***Baker v. Willoughby***[21] and expressed the view that it is obligatory on the part of the court or the tribunal to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. He is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

26. It is worthy noting that the Bench referred to the pecuniary damages and non-pecuniary damages and opined thus: -

*"**Pecuniary damages (Special damages)***

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

18 (2010) 10 SCC 254

19 (1994) 2 SCC 176

20 (2011) 1 SCC 343

21 1970 AC 467 : (1970) 2 WLR 50 : (1969) 3 All ER 1528 (HL)

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity)."

After so stating the Bench proceeded to opine that : (Raj Kumar case[20], SCC p. 348, para 7)

> *"7. assessment of pecuniary damages under Item (i) and under Item (ii) (a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses—Item (iii)—depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages—Items (iv), (v) and (vi)—involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant."*

It has been observed therein that what usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability—Item (ii)(a). Thereafter, the Bench adverted to the features which are necessary while assessing the loss of future earnings on account of permanent disability. In the said case it has been opined that permanent disability can be either partial or total and the assessment of compensation under the heads of loss of future earnings would depend upon the factum and impact of such permanent disability on his earning capacity. It has been laid down that the tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. It has been further observed that: (Raj Kumar case[20], SCC p. 349, para 10)

> *"10. .. In most of the cases, the percentage of economic loss, i.e., the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability.*

However, in some cases on appreciation of evidence and assessment the percentage of loss of earning capacity as a result of the permanent disability would be approximately the same as the percentage of permanent disability in which case,

of course, the court or tribunal would adopt the said percentage for determination of compensation. To arrive at the said conclusion reliance was placed on Arvind Kumar Mishra[18] and Yadav Kumar[9].

27. In the case at hand the High Court has determined the loss of earning capacity on the base of multiplier method and reduced the quantum awarded by the tribunal from Rs.5,00,000/- to Rs.4,68,000/-. Applying the ratio in Yadav Kumar (supra) and Arvind Kumar Mishra (supra) and also Raj Kumar (supra) and regard being had to the serious nature of injury we do not find any error in the said method of calculation and, accordingly, we uphold the method of computation as well as the quantum.

28. Presently to the grant of compensation on other scores. It is noticeable that the High Court has reduced the additional medical expenses from Rs.2,00,000/- to Rs.50,000/-. In our considered opinion, the same is not correct as there is ample evidence on record as regards the necessity for treatment in future. It is demonstrable that pedicle screws were passed into pedicles of D11 vertebra; pedicle screws were passed into pedicles of L1 vertebra; and two screws on left thigh were connected using a rod each. That may be required to be removed or scanned from time to time depending upon other aspects. That apart, there is persistent pain and as medically advised physiotherapy is necessary and hence, continuous treatment has to be availed of. Thus, the High Court was not justified in reducing the said amount.

29. The High Court has maintained the award in respect of transport charges, extra nourishment, medical expenses and, accordingly, they are maintained. It has enhanced the award from Rs.2,00,000/- to Rs.2,50,000 on the head of pain and suffering, but has deleted the amount awarded on permanent disability from the total compensation awarded by the tribunal by relying on the decision in *Cholan Roadways Corporation Ltd.*[15]. As has been stated earlier, the said decision has been considered in *B. Kothandapani*[14] and is not accepted, and this Court has expressed the view that grant of compensation towards permanent disability is permissible. Regard been had to the totality of the facts and circumstances, we are inclined to think that compensation of Rs.2,50,000/- should be granted towards permanent disability and Rs.2,00,000/- towards pain and suffering. We have so held as the injury is of serious nature and under the heading of nonpecuniary damages compensation is awardable under the headings of pain and suffering and damages for loss of amenities of life on account of injury. In the case of R.D. Hattangadi (supra) this Court has granted compensation under two heads, namely, "pain and suffering" and "loss of amenities of life". Quite apart from that compensation was granted towards

future earnings. In ***Laxman v. Divisional Manager, Oriental Insurance Co. Ltd. and another***[22] it has been ruled thus: (Laxman case[20], SCC p. 762, para 15)

> *"15. The ratio of the above noted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."*

Thus, the deletion by the High Court was not justified. However, we have restricted to the amount as stated hereinbefore.

30. The High Court has deleted the additional transport charges. We are disposed to think that while availing treatment the said expenses would be imperative. Hence, there was no justification to reduce the same and, accordingly, we restore it.

31. It is perceptible that the High Court has deleted the amount awarded under the head of pain and suffering by family members of the claimant and the amount granted towards loss of marital life. There is no iota of evidence with regard to loss of marital life, hence, we do not find any error in the said deletion. As far as grant of compensation on the score of pain and suffering suffered by the family members of claimant is concerned, the same is not permissible and, accordingly, we hold that that has been correctly deleted.

32. The High Court has deleted an amount of Rs.3,00,000/- and a sum of Rs.2,00,000/- towards mental agony and inability on the part of the claimant to participate in public functions respectively. We have already determined Rs.2,00,000/- under the heading of pain and suffering already suffered and to be suffered and Rs.2,50,000/- under the heading of permanent disability and hence, no different sum need be awarded under the heading of mental agony. As far as participation in public functions is concerned, there is no evidence in that regard and, therefore, we are disposed to think that the finding of the High Court on that score is totally justified and does not call for any interference.

33. Calculated on the aforesaid base, the compensation would be payable on the headings, namely, transport charges, extranourishment, medical expenses, additional medical expenses, additional transport charges, pain and suffering, loss of earning capacity and permanent disability and the amount on the aforesaid scores would be, in toto, Rs.13,48,000/-. The said amount shall carry interest at the

22 2012 ACJ 191

rate of 7.5% from the date of application till the date of payment. The same shall be deposited before the tribunal within a period of two months and the tribunal shall disburse 50% of the amount in favour of the claimant and the rest of the amount shall be deposited in a nationalized bank for a period of three years. Be it clarified if the earlier awarded sum has been deposited, the differential sum shall be deposited within the stipulated time as mentioned hereinabove and the disbursement shall take place accordingly.

34. Consequently, the appeal is allowed in part leaving the parties to bear their respective costs.

❑❑❑

(2015) 5 Supreme Court Cases 705

Shamima Farooqui v. Shahid Khan

(Before Dipak Misra and Prafulla C. Pant, JJ.)

Shamima Farooqui .. Appellant;
Versus
Shahid Khan .. Respondent.

Criminal Appeals Nos. 564-65 of 2015[†],
decided on April 6, 2015

A. **Family and Personal Laws — Family Courts Act, 1984 — Ss. 7(1) Expln. (f) and 7(2)(a) — Maintenance — Family Court can grant maintenance allowance to divorced Muslim woman under S. 125 CrPC — Criminal Procedure Code, 1973 — S. 125(1) Expln. (b) — Reiterated, applicable to divorced Muslim woman**

B. **Criminal Procedure Code, 1973 — Ss. 125(2) & (1) second proviso — Speedy disposal of application for maintenance essential — Belated disposal without grant of interim maintenance not justified — Court's approach — In case of delay caused by dilatory tactics adopted by parties, court should endeavour to curtail such designed procrastination of proceedings — On its own part, court should avoid lethargy and apathy and adopt a proactive approach which should be instilled by judicial academies functioning under High Court — Maintenance granted from date of application in 1998 till passing of order of maintenance in 2012, without any grant of interim maintenance, not justified — Family Courts Act, 1984, S. 7**

C. **Criminal Procedure Code, 1973 — S. 125 — Maintenance allowance to wife — Wife has absolute right of maintenance — Husband not absolved from his obligation to provide maintenance merely on his plea of financial constrains, so long as he is healthy, able-bodied and capable of earning for his own support**

D. **Criminal Procedure Code, 1973 — S. 125 — Maintenance allowance to wife — Quantum — Principle of sustenance — Sustenance does not mean bare survival and it gains more weightage when children are also with wife — Quantum should be adequate so as to enable wife to live with dignity, similar to standard with which she would have lived in her matrimonial home — In this context status and strata become relevant — Retirement of husband from service cannot be sole consideration for High Court for further reduction of a nominal amount of maintenance awarded by Family Court — Constitution of India — Art. 21 — Family and Personal Laws — Maintenance — Quantum — Right to live with dignity**

E. **Criminal Procedure Code, 1973 — Ss. 401 and 125 — Revisional jurisdiction of High Court — Non-application of mind — Findings of lower court neither perverse nor erroneous but instead based on proper appreciation of evidence on record and endeavour to do substantial justice — Interference of High Court therewith, only because it would have arrived at a different or another conclusion, held, reflects non-application of mind and not sustainable**

The appellant filed an application under Section 125 CrPC in 1998 alleging that she married the respondent in 1992 but during her stay in matrimonial home, she was subjected to continuous harassment for having not met the husband's demand for a car and that in due course, on coming to know about the respondent husband's illicit relationship with another woman when she asked about the affair she was assaulted. As the situation gradually worsened and being deserted and ill-treated and suffering from fear psychosis, it became unbearable for her to stay at the matrimonial home, her parents came and took her back to the parental home. The appellant, therefore, sought grant of maintenance @ Rs 4000 p.m. on the basis that her husband was working on the post of Nayak in the Army and getting a salary of Rs 10,000 approximately apart from other perks.

The Family Court before which the proceedings commenced, did not accept the primary objection as regards the maintainability of the application under Section 125 CrPC on the ground of the applicant being a Muslim woman and came to hold that even after the divorce the application of the wife under Section 125 CrPC was maintainable in the Family Court. The Family Court found that the husband had divorced the applicant appellant in 1997, that on being ill-treated at her matrimonial home, she had come back and stayed with her parents, that the husband had not made any provision for grant of maintenance; that the wife did not have any source of income to support her and that as the husband was getting at the time of disposal of the application as per the salary certificate Rs 17,654 she would be entitled to a sum of Rs 2500 as monthly maintenance allowance from the date of submission of the application till the date of judgment and thereafter Rs 4000 p.m. from the date of judgment till the date of remarriage.

The respondent husband filed a revision before the High Court which held that the Family Court had not ascribed any reason for grant of maintenance from the date of the application, yet when the case for maintenance filed in the year 1998 was decided on 17-2-2012 and there was no order for interim maintenance, the grant of Rs 2500 as monthly maintenance from the date of application was neither illegal nor excessive. The High Court took note of the fact that the husband had retired on 1-4-2012 and consequently reduced the maintenance allowance to Rs 2000 from 1-4-2012 till remarriage of the appellant. The High Court therefore, modified the order of the Family Court accordingly.

Allowing the appellant wife's appeal, the Supreme Court

Held :

Section 125 CrPC has been rightly held by the Family Court to be applicable to a Muslim woman who has been divorced. (Para 9)

Shamim Bano v. AsrafKhan, (2014) 12 SCC 636 : (2014) 5 SCC (Civ) 145 : (2014) 5 SCC (Cri) 162; *Danial Latifi v. Union of India,* (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266; *Khatoon Nisa v. State of U.P.,* (2014) 12 SCC 646 : (2014) 5 SCC (Civ) 155 : (2014) 5 SCC (Cri) 170; *Shabana Bano v. Imran Khan,* (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, *followed*

In the present case, it is disturbing that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17-2-2012. It is also shocking to note that there was no order for grant of interim maintenance. (Para 11)

An application for grant of maintenance has to be disposed of at the earliest. When an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. These litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. (Paras 11 and 13)

It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the court. As regards the second facet, the Family Courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same. It is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. (Paras 13 and 11)

Bhuwan Mohan Singh v. Meena, (2015) 6 SCC 353; *K.A. Abdul J alee! v. T.A. Shahida,* (2003) 4 SCC 166 : 2003 SCC (Cri) 810, followed

The obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes her faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance. Grant of maintenance to wife has been perceived as a measure of social justice. An order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able-bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. Thus, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning. (Paras 14, 16, 17 and 19)

Jasbir Kaur Sehgal v. District Judge, Dehradun, (1997) 7 SCC 7; *Chaturbhujv. Sita Bai,* (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356, relied on

Chander Parkash Bodh Raj v. Shila Rani Chander Prakash, 1968 SCC OnLine Del 52 : AIR 1968 Del 174, *approved*

Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 : 1978 SCC (Cri) 508; *Savitaben Somabhai Bhatiya v. State of Gujarat,* (2005) 3 SCC 636 : 2005 SCC (Cri) 787, *cited*

The inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affajrs as well as mental agony and anguish that a woman suffers when she is compelled to leave her matrimonial home. The statute commands that there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to

be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. (Para 14)

In the present case, the High Court has shown immense sympathy to the husband by reducing the amount of maintenance after his retirement. The High Court, without indicating any reason, has reduced the amount of maintenance from Rs 4000 to Rs 2000. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs 2000 per month. It has been asserted on behalf of the appellant that the respondent had taken voluntary retirement after the judgment dated 17-2-2012 with the purpose of escaping the liability to pay the maintenance amount as directed to the appellant wife; that the last-drawn salary of the respondent taken into account by the Family Judge was Rs 17,564 as per salary slip of May 2009 and after deduction of AFPP Fund and AGI, the salary of the respondent was Rs 12,564 and hence, even on the basis of the last basic pay (i.e. Rs 9830) of the respondent the total pension would come to Rs 14,611 and if 40% of commutation is taken into account then the pension of the respondent amounts to Rs 11,535; and that the respondent, in addition to his pension, had received encashment of commutation to the extent of 40% i.e. Rs 3,84,500 and other retiral dues i.e. AFPP, AFGI, gratuity and leave encashment to the tune of Rs 16,01,455. The aforesaid aspects have gone uncontroverted as the respondent husband has not appeared and contested the matter. Therefore, the assertions can be accepted. (Paras 14, 20 and 21)

The High Court has become oblivious of the fact that she has to stay on her own. The order of the Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errors. In fact, when the order is based on proper appreciation of evidence on record, no Revisional Court should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the" non-application of mind and, therefore, it is not possible to sustain the said order. Hence, the order of the Family Judge is restored. (Para 20)

Shahid Khan v. Shamima Farooqui, Criminal Revision No. 134 of 2012, order dated 17-9-2013 (All), reversed

Anita Rani v. Rakeshpal Singh, (1991) 2 Crimes 725 (All); *Dharmendra Kumar Gupta v. Chandra Prabha Devi*, 1990 SCC OnLine All 275 : 1990 Cri U 1884; *Rakesh Kumar Dikshit v. Jayanti Devi*, 1999 SCC OnLine All 531 : (1999) 39 ACC 4 : (1999) 2 JIC 323 (ACC); *Ashutosh Tripathi v. State of U.P.*, 1999 SCC OnLine All 641 : (1999) 39 ACC 434

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R-D/54684/CVR

Advocates who appeared jn this case:

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18. 1968 SCC OnLine Del 52 : AIR 1968 Del 174, Chander Parkash Bodh Raj v. Shi la Rani Chander Prakash 716d

The Judgment of the Court was delivered by

Dipak Misra, J. — Leave granted. When centuries old obstructions are removed, age old shackles are either burnt or lost their force, the chains get rusted, and the human endowments and virtues are not indifferently treated and emphasis is laid on "free identity" and not on "annexed identity", and the women of today can gracefully and boldly assert their legal rights and refuse to be tied down to the obscurant conservatism, and further determined to ostracize the "principle of commodity", and the "barter system" to devoutly engage themselves in learning, criticizing and professing certain principles with committed sensibility and participating in all pertinent and concerned issues, there is no warrant or justification or need to pave the innovative multi-avenues which the law does not countenance or give its stamp of approval. Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniac ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority. They should be able to say that they are the persons of modern age and they have the ideas of today's "Bharat". Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger – an outsider. That is the truth in essentiality.

2. The facts which are requisite to be stated for adjudication of these appeals are that the appellant filed an application under Section 125 of the Code of Criminal Procedure (CrPC) contending, inter alia, that she married Shahid Khan, the respondent herein, on 26.4.1992 and during her stay at the matrimonial home she was prohibited from talking to others, and the husband not only demanded a car from the family but also started harassing her. A time came when he sent her to the parental home where she was compelled to stay for almost three months. The indifferent husband did not come to take her back to the matrimonial home, but she returned with the fond and firm hope that the bond of wedlock would be sustained and cemented with love and peace but as the misfortune would have it, the demand for the vehicle continued and the harassment was used as a weapon for fulfilment of the demand. In due course she came to learn that the husband had illicit relationship with another woman and he wanted to marry her. Usual to sense of human curiosity and wife's right when she asked him she was assaulted. The situation gradually worsened and it became unbearable for her to stay at the matrimonial home. At that juncture, she sought help of her parents who came and took her to the parental home at Lucknow where she availed treatment. Being deserted and ill-treated and, in a way, suffering from

fear psychosis she took shelter in the house of her parents and when all her hopes got shattered for reunion, she filed an application for grant of maintenance at the rate of Rs.4000/- per month on the foundation that husband was working on the post of Nayak in the Army and getting a salary of Rs.10,000/- approximately apart from other perks.

3. The application for grant of maintenance was resisted with immense vigour by the husband disputing all the averments pertaining to demand of dowry and harassment and further alleging that he had already given divorce to her on 18.6.1997 and has also paid the Mehar to her.

4. A reply was filed to the same by wife asserting that she had neither the knowledge of divorce nor had she received an amount of Mehar.

5. During the proceeding before the learned Family Judge the wife-appellant examined herself and another, and the respondent-husband examined four witnesses, including himself. The learned Family Judge, Family Court, Lucknow while dealing with the application forming the subject matter Criminal Case No. 1120 of 1998 did not accept the primary objection as regards the maintainability under Section 125 CrPC as the applicant was a Muslim woman and came to hold even after the divorce the application of the wife under Section 125 CrPC was maintainable in the family court. Thereafter, the learned Family Judge appreciating the evidence brought on record came to opine that the marriage between the parties had taken place on 26.4.1992; that the husband had given divorce on 18.6.1997; that she was ill treated at her matrimonial home; and that she had come back to her parental house and staying there; that the husband had not made any provision for grant of maintenance; that the wife did not have any source of income to support her, and the plea advanced by the husband that she had means to sustain her had not been proved; that as the husband was getting at the time of disposal of the application as per the salary certificate Rs.17654/- and accordingly directed that a sum of Rs.2500/- should be paid as monthly maintenance allowance from the date of submission of application till the date of judgment and thereafter Rs.4000/- per month from the date of judgment till the date of remarriage.

6. The aforesaid order passed by the learned Family Judge came to be assailed before the High Court in Criminal Revision wherein, the High Court after adumbrating the facts referred to the decisions in ***Anita Rani v. Rakeshpal Singh***[1], ***Dharmendra***

1 1991 (2) Crimes 725 (All)

Kumar Gupta v. Chander Prabha Devi[2], R***akesh Kumar Dikshit v. Jayanti Devi***[3], ***Ashutosh Tripathi v. State of U.P.***[4], ***Paras Nath Kurmi v. The Session Judge***[5] and ***Sartaj v. State of U.P. and others***[6] and came to hold[7] that though the learned principal Judge, Family Court had not ascribed any reason for grant of maintenance from the date of application, yet when the case for maintenance was filed in the year 1998 decided on 17.2.2012 and there was no order for interim maintenance, the grant of Rs.2500/- as monthly maintenance from the date of application was neither illegal nor excessive. The High Court took note of the fact that the husband had retired on 1.4.2012 and consequently reduced the maintenance allowance to Rs.2000/-from 1.4.2012 till remarriage of the appellant herein. Being of this view the learned Single Judge modified the order passed by the Family Court. Hence, the present appeal by special leave, at the instance of the wife.

7. We have heard Dr. J.N. Dubey, learned senior counsel for the appellant. Despite service of notice, none has appeared for the respondent.

8. It is submitted by Dr. Dubey, learned senior counsel that Section 125 CrPC is applicable to the Muslim women and the Family Court has jurisdiction to decide the issue. It is urged by him that the High Court has fallen into error by opining that the grant of maintenance at the rate of Rs.4,000/- per month is excessive and hence, it should be reduced to Rs.2000/- per month from the date of retirement of the husband i.e. 1.4.2012 till her re-marriage. It is also contended that the High Court failed to appreciate the plight of the appellant and reduced the amount and hence, the impugned order is not supportable in law.

9. First of all, we intend to deal with the applicability of Section 125 CrPC to a Muslim woman who has been divorced. In ***Shamim Bano v. Asraf Khan***[8], this Court after referring to the Constitution Bench decisions in ***Danial Latifi v. Union of India***[9] and ***Khatoon Nisa v. State of U.P.***[10] had opined as follows:(Shamim Bano case[8], SCC p. 644, paras 13-14)

2 1990 Cr.L.J. 1884

3 1999 (2) JIC, 323 (ACC)

4 1999 (2) 763, Allahabad J.I.C

5 1999 (2) JIC 522 All

6 2000 (2) JIC 967 All

7 Shahid Khan v. Shamima Farooqui, Criminal Revision No. 134 of 2012, order dated 17-9-2013 (All)

8 (2014) 12 SCC 636

9 (2001) 7 SCC 740

10 (2014) 12 SCC 646

"13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

14. Slightly recently, in ***Shabana Bano v. Imran Khan***[11]*, a two-Judge Bench, placing reliance on Danial Latifi (supra), has ruled that:-*

"21. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in Khatoon Nisa (supra)."

In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge.

10. On a perusal of the order passed by the Family Court, it is manifest that it has taken note of the fact that the salary of the husband was Rs.17,654/- in May, 2009. It had fixed Rs.2,500/- as monthly maintenance from the date of submission of application till the date of order i.e. 17.2.2012 and from the date of order, at the rate of Rs.4,000/- per month till the date of remarriage. The High Court has opined that while granting maintenance from the date of application, judicial discretion has to be appropriately exercised, for the High Court has noted that the grant of maintenance at the rate of Rs.2,500/- per month from the date of application till date of order, did not call for modification.

11 (2010) 1 SCC 666

11. The aforesaid finding of the High Court, affirming the view of the learned Family Judge is absolutely correct. But what is disturbing is that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17.2.2012. It is also shocking to note that there was no order for grant of interim maintenance. It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. An application for grant of maintenance has to be disposed of at the earliest. The family courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same.

12. The concern and anguish that was expressed by this Court in ***Bhuwan Mohan Singh v. Meena and Ors.***[12], is to the following effect:(SCC p. 170. paras 12-13)

> *"12. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in* ***K.A. Abdul Jaleel v. T.A. Shahida***[13]*, while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: (SCC p. 170, para 10)*
>
> > *"10. The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."*
>
> *13. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience*

12 AIR 2014 SC 2875

13 (2003) 4 SCC 166

and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc." [emphasis supplied]

13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on for ever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a pro-active approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-. In today's world, it is extremely

difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right.

15. While determining the quantum of maintenance, this Court in ***Jabsir Kaur Sehgal v. District Judge Dehradun & Ors.***[14] has held as follows:(SCC p. 12, para 8)

> *"The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."*

14 (1997) 7 SCC 7

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In ***Chaturbhuj v. Sita Bai***[15], it has been ruled that: (SCC p. 320, para 6)

> *"Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in* ***Captain Ramesh Chander Kaushal v. Veena Kaushal****16 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. 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. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in* ***Savitaben Somabhai Bhatiya v. State of Gujarat***[17]*."*

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

18. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in ***Chander Prakash Bodhraj v. Shila Rani Chander Prakash***[18] wherein it has been opined thus: (SCC Online Del para 7)

> *"7. ... An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."*

19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law

15 (2008) 2 SCC 316

16 (1978) 4 SCC 70

17 (2005) 3 SCC 636

18 AIR 1968 Delhi 174

can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance.

20. In the instant case, as is seen, the High Court has reduced the amount of maintenance from Rs.4,000/- to Rs.2,000/-. As is manifest, the High Court has become oblivious of the fact that she has to stay on her own. Needless to say, the order of the learned Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errors. In fact, when the order is based on proper appreciation of evidence on record, no revisional court should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the non-application of mind and, therefore, we are unable to sustain the said order.

21. Having stated the principle, we would have proceeded to record our consequential conclusion. But, a significant one, we cannot be oblivious of the asseverations made by the appellant. It has been asserted that the respondent had taken voluntary retirement after the judgment dated 17.2.2012 with the purpose of escaping the liability to pay the maintenance amount as directed to the petitioner; that the last drawn salary of respondent taken into account by the learned Family Judge was Rs.17,564/- as per salary slip of May, 2009 and after deduction of AFPP Fund and AGI, the salary of the respondent was Rs.12,564/- and hence, even on the basis of the last basic pay (i.e. Rs.9,830/-) of the respondent the total pension would come to Rs.14,611/- and if 40% of commutation is taken into account then the pension of the respondent amounts to Rs.11,535/-; and that the respondent, in addition to his pension, hand received encashment of commutation to the extent of 40% i.e. Rs.3,84,500/- and other retiral dues i.e. AFPP, AFGI, Gratuity and leave encashment to the tune of Rs.16,01,455/-. The aforesaid aspects have gone uncontroverted as the respondent-husband has not appeared and contested the matter. Therefore, we are disposed to accept the assertions. This exposition of facts further impels us to set aside the order of the High Court.

22. Consequently, the appeals are allowed, the orders passed by the High Court are set aside and that of the Family Court is restored. There shall be no order as to costs.

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(2015) 4 Supreme Court Cases 1

K.P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate

(Before Dipak Misra and V. Gopala Gowda, JJ.)

K.P. Manu ... Appellant;
Versus
Chairman, Scrutiny Committee For Verification Of Community Certificate ... Respondent.

Civil Appeal No. 7065 of 2008†,
decided on February 26, 2015

A. **Family and Personal Laws — Hindu Law — Conversion/ Reconversion — Eclipse of original Hindu caste on conversion to another religion and revival thereof on reconversion to Hindu religion — Principle applicable also where reconversion takes place several generations after conversion by ancestors — Conditions for applicability of the principle, laid down**

— Conditions for applicability of the principle, held, are: (i) there must be absolutely clear-cut proof that he belongs to the caste that has been recognised by the Constitution (Scheduled Castes) Order, 1950; (ii) there has been reconversion to the original religion to which the parents and earlier generations had belonged; and (iii) there has to be evidence establishing the acceptance by the community — Each aspect is very significant, and if one is not substantiated, the recognition would not be possible — Therefore, if a person born to Christian parents, who, belonging to a Scheduled Caste had converted themselves to Christianity, the said person on reconversion to his religion and on acceptance by his community with a further rider that he would practise the customs and traditions of the caste, would be treated as a member of the said Scheduled Caste and if the said caste is one of the castes falling within the Constitution (Scheduled Castes) Order, 1950, then he will be treated as a Scheduled Caste person

— Ancestors/grandparents, originally belonging to Hindu Scheduled Caste, embraced Christianity several generations ago — Appellant born in such Christian family, after attaining majority chose to get himself reconverted to Hinduism — Certificate issued by Government recognised community organisation that appellant reconverted himself to his original Hindu community after performing Sudhi Karma according to Hindu rites and customs — Thereafter, authorised officer i.e. Tahsildar issued caste certificate that appellant came within fold of the original caste as recognised by Constitution (Scheduled

† From the Judgment and Order dated 9-8-2006 in RP No. 503 of 2006 and Order dated 10-3-2006 in MFA No. 55 of 2006 of the High Court of Kerala at Ernakulam

Castes) Order, 1950 — Held, reconversion to original Hindu religion and acceptance by the community is established by evidence — Hence, caste to which appellant's ancestors originally belonged revived — Fact that appellant married a Christian lady is immaterial in view of acceptance by community which has final say in the matter — Once it is proved that appellant belonged to a caste as recognised by 1950 Order, appellant is entitled to benefit of his caste certificate — Constitution (Scheduled Castes) Order, 1950 — Constitution of India — Arts. 14, 15, 16, 341 and 342 — SCs, STs, OBCs and Minorities — Caste/ Tribe Certificate

B. **Service Law — Back Wages — Improper removal — Reinstatement — Grant of back wages and other consequential benefits in case of — Removal from service on ground of securing employment by producing false caste certificate — Caste certificate found to be valid — Hence, reinstatement in service with all benefits relating to seniority and back wages up to 75% ordered**

C. **Precedents .— Per Incuriam Decision — When can judgment be treated as per incuriam — Principles summarised — Constitution of India, Art. 141**

D. **Precedents — Obiter dicta — What are — Obiter dicta of even a larger Bench, reiterated, not binding — Constitution of India, Art. 141**

The great-grandfather of the appellant belonged to Hindu Pulaya community. His son embraced Christianity and married a woman who originally belonged to Hindu Ezhava community but later on had converted to Christianity. From the wedlock the father of the appellant was born, who married a Christian lady. Though the appellant was born to Christian parents but at the age of 24 ' years he converted himself to Hindu religion. Akhila Bharata Ayyappa Seva Sangham, which is recognised as one of the agencies by the Government of Kerala as a competent organisation to issue community certificate, issued a certificate certifying that the appellant has converted on behalf of the Sangham from Christian Pulayan community to Hindu Pulayan community, after performing Sudhi Karma according to Hindu rites and customs. Eventually, the Tahsildar who was authorised to issue the caste certificate, issued the necessary -caste certificate. On the basis of the caste certificate the appellant secured an employment under the State Government. Subsequently, pursuant to a complaint made, the Scrutiny Committee upon inquiry recorded its findings as follows: "... neither the claimant nor his parents were born as Hindu and later converted to Christianity from Hinduism. In fact they are born as Christians. Hence, there is no element of reconversion in the claimant's case. Hence, the question of reviving caste status as Pulayan (SC) on the ground that some of his ancestors were having Pulayan (SC) status does not arise. The claimant traces SC (Pulayan) status from generations back despite the fact that his ancestors in the descending

generation, consistently opted to renounce Pulayan caste status and Hindu religious status by converting to Christianity. Ordinarily one gets his/her caste on the basis of his/her parents. In other words, one shall be, on birth deemed to be belonging to the caste of his/her parents. In the facts and circumstances of the claimant's case, the claimant and his parents were devoid of any caste identity right from their birth. It is significant to note that ten years after his conversion to Hinduism, the claimant has contracted marriage with a Christian lady, as per the Special Marriage Act. Hence, the Committee found that the claimant's case does not come under the ambit of aforementioned verdicts". The High Court approved the said report.

The controversy fundamentally has three arenas, namely, (i) whether on conversion and at what stage a person born to Christian parents can, after reconversion to the Hindu religion, be eligible to claim the benefit of his original caste; (iii) whether after his eligibility is accepted and his original community on a collective basis takes him within its fold, he still can be denied the benefit; and (iii) who should be the authority to opine that he has been following the traditions and customs of a particular caste or not.

Allowing the appeal, the Supreme Court

Held:

There is no rational principle why should a person, who has embraced another religion should not be able to come back to his caste. It cannot be laid down as an absolute rule uniformly applicable in all cases that whenever a member of a caste is converted from Hinduism to Christianity, he loses his membership of the caste. It is true that ordinarily on conversion to Christianity, he would cease to be a member of the caste, but that is not an invariable rule, and it would depend on the structure of the caste and its rules and regulations. There has been detailed study to indicate that Scheduled Caste persons belonging to the Hindu religion, who had embraced Christianity with some kind of hope or aspiration, have remained socially, educationally and economically backward. The object and purpose of the Constitution (Scheduled Castes) Order, 1950 would be advanced if, on reconversion to his original religion, he would become a member of his original caste and not suffer from the same social and economic disabilities. In Kailash Sonkar, (1984) 2 SCC 91, the Supreme Court observed: "... when a person is converted to Christianity or some other religion the original caste remains under eclipse and as soon as during his/her lifetime the person is reconverted to the original religion the eclipse disappears and the caste automatically revives." (Paras 11, 12, 19 and 36)

Kailash Sonkar v. Maya Devi, (1984) 2 SCC 91; CM. *Aritmugam v. S. Rajgopal*, (1976) 1 SCC 863; *State of M.P. v. Ram Kishna Balotliia*, (1995) 3 SCC 221 : 1995 SCC (Cri) 439. *relied on*

G. Michael v. S. Venkateswaran. 1951 SCC Online Mad 312 : AIR 1952 Mad 474, *held, approved*

Cooppoosami Chettv v. Duraisami Chetty, ILR (1910) 33 Mad 67; *Muthusami Mudaliar v. Masilamani.* ILR'(1910) 33 Mad 342 : "(1910) 20 MLJ 49. *considered*

James Massey: *Dalits in India*; Mandal Commission Report of the Backward Classes Commission. 1980; Church of South India Commission in 1964; Dr Y. Antony Raj: *Social Impact of Conversion*; John C.B. Webster: *The Dalit Christians: A History*. Ch. Ill titled 'The Politics of Numbers", *referred to*

However, three things that need to be established by a person who claims to be a beneficiary of the caste certificate are: (i) there must be absolutely clear-cut proof that he belongs to the caste that has been recognised by the Constitution (Scheduled Castes) Order, 1950; (ii) there has been reconversion to the original religion to which the parents and earlier generations had belonged; and (iii) there has to be evidence establishing the acceptance by the community. Each aspect is very significant, and if one is not substantiated, the recognition would not be possible. Therefore, if a person born to Christian parents, who, belonging to Scheduled Caste had converted fhemsetoes to Christianity, the said person on reconversion to his religion and on acceptance by his community with a further rider that he would practise the customs and traditions of the caste, would be treated as a member of the said Scheduled Caste and if the said caste is one of the castes falling within the Constitution (Scheduled Castes) Order, 1950, then he will be treated as a Scheduled Caste person. (Paras 38 and 36)

The three-Judge Bench of the Supreme Court in Kailash Sonkar, (1984) 2 SCC 91 expressed: "We might pause here to add a rider to what we have said i.e. where it appears that the person reconverted to the old religion had been converted to Christianity since several generations, it may be difficult to apply the doctrine of eclipse to the revival of caste. However, that question does not arise here." But the Court has not expressed any opinion. Therefore, it cannot be treated as a precedent for the purpose that it would only encompass the previous generation. The doctrine of eclipse to the original caste and revival thereof on reconversion cannot be confined only to the parents and exclude the grandparents. There is no reason that any different principle will apply to a person whose forefathers had abandoned Hinduism; where the person reconverted to the old religion had been converted to Christianity since several generations. If a person who is born to Christian parents who had converted to Christianity from the Scheduled Caste Hindu can avail the benefit of the caste certificate after his embracing Hinduism subject to other qualifications, there cannot be any soundness of logic that he cannot avail the similar benefit because his grandparents were converted and he was born to the parents who were

Christians. They must have belonged to that caste and after conversion the community has accepted. (Paras 19 to 21, 37, 37.1 and 39)

Puneet Rai v. Dinesh Chaudhary. (2003) 8 SCC 204; State of Kerala v. Chandramohanan, (2004) 3 SCC 429 : 2004 SCC (Cri) 818, relied on

Nityanand Sharma v. State of Bihar, (1996) 3 SCC 576; N.E. Horn v. Jahanara Jaipal Singh, (1972) 1 SCC 771. *considered*

Kailash Sonkar v. Maya Devi, (1984) 2 SCC 91, *held obiter on this point*

Dr Jai Prakash Gupta: *The Customary Laws of Muda and Oraon*; K.L. Bhowmik: *Tribal India: A Profile in Indian Ethnology, referred to*

S.B. Wad: *Caste and the Law in India*, p. 30, cited

The view taken in S. Swvigaradoss, (1996) 3 SCC 100 that a person born to Christian parents, who initially belonged to the Scheduled Caste, even after his reconversion cannot claim to be a Scheduled Caste, is per incuriam. This view runs contrary to the proposition laid down by the Constitution Bench in Y. Mohan Rao, (1976) 3 SCC 411 and the decisions rendered by the three-Judge Bench. When a binding precedent is not taken note of and the judgment is rendered in ignorance or forgetfulness of the binding authority, the concept of per incuria comes into play. (Paras 47 and 48)

Guntur Medical College v. ¥. Mohan Rao, (1976) 3 SCC 411; *Kailash Sonkar v. Maya Devi*, (1984) 2 SCC 91; 5. *Anbalagan v. B. Devarajan*, (1984) 2 SCC 112; A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602 :'l988 SCC (Cri)'372; *Union of India v. R.P. Singh*, (2014) 7 SCC 340 : (2014) 2 SCC (L&S) 494, *followed*

B. Basavalingappa v. D. Munichinnappa, AIR 1965 SC 1269; *Bhaiya Lai v. Harikishan Singh*. AIR 1965 SC 1557; *Srish Kumar Choudhury v. State of Tripura*, 1990 Supp SCC 220; *Madhuri Patil v. Comm, Tribal Development*, (1994) 6 SCC 241 : 1994 SCC (L&S) 1349 : (1994) 28 ATC 259; *Union of India v. Raghubir Singh*. (1989) 2 SCC 754. relied on

Young v. Bristol Aeroplane Co. Ltd.. 1944 KB 718 : (1944) 2 All ER 293 (CA); *Goona Durgaprasada Rao v. Goona Sudorsanaswami*, 1939 SCC OnLine Mad 342 : AIR 1940 Mad 513 : ILR 1940 Mad 653 ; (1940) 1 MLJ 800, *held, approved*

Administrator-General of Madras v. Anandachari, ILR (1886) 9 Mad 466; *Gurusami Nadar v. Irulappa Konar*, 1934 SCC OnLine Mad 106 : (1934) 67 MLJ 389 : AIR 1934 Mad 630; *Rajagopal v. Armugam*, AIR 1969 SC 101 : (1969) 1 SCR 254; *Perianal Nadar v. Ponnuswami*, (1970) 1 SCC 605; *Agnes Dorothy Vermani v. Bryant David Vermani*, 1942 SCC OnLine Lali 92 : AIR 1943 Lah 51 : 205 IC 290; *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram*, AIR 1954 SC 236 : 1954 SCR 817. *considered*

S. Swvigaradoss v. Zonal Manager. F.C.I., (1996) 3 SCC 100, *held, per incuriam on this point*

Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514. *referred to*

Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465, *cited*

As regards the proof of the caste to which the appellant belongs, a court can look into the notification by the President and the Act of Parliament under the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 and the Schedule appended 'thereto for the limited purpose to find out whether the castes, races or tribes are parts or groups within the castes, races or tribes, especially Scheduled Castes for the purpose of Constitution, and it is because what has been included or excluded therein are conclusive. In the present case, there is no dispute that the appellant belongs to a caste which has been recognised by the Constitution (Scheduled Castes) Order, 1950. (Para 47)

In the instant case, the appellant got married to a Christian lady and that has been held against him. It has also been opined that he could not produce any evidence to show that he has been accepted by the community for leading the life of a Hindu. As far as the marriage and leading of Hindu life are concerned, in the instant case, it really cannot be allowed to make any difference. The community which is a recognised organisation by the State Government, has granted the certificate in categorical terms in favour of the appellant. It is the community which has the final say as far as acceptance is concerned, for it accepts the person, on reconversion, and takes him within its fold. Therefore, it must be held that the appellant after reconversion had come within the fold of the community and thereby became a member of the Scheduled Caste. Had the community expelled him the matter would have been different. The acceptance is in continuum. Ergo, the reasonings ascribed by the Scrutiny Committee which have been concurred with by the High Court are wholly unsustainable. (Para 51)

Kodikunnil Suresh v. N.S. Saji Kumar, (2011) 6 SCC 430 : (2011) 3 SCC (Civ) 352, *referred to*

Consequently, the judgment and order of the High Court, findings of the Scrutiny Committee and the orders passed by the State Government and the second respondent are set aside. The appellant shall be reinstated in service forthwith with all the benefits relating to seniority and his caste, and shall also be paid back wages up to 75% within eight weeks. (Para 52)

K.P. Manu v. Scrutiny Committee for Verification of Community Certificate, Misc. First Appeal No. 55 of 2006, decided on 10-3-2006 (Ker), *reversed*

R-D/54460/CL

Advocates who appeared in this case :

Shekhar Naphade, Senior Advocate (Jayakrishnan and John Mathew, Advocates) for the Appellant;

Ms Liz Mathew, M.F. Philip, Ms Shriya Raj Chauhan, R. Sathish and G. Prakash, Advocates, for the Respondent.

Chronological list of cases cited on page(s)

23.	AIR 1965 SC 1269. B. Basavalingappa v. D. Munichinnappa	26g
24.	AIR 1954 SC 236 : 1954 SCR 817. Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram	16c
25.	1951 SCC OnLine Mad 312 : AIR 1952 Mad 474, G. Michael v. S. Venkateswaran	10a, 10a-b, 10e
26.	1944 KB 718 : (1944) 2 All ER 293 (CA), Young v. Bristol Aeroplane Co. Ltd.	28d-e
27.	1942 SCC OnLine Lah 92 : AIR 1943 Lah 51 : 205 IC 290, Agnes Dorothy Vennani v. Bryant David Vermani	16b-c
28.	1939 SCC OnLine Mad 342 : AIR 1940 Mad 513 : ILR 1940 Mad 653 (1940) 1 MLJ 800, Goona Durgaprasada Rao v. Goona Sudarsanaswami	13f, 16c
29.	1934 SCC OnLine Mad 106 : (1934) 67 MLJ 389 : AIR 1934 Mad 630. Gurusami Nadar v. Irulappa Konar	16£>-c
30.	ILR (1910) 33 Mad 342 : (1910) 20 MLJ 49, Muthusami Mudaliar v. Masilamani	9g-h, 16b-c
31.	ILR (1910) 33 Mad 67, Cooppoosaini Chetty v. Duraisami Chetty	9g-h
32.	ILR (1886) 9 Mad 466, Administrator-General of Madras v. Anandachari	16b

The Judgment of the Court was delivered by

Dipak Misra, J. — In this appeal, by special leave, the assail is to the judgment and order dated 10th March, 2006 passed by the Division Bench of the High Court of Kerala K.P. Manu v. Scrutiny Committee for Verification of Community Certificate[1] wherein the High Court has accepted the report of the Scrutiny Committeeconstituted under the Kerala (Scheduled Castes and Scheduled Tribes) Regulation of Issue of Community Certificates Act, 1996 (for short "the Act") wherein the caste certificate granted in favour of K.P. Manu, the appellant herein, had been cancelled.

2. The facts giving rise to the present appeal are that one Shri S. Sreekumar Menon invoked the jurisdiction of the Scrutiny Committee under Section 11(3) of the Act challenging the grant of caste certificate, namely, Hindu Pulaya to the appellant on the ground that the said certificate had been obtained by him on misrepresentation, and that apart the concerned authority had issued the caste certificate in total transgression of law. The Committee conducted an enquiry and eventually by its order dated 4th February, 2006 had returned a finding that the appellant was erroneously issued a caste certificate inasmuch as he was not of Hindu origin and hence, could not have been conferred the benefit of the caste status. It is not in dispute

1 Misc. First Appeal No. 55 of 2006, decided on 10-3-2016

that the great grandfather of the appellant belonged to Hindu Pulaya Community. His son Chothi embraced Christianity and accepted a new name, that is, Varghese who married Mariam who originally belonged to Hindu Ezhava community and later on converted to Christianity. In the wedlock three sons, namely, Varghese, Yohannan and Paulose were born. The father of the appellant, Paulose, got married to Kunjamma who was a Christian.

3. The appellant who was born on 03.01.1960 sometime in the year 1984 at the age of 24 converted himself to Hindu religion and changed his name to that of K.P. Manu. On the basis of the conversion he applied for a caste certificate to Akhila Bharata Ayyappa Seva Sangham. Be it stated, the appellant after conversion had obtained a certificate from the concerned community on 5th February, 1984. Eventually, the Tehsildar who was authorised to issue the caste certificate had issued the necessary caste certificate.

4. On the basis of the complaint made, the Scrutiny Committee embarked upon an enquiry and recorded a finding holding, inter alia, that the appellant does not belong to that caste. The report of the Scrutiny Committee appears to have been influenced by two aspects, namely, that the appellant was born to Christian parents, whose grandparents had embraced Christianity and second, there is no material brought on record to show that the appellant after conversion has been following the traditions and customs of the community. To arrive at the second conclusion, emphasis has been laid on the fact that the appellant after conversion, had married a Christian lady.

5. On the basis of the aforesaid report of the Scrutiny Committee, the State Government took action and directed the employer of the appellant, respondent No. 2 herein, to remove him from service and recover a sum of Rs.15 lakhs towards the salary paid to him. The said report of the Committee and the order in sequitur having the base on the report were the subject matter of challenge before the High Court in appeal.

6. On a perusal of the order passed by the High Court it is perceptible that it has affirmed the findings of the Committee on the basis that the paternal as well as maternal grandfather of the appellant belonged to Christian community and professed Christian faith; that the parents of the appellant were born as Christians and they continued to profess Christianity; that the appellant also was born as a Christian; that there is no caste by name 'Pulaya convert'; that neither the state government nor the revenue officials have the power to effect any alteration in the caste name contrary to the Constitution (Scheduled Castes) Order, 1950 issued under the authority of the Constitution of India; that the appellant cannot claim

the caste status of Pulaya merely on the ground that he had embraced Hinduism at the age of 24; that his claim that he should be treated as one belonging to scheduled caste community has been rightly rejected by the Committee after considering all the relevant facts and the law on the subject; and that neither the appellant nor his parents had enjoyed the caste status of Pulaya. On the aforesaid basis, the High Court opined that by embracing Hinduism at the age of 24, the appellant who was born to Christian parents and professed Christian faith is not entitled to claim that he is "Hindu-Pulaya." In the ultimate result, the writ petition was dismissed.

7. Calling in question the legal propriety of the aforesaid order, it is submitted by Mr. Naphade, learned senior counsel for the appellant that the High Court has fallen into serious error in its understanding of the ratio laid down by the Constitution Bench in ***Guntur Medical College* v. Y. Mohan Rao**[2], inasmuch as it has ruled that benefit available to a Scheduled Caste can only be made available to a person, if his parents were converted to Christianity and he has been reconverted and further satisfies other conditions like following the customs and traditions of the Caste after reconversion but would not be applicable to a person if his grandparents had converted to Christianity. Learned senior counsel would submit that the finding of the Scrutiny Committee does not deserve acceptation inasmuch as the expert agency which has been constituted under Section 9 of the Act to inquire into certain aspects though has given a categorical finding that the appellant had produced the requisite certificate, yet has fallaciously concluded that after conversion he has not been following the traditions of Christian religion, for he has entered into wedlock with a Christian woman. Learned senior counsel has also placed reliance on a two-Judge Bench decision in **Kodikunnil Suresh v. N.S. Saji Kumar**[3].

8. Resisting the submissions canvassed by Mr. Naphade, learned senior counsel for the appellant, Ms. Liz Mathew, learned counsel for the respondent-State submitted that the reasoning of High Court cannot be faulted inasmuch as the Constitution Bench does not lay down that a person born as a Christian whose grandparents had embraced Christianity can, on reconversion, come back to the stream of his/her original caste on acceptance by the community, and further the principle stated therein should not be stretched to cover that arena. That apart, submits she, the onus is on the appellant to adduce proof in respect of the fact that after conversion he has been following the Hindu rites and customs that is meant for the caste and in the case at hand the said burden has not been discharged.

2 (1976) 3 SCC 411

3 (2011) 6 SCC 430 : (2011) 3 SCC (Civ) 352

9. As we perceive, the controversy fundamentally has three arenas, namely,

(i) whether on conversion and at what stage a person born to Christian parents can, after reconversion to the Hindu religion, be eligible to claim the benefit of his original caste;

(ii) whether after his eligibility is accepted and his original community on a collective basis takes him within its fold, he still can be denied the benefit; and

(iii) that who should be the authority to opine that he has been following the traditions and customs of a particular caste or not.

We have enumerated the basic tests and in course of our discussion, we shall delve into certain ancillary issues regard being had to the area of analysis.

10. To appreciate the questions that we have formulated, it is necessary to refer to the authorities in chronology. A three-Judge Bench in **C.M. Arumugam V. S. Rajgopal**[4], while dealing with the concept of caste, referred to the pronouncements in **Coopoosami Chetty V. Duraisami Chetty**[5], **Muthusami Mudaliar V. Masilamani**[6] and **G. Michael V. S. Venkateswaran**[7] and opined thus: (*C.M.Arumugam case*[4], SCC pp. 872-73, para 10)

> *"10. ... It is no doubt true, and there we agree with the Madras High Court in G. Michael case that the general rule is that conversion operates as an expulsion from the caste, or, in other words, the convert ceases to have any caste, because caste is predominantly a feature of Hindu society and ordinarily a person who ceases to be a Hindu would not be regarded by the other members of the caste as belonging to their fold. But ultimately it must depend on the structure of the caste and its rules and regulations whether a person would cease to belong to the caste on his abjuring Hinduism. If the structure of the caste is such that its members must necessarily belong to Hindu religion, a member, who ceases to be a Hindu, would go out of the caste, because no non-Hindu can be in the caste according to its rules and regulations. Where, on the other hand, having regard to its structure, as it has evolved over the years, a caste may consist not only of persons professing Hindu religion but also persons professing some other religion as well, conversion from Hinduism to that other religion may not involve*

4 (1976) 1 SCC 863

5 4 ILR 33 Mad 57

6 ILR 33 Mad 342; Mad I.J. 49

7 AIR 1952 Mad. 474

loss of caste, because even persons professing such other religion can be members of the caste. This might happen where caste is based on economic or occupational characteristics and not on religious identity or the cohesion of the caste as a social group is so strong that conversion into another religion does not operate to snap the bond between the convert and the social group. This is indeed not an infrequent phenomenon in South India where, in some of the castes, even after conversion to Christianity, a person is regarded as continuing to belong to the caste. When an argument was advanced before the Madras High Court in G. Michael case[7]

> *"that there were several cases in which a member of one of the lower castes who has been converted to Christianity has continued not only to consider himself as still being a member of the caste, but has also been considered so by other members of the caste who had not been converted",*

Rajamannar, C.J., who, it can safely be presumed, was familiar with the customs and practices prevalent in South India, accepted the position "that instances can be found in which in spite of conversion the caste distinctions might continue", though he treated them as exceptions to the general rule."

[Emphasis supplied]

11. Thereafter, the Court referred to number of authorities of various High Courts and ruled that it cannot be laid down as an absolute rule uniformly applicable in all cases that whenever a member of caste is converted from Hinduism to Christianity, he loses his membership of the caste. It is true that ordinarily on conversion to Christianity, he would cease to be a member of the caste, but that is not an invariable rule, and it would depend on the structure of the caste and its rules and regulations. The Court referred to certain castes, particularly in South India, where this consequence could not follow by conversion since such castes comprise both Hindus and Christians. Eventually, the Court opined that: (C.M. Arumugam case[4], SCC p. 877, para 17)

"There is no reason either on principle or on authority which should compel us to disregard this view which has prevailed for almost a century and lay down a different rule on the subject. If a person who has embraced another religion can be reconverted to Hinduism, there is no rational principle why he should not be able to come back to his caste, if the other members of the caste are prepared to readmit him as a member. It stands to reason that he should be able to come back to the fold to which he once belonged,

provided of course the community is willing to take him within the fold. It is the orthodox Hindu society still dominated to a large extent, particularly in rural areas, by medievalistic outlook and status-oriented approach which attaches social and economic disabilities to a person belonging to a scheduled caste and that is why certain favoured treatment is given to him by the Constitution. Once such a person ceases to be a Hindu and becomes a Christian, the social and economic disabilities arising because of Hindu religion cease and hence it is no longer necessary to give him protection and for this reason he is deemed not to belong to a scheduled caste. But when he is reconverted to Hinduism, the social and economic disabilities once again revive and become attached to him because these are disabilities inflicted by Hinduism. A Mahar or a Koli or a Mala would not be recognised as anything but a Mahar or a Koli or a Mala after reconversion to Hinduism and he would suffer from the same social and economic disabilities from which he suffered before he was converted to another religion. It is, therefore, obvious that the object and purpose of the Constitution (Scheduled Castes) Order, 1950 would be advanced rather than retarded by taking the view that on reconversion to Hinduism, a person can once again become a member of the scheduled caste to which he belonged prior to his conversion."

(Emphasis supplied)

12. The aforesaid pronouncement has to be understood from constitutional and social perspective as the Court has viewed that there is no rational principle why should a person, who has embraced another religion should not be able to come back to his caste, and further the object and purpose of the Constitution (Scheduled Castes) Order, 1950 would be advanced if, on reconversion, to his original religion, he would become a member of his original caste and not suffer from the same social and economic disabilities.

13. Before the Constitution Bench, in Y. Mohan Rao (supra), the question arose whether a person whose parents belong to a scheduled caste before their conversion to Christianity can, on conversion or re-conversion to Hinduism, be regarded as a member of the Scheduled Caste so as to be eligible for the benefit of reservation of seats for scheduled castes in the matter of admission to a medical college. The parents of the respondent therein originally professed Hindu religion and belonged to Madiga caste which is admittedly a caste deemed to be a scheduled caste in the State of Andhra Pradesh as specified in Part I of the schedule to the Constitution (Scheduled Castes) Order, 1950. The respondent was born after the conversion,

that is to say, he was born of Christian parents and he had got himself converted to Hinduism on September 20, 1973 from Andhra Pradesh Arunchatiya Sangham stating that he had renounced Christianity and embraced Hinduism after going through Suddhi ceremony and he was thereafter received back into Madiga caste of Hindu fold. On the strength of the certificate, he had applied for admission in respect of the reserved seat to Guntur Medical College. Initially he was provisionally selected for admission, but his selection was cancelled as he was not Hindu by birth. On a writ petition being filed, the High Court referred to the Constitution (Scheduled Castes) Order, 1950 and opined that a candidate, in order to be eligible for a seat reserved for scheduled caste, need not belong to a scheduled caste by birth and when such a stipulation is made by the Government Notification, it has travelled beyond the 1950 order. The view expressed by the learned Single Judge in the writ petition was accepted by the Division Bench. It was contended by the State before the larger Bench that when the respondent was converted to Hinduism, he did not automatically become a member of the Madiga caste, but it was open to the members of the Madiga caste to accept him within their fold and it was only if he was so accepted, that he could have claimed to have become a member of the said caste.

14. The Constitution Bench referred to the three-Judge Bench in C.M. *Arumugam*[4] and posed the issue in the following manner: (*Y. Mohan Rao case*[2], SCC pp. 414-15, para 5)

> *"5. Now, before we proceed to consider this contention, it is necessary to point out that there is no absolute rule applicable in all cases that whenever a member of a caste is converted from Hinduism to Christianity, he loses his membership of the caste. This question has been considered by this Court in C. M. Arumugam v. S. Rajgopal and it has been pointed out there that ordinarily it is true that on conversion to Christianity, a person would cease to be a member of the caste to which he belongs, but that is not an invariable rule. It would depend on the structure of the caste and its rules and regulations. There are some castes, particularly in South India, where this consequence does not follow on conversion, since such castes comprise both Hindus and Christians. Whether Madiga is a caste which falls within this category is a debatable question. The contention of the respondent in his writ petition was that there are both Hindus and Christians in Madiga caste and even after conversion to Christianity, his parents continued to belong to Madiga caste and he was, therefore, a member of Madiga caste right from the time of his birth. It is not necessary for the purpose of the present appeal*

to decide this question. We may assume that, on conversion to Christianity, the parents of the respondent lost their membership of Madiga caste and that the respondent was, therefore, not a Madiga by birth. The question is: could the respondent become a member of Madiga caste on conversion to Hinduism? That is a question on which considerable light is thrown by the decision of this Court in C.M. Arumugam[4]."

15. Thereafter, the Court accepting the principle stated in *C.M. Arumugam*[4] proceeded to opine that the reasoning given in the said judgment has to be accepted and made applicable to a case where the parents of a person are converted from Hinduism to Christianity and he is born after their conversion and has subsequently embraced Hinduism. In addition to the conversion, he has to be accepted by the members of the caste and is taken as a member within its fold. In that context, the Court ruled thus: (*Y. Mohan Rao case*[2], SCC. pp. 415-16, para 7)

"7. The reasoning on which this decision proceeded is equally applicable in a case where the parents of a person are converted from Hinduism to Christianity and he is born after their conversion and on his subsequently embracing Hinduism, the members of the caste to which the parents belonged prior to their conversion accept him as a member within the fold. It is for the members of the caste to decide whether or not to admit a person within the caste. Since the caste is a social combination of persons governed by its rules and regulations, it may, if its rules and regulations so provide, admit a new member just as it may expel an existing member. The only requirement for admission of a person as a member of the caste is the acceptance of the person by the other members of the caste, for, as pointed out by Kirshnaswami Ayyangar, J., in ***Durgaprasada Rao v. Sudarsanaswami***[8]*, 'in matters affecting the well being or *composition of a caste, the caste itself is the supreme judge*'. It will, therefore, be seen that on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but he would become such member, if the other members of the caste accept him as a member and admit him within the fold." [emphasis supplied]*

16. From the aforesaid paragraph, it is plain as day that if the parents of a person are converted from Hinduism to Christianity and he is born after the conversion and

8 AIR 1940 Mad 513 : ILR 1940 Mad 653 : (1940) 1 MLJ 800

* Ed. : The matter between two asterisks has been emphasised in Goona Durgaprasada Rao case, 1939 SCC OnLine Mad 342 as well.

embraces Hinduism and the members of the caste accept him, he comes within the fold of the caste.

17. Mr. Naphade, learned senior counsel for the appellant would contend that the reasoning that has been made applicable to the parents, there is no reason or justification for not applying the said principle to the grandparents. Learned counsel for the State, per contra, would contend that the Constitution Bench has not laid down any principle as regards the grandparents and the same is with the avowed purpose as it cannot cover several generations. In this regard, we may profitably refer to a three-Judge Bench decision in ***Kailash Sonkar V. Maya Devi***[9]. In the said case, the Court posed the issue thus: (SCC p. 94, para 5)

> *"5. ... The knotty and difficult, puzzling and intricate issue with which we are faced is, to put it shortly, "what happens if a member of a scheduled caste or tribe leaves his present fold (Hinduism) and embraces Christianity or Islam or any other religion" — does this amount to a complete loss of the original caste to which he belonged for ever and, if so, if he or his children choose to abjure the new religion and get reconverted to the old religion after performing the necessary rites and ceremonies, could the original caste revive? The serious question posed here arose and has formed the subject-matter of a large catena of decisions starting from the year 1861, traversing a period of about a century and a half, and culminating in a decision of this Court in the case of C.M. Arumugam v. S. Rajagopal*[4]*."*

18. The Court, after referring to several decisions including the decision in *C.M. Arumugam*[4], has held thus: (*Kailash Sonkar case*[9], SCC p. 105, paras 31-32)

> *"31. In our opinion, the main test should be a genuine intention of the reconvert to abjure his new religion and completely dissociate himself from it. We must hasten to add here that this does not mean that the reconversion should be only a ruse or a pretext or a cover to gain mundane worldly benefits so that the reconversion becomes merely a show for achieving a particular purpose whereas the real intention may be shrouded in mystery. The reconvert must exhibit a clear and genuine intention to go back to his old fold and adopt the customs and practices of the said fold without any protest from members of his erstwhile caste. In order to judge this factor, it is not necessary that there should be a direct or conclusive proof of the expression of the views of the community of the erstwhile caste and it would be sufficient compliance of this condition if no exception or protest is lodged*

9 (1984) 2 SCC 91

by the community members, in which case the caste would revive on the reconversion of the person to his old religion.

32. Another aspect which one must not forget is that when a child is born neither has he any religion nor is he capable of choosing one until he reaches the age of discretion and acquires proper understanding of the situation. Hence, the mere fact that the parents of a child, who were Christians, would in ordinary course get the usual baptism certificate and perform other ceremonies without the child knowing what is being done but after the child has grown up and becomes fully mature and able to decide his future, he ought not to be bound by what his parents may have done. Therefore, in such cases, it is the intention of the convertee which would determine the revival of the caste. If by his clear and conclusive conduct the person reconverts to his old faith and abjures the new religion in unequivocal terms, his caste automatically revives."

19. What is important for our purpose is paragraph 34 of the said decision, which is as follows: (Kailash Sonkar case[9], SCC pp. 105-06)

"34. In our opinion, when a person is converted to Christianity or some other religion the original caste remains under eclipse and as soon as during his/her lifetime the person is reconverted to the original religion the eclipse disappears and the caste automatically revives. Whether or not the revival of the caste depends on the will and discretion of the members of the community of the caste is a question on which we refrain from giving any opinion because in the instant case there is overwhelming evidence to show that the respondent was accepted by the community of her original Katia caste. Even so, if the fact of the acceptance by the members of the community is made a condition precedent to the revival of the caste, it would lead to grave consequences and unnecessary exploitation, sometimes motivated by political considerations. Of course, if apart from the oral views of the community there is any recognised documentary proof of a custom or code of conduct or rule of law binding on a particular caste, it may be necessary to insist on the consent of the members of the community, otherwise in normal circumstances the case would revive by applying the principles of doctrine of eclipse. We might pause here to add a rider to what we have said i.e. whether it appears that the person reconverted to the old religion had been converted to Christianity since several generations, it may be difficult to apply the

doctrine of eclipse to the revival of caste. However, that question does not arise here." *[Emphasis supplied]*

20. The Learned counsel for the State has laid immense emphasis on the last part of the aforequoted paragraph in *Kailash Sonkar case*[9] wherein the Court has observed that in a case where the person reconverted to the old religion had been converted to Christianity since several generations, it may be difficult to apply the doctrine of eclipse to the relevant caste. Mr. Naphade, learned senior counsel would contend that the three-Judge Bench has not referred to the Constitution Bench decision in Y. Mohan Rao (supra) and had that been adverted to, in all possibility, the Court could have held if it could travel to the immediate generation, there was no warrant or justification not to take in its fold the grandparents. His further submission is in the case at hand, it is not a case of several generations, but only the grandparents.

21. In this context, a reference may be made to the authority in ***S. Anbalagan v. B. Devarajan***[10]. In the said case, the Court dwelt upon the legal position in regard to the caste, their status on conversion, or reconversion to Hinduism. After referring to various authorities, namely, ***Administrator-General of Madras v. Anandachari***[11], ***Muthusami Mudaliar v. Masilamani (supra), Gurusami Nadar v. Irulappa Konar***[12], ***Rajagopal v. Armugam***[13], ***Perumal Nadar v. Ponnuswami***[14], ***Vermani v. Vermani***[15], ***Durgaprasada Rao (supra) and Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram***[16], came to hold as follows: (*S. Anbalagan case*[10], SCC pp. 118-19, para 13)

"13. These precedents, particularly those from South India, clearly establish that no particular ceremony is prescribed for reconversion to Hinduism of a person who had earlier embraced another religion. Unless the practice of the caste makes it necessary, no expiatory rites need be performed and, ordinarily, he regains his caste unless the community does not accept him. In fact, it may not be accurate to say that he regains his caste; it may be more accurate to say that he never lost his caste in the first instance when he embraced another religion. The practice of caste however irrational it may appear to our reason and however repugnant it may appear to our moral

10 (1984) 2 SCC 112
11 ILR 9 Mad 342
12 1934 MLJ 389; AIR 1934 Mad 630
13 (1969) 1 SCR 254
14 (1971) 1 SCR 49
15 AIR 1943 Lah 51: 205 IC 290
16 1954 SCR 817

and social sense, is so deep-rooted in the Indian people that its mark does not seem to disappear on conversion to a different religion. If it disappears, it disappears only to reappear on reconversion. The mark of caste does not seem to really disappear even after some generations after conversion. In Andhra Pradesh and in Tamil Nadu, there are several thousands of Christian families whose forefathers became Christians and who, though they profess the Christian religion, nonetheless observe the practice of caste. There are Christian Reddies, Christian Kammas, Christian Nadars, Christian Adi Andhras, Christian Adi Dravidas and so on. The practice of their caste is so rigorous that there are intermarriages with Hindus of the same caste but not with Christians of another caste. Now, if such a Christian becomes a Hindu, surely he will revert to his original caste, if he had lost it at all. In fact this process goes on continuously in India and generation by generation lost sheep appear to return to the caste-fold and are once again assimilated in that fold. This appears to be particularly so in the case of members of the Scheduled Castes, who embrace other religions in their quest for liberation, but return to their old religion on finding that their disabilities have clung to them with great tenacity. We do not think that any different principle will apply to the case of conversion to Hinduism of a person whose forefathers had abandoned Hinduism and embraced another religion from the principle applicable to the case of reconversion to Hinduism of a person who himself had abandoned Hinduism and embraced another religion."
[emphasis supplied]

Thus, in the aforesaid case the Court has ruled that there is no reason that any different principle will apply to a person whose forefathers had abandoned Hinduism.

22. In ***Puneet Rai v. Dinesh Chaudhary***[17], S.B. Sinha, J. in his concurring opinion has observed thus: "30. In Caste and the Law in India by Justice S.B. Wad at p. 30 under the heading "Sociological Implications", it is stated: (SCC p. 220, paras 30-31)

"Traditionally, a person belongs to a caste in which he is born. The caste of the parents determines his caste but in case of reconversion a person has the liberty to renounce his casteless status and voluntarily accept his original caste. His caste status at birth is not immutable. Change of religion does not necessarily mean loss of caste. If the original caste does not positively disapprove, the acceptance of the caste can be presumed. Such acceptance can also be presumed if he is elected by a majority to a reserved seat. Although

17 (2003) 8 SCC 204

it appears that some dent is made in the classical concept of caste, it may be noticed that the principle that caste is created by birth is not dethroned. There is also a judicial recognition of caste autonomy including the right to outcaste a person."

31. If he is considered to be a member of the Scheduled Caste, he has to be accepted by the community."

23. In ***State of Kerala & Anr. v. Chandramohanan***[18], the appellant had lodged a complaint against the respondent alleging that he had taken one eight year old girl to the classroom in Pattambi Government U.P. School with an intent to dishonour and outrage her modesty. The said complaint was treated as first information report under Section 509 of the I.P.C. The Investigating Officer, during investigation, came to know that the father of the victim belonged to Mala Aryan community, which is considered to be a Scheduled Tribe in the State of Kerala and lodged another FIR charging the respondent under Section 3(1) (xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the 1989 Act') as well as under Section 509 of the I.P.C. Being aggrieved by the said order, the respondent filed a petition under Section 482 of the Code of Criminal Procedure, for quashing of the charges framed under Section 3(1)(xi) of the 1989 Act and the High Court took the view that since the victim's parents had embraced Christianity, the victim had ceased to be a member of the Scheduled Tribe and accordingly quashed the charges in respect of the said offences.

24. The three-Judge Bench in *Chandramohanan case*[18] referred to Article 342 of the Constitution, the object of the said Article which is meant to provide right for the purpose of grant of protection to the Scheduled Tribes having regard to the economic and educational backwardness wherefrom they suffer, the Constitution (Scheduled Tribes) Order, 1950 made in terms of the aforesaid provisions, *The Customary Laws of Muda and Oraon* by Dr. Jai Prakash Gupta, *Tribal India: A Profile in Indian Ethnology* by K.L. Bhowmik, the decisions in ***Nityanand Sharma v. State of Bihar***[19], *Puneet Rai*[17], ***N.E. Horo v. Jahanara Jaipal Singh***[20] and thereafter held that: (*Chandramohanan case*[18] , SCC p. 435, paras 16)

"16. Before a person can be brought within the purview of the Constitution (Scheduled Tribes) Order, 1950, he must belong to a tribe. A person for the purpose of obtaining the benefits of the Presidential Order must fulfil the

18 (2004) 3 SCC 429

19 (1996) 3 SCC 576

20 (1972) 1 SCC 771

condition of being a member of a tribe and continue to be a member of the tribe. If by reason of conversion to a different religion a long time back, he/ his ancestors have not been following the customs, rituals and other traits, which are required to be followed by the members of the tribe and even had not been following the customary laws of succession, inheritance, marriage etc. he may not be accepted to be a member of a tribe. In this case, it has been contended that the family of the victim had been converted about 200 years back and in fact the father of the victim married a woman belonging to a Roman Catholic, wherefrom he again became a Roman Catholic. The question, therefore, which may have to be gone into is as to whether the family continued to be a member of a Scheduled Tribe or not. Such a question can be gone into only during trial."

25. After so holding, the Court referred to in extenso the decision in *C.M. Arumugam*[4] and came to rule thus: (*Chandramohanan case*[18] , SCC pp. 436-37, paras 18-20)

"18. The aforementioned decision is, thus, also an authority for the proposition that upon conversion, a person may be governed by a different law than the law governing the community to which he originally belonged but that would not mean that notwithstanding such conversion, he may not continue to be a member of the tribe.

19. Learned counsel for the appellant has drawn our attention to the circulars issued by the State of Kerala with a view to show that the members of the tribes are being treated in the same capacity despite conversion. We are afraid that such circulars being not law within the meaning of Article 13 of the Constitution of India, would be of no assistance. ...

20. We, therefore, are of the opinion that although as a broad proposition of law it cannot be accepted that merely by change of religion a person ceases to be a member of the Scheduled Tribe, but the question as to whether he ceases to be a member thereof or not must be determined by the appropriate court as such a question would depend upon the facts of each case. In such a situation, it has to be established that a person who has embraced another religion is still suffering from social disability and also following the customs and traditions of the community, which he earlier belonged to. Under such circumstances, we set aside the order under appeal and remit the same to the Sessions Court, Palakkad, to proceed in accordance with law."

26. At this juncture, we are disposed to think that reference to certain reports and articles would be profitable for the purpose of understanding the ground reality and appreciate factual score in proper perspective. In the article, namely, "Dalits in India" by James Massey, B.R. Ambedkar, as is reflected from the said article, has devoted two long essays on the subject under the title "Christianising the Untouchables" and "The Condition of the Convert". Speaking about the general conditions of Christians Dalits, Ambedkar had put a direct challenge by saying:

> *"It is necessary to bear in mind that Indian Christians are drawn chiefly from the Untouchables (Dalits) and, to a much less extent from low ranking Shudra castes. The social services of Missions must therefore be judged in the light of the needs of these classes. What are those needs? The services rendered by the Missions in the fields of education and medical relief are beyond the ken of the Indian Christians. They go mostly to benefit the high caste Hindu."*

27. James Massey has analysed the reasons ascribed by Ambedkar by stating:

> *"What has Christianity achieved in the way of changing the mentality of the convert? Has the Untouchable convert risen to status of the touchables? Have the touchable and untouchable converts discarded caste? Have they ceased to worship their old pagan gods and to adhere to their old pagan superstitions? These are far-reaching questions. They must be answered and Christianity in India must stand or fall by the answers it gives to these questions."*

28. James Massey, the learned author has referred to the observations of Karnataka Backward Classes Commission, 1952. The relevant part is as follows:-

> *"A Scheduled Caste (man) might have made some progress, or might have embraced Islam or Christianity, and thereby the disabilities, under which he suffered as a result of untouchability, might have, to some extent, disappeared. But the fact remains that such castes, tribes and racial groups still continue to suffer under other social, educational and economic handicaps and taboos."*

29. Archbishop George Zur, Apostolic Pro-Nuncio to India in his inaugural address to the Catholic Bishops Conference of India, (CBCI) in the meeting held in Pune during December 1991, made the following observations:

> *"Though Catholics of the lower castes and tribes form 60 per cent of Church membership they have no place in decision-making. Scheduled caste converts*

are treated as low caste not only by high caste Hindus but by high caste Christians too. In rural areas they cannot own or rent houses, however, well-placed they may be. Separate places are marked out for them in the parish churches and burial grounds. Inter-caste marriages are frowned upon and caste tags are still appended to the Christian names of high caste people.

Casteism is rampant among the clergy and the religious. Though Dalit Christians make 65 per cent of the 10 million Christians in the South, less than 4 per cent of the parishes are entrusted to Dalit priests. There are no Dalits among 13 Catholic bishops of Tamil Nadu or among the Vicars-general and rectors of seminaries and directors of social assistance centres."

30. The Mandal Commission report of the Backward Classes Commission 1980, speaking about the Indian Christians in Kerala had expressed thus:-

".... Christians in Kerala are divided into various denominations on the basis of beliefs and rituals and into various ethnic groups on the basis of their caste background .... even after conversion, the lower caste converts were continued to be treated as Harijans by all sections of the society including the Syrian Christians, even though with conversion the former ceased to be Harijans and untouchables..... In the presence of rich Syrian Christians, the Harijan Christians had to remove their head-dress while speaking with their Syrian Christian masters. They had to keep their mouth closed with a hand ..... It was found that the Syrian and Pulaya members of the same Church conduct religious rituals separately in separate buildings ... Thus lower caste converts to a very egalitarian religion like Christianity, ever anxious to expand its membership, even after generations were not able to efface the effect of their caste background."

31. A Church of South India Commission in 1964 investigating the grievances of Dalit Christians, whether they split off or remain with the Church of South India, wrote:-

"First and foremost is the feeling that they are despised, not taken seriously, overlooked, humiliated or simply forgotten. They feel that again and again affairs in the diocese are arranged as if they did not exist. Caste appellations are still occasionally used in Church when they have been abandoned even by Hindus. Backward class desires and claims seem again and again to be put on the waiting list, while projects which they feel aim chiefly at the benefit of the Syrian community seem to get preferential consideration. In appointments, in distribution of charity, in pastoral care and in the attitude

shown to them, in disputes with the authorities, the treatment they receive, when compared with that received by their Syrian brothers, suggests a lack of sympathy, courtesy and respect."

32. Chinappa Commission Report (1990) states:-

"By and large, the Christian community in Karnataka is an advanced community except for SC and ST converts, whose position has not improved very much for the better. Thanks to the all pervasive caste system which has penetrated the barriers of religion also, SC and ST converts to Christianity and their descendants continue, to a great degree, to be victims of the same social injustice to which the SCs and STs are subjects".

33. Dr. Y. Antony Raj, the author of "Social Impact of Conversion" comments:

"The mass conversion from Christianity to Hinduism, Islam and Buddhism is often explained as the frustration of the coverts to Christianity. Devadason names the reason for such reconversion as 'disillusionment' among the CSCO. "Till recently" says he, "the conversion to Christianity was considered an attractive proposition. That trend has slowed down, if not stopped. This was because of the disillusionment among the Harijan converts, who discovered that they had carried with them their caste stigma and that inter-caste marriage and other contacts continued to be as difficult as before."

34. As per the analysis made by John C.B. Webster, in the book, "*The Dalit Christians: A History*", in Chapter III titled "The Politics of Numbers", Dr. Ambedkar, being aware of the continuing problems of Dalit Christians had ruled out conversion to Christianity. To quote the learned author:

"He was certainly aware of them. In what was probably the most perceptive analysis of the Christian community from this period, Ambedkar noted that caste Hindus were the chief beneficiaries of Christian educational and medical work, that caste continued within the churches, and that Dalits suffered from the same disabilities after as before conversion to Christianity. More importantly, Christianity failed the political test. For one thing, while Christianity may have inspired Dalit converts to change their social attitudes, it had not inspired them to take practical steps to redress the wrongs from which they suffered."

35. In this context, it will be fruitful to make a reference to the authority in ***State of M.P. v. Ram Kishna Balothia***[21]. In the said case, the two-Judge Bench was called upon to deal with the validity of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, especially Section 18 that stipulates that Section 438 of the CrPC will not apply to the persons committing an offence under the said Act. While upholding the validity of the provisions and annulling the judgment of the High Court of M.P., the learned Judges have referred to the Statement of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes Bill, 1989 when it was introduced in the Parliament. To quote: (SCC pp. 225-26, para 6)

> *"6. ... It sets out the circumstances surrounding the enactment of the said Act and points to the evil which the statute sought to remedy. In the Statement of Objects and Reasons it is stated:*
>
> *"1. "Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons*
>
> *2. … When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Caste persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes…. A special legislation to check and deter crimes against*

21 (1995) 3 SCC 221

them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary."

The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above Statement of Objects and Reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences."

36. We have referred to the aforesaid materials and the observations singularly for the purpose that there has been detailed study to indicate the Scheduled Castes persons belonging to Hindu religion, who had embraced Christianity with some kind of hope or aspiration, have remained socially, educationally and economically backward. The Constitution Bench in Y. Mohan Rao (supra) has clearly laid down that if a person born to Christian parents, who, belonging to Scheduled Caste had converted themselves to Christianity, the said person on reconversion to his religion and on acceptance by his community with a further rider that he would practise the customs and traditions of the caste, would be treated as a member of the said Scheduled Caste and if the said caste is one of the castes falling within the Constitution (Scheduled Castes) Order, 1950, then he will be treated as a Scheduled Caste.

37. As we understand the authority it does not lay down that it only would apply to the parents and exclude the grandparents. At this stage, two decisions are required to be properly understood.

37.1. In *Kailash Sonkar*[9], the three-Judge Bench while applying the doctrine of eclipse to the original caste and the principle of revival applying the said doctrine, has observed whether to a situation where the person reconverted to the old religion had been converted to Christianity since several generations, it may be difficult to apply the doctrine of eclipse to the revival of caste. The Court, by way of abundant caution, has also proceeded to state that the question did not arise there. That apart, it has not expressed any opinion. Therefore, it cannot be treated as a precedent for the purpose that it would only encompass the previous generation.

37.2 In S. Anbalagan[10] which we have referred to in extenso earlier, has laid down that if the caste disappears, it disappears only to reappear on reconversion and the mark of caste does not seem to really disappear even after some generations after conversion. As has been held therein, the process goes on continuously in India and generation by generation last sheep to return to their caste fold are once again assimilated to that fold. The three-Judge Bench has commented that the members of the scheduled castes who had embraced another religion in their quest for liberation, but return to their old religion on finding that their disabilities have clung to them with great tenacity; and thereafter stated that it does not think that any different principle would apply to the case of conversion to Hinduism of a person whose forefathers had abandoned Hinduism and embraced another religion from the principle applicable to the case of reconversion to Hinduism of a person who himself had abandoned Hinduism and embraced another religion. This view, in our considered opinion, is in consonance with the Constitution Bench in *Y. Mohan Rao*[2] and does not run counter to it. One may raise a question how does one find out about the forefathers. There can be a false claim but that would be the subject matter of inquiry. Therefore, the principle of "definitive traceability" may be applied during the inquiry and the onus shall be on the person who claims the benefit after reconversion. To elaborate, he has to establish beyond a shadow of doubt that his forefathers belonged to the scheduled caste that comes within the Constitution (Scheduled Castes) Order, 1950 and he has been reconverted and his community has accepted him and taken him within its fold.

38. In our considered opinion, three things that need to be established by a person who claims to be a beneficiary of the caste certificate are (i) there must be absolutely clear cut proof that he belongs to the caste that has been recognised by the Constitution (Scheduled Castes) Order, 1950; (ii) there has been reconversion to the original religion to which the parents and earlier generations had belonged; and (iii) there has to be evidence establishing the acceptance by the community. Each aspect according to us is very significant, and if one is not substantiated, the recognition would not be possible.

39. In the case at hand, as far as the first aspect is concerned, as we have stated hereinbefore, there is no dispute. If a person who is born to Christian parents who had converted to Christianity from the Scheduled Caste Hindu can avail the benefit of the caste certificate after his embracing Hinduism subject to other qualifications, there cannot be any soundness of logic that he cannot avail the similar benefit

because his grandparents were converted and he was born to the parents who were Christians. They must have belonged to that caste and after conversion the community has accepted. Our view is fortified by the authority in S. Anbalagan (supra). Thus, the reasoning as ascribed by the Scrutiny Committee as well as by the High Court on this score is unacceptable.

40. As far as the community acceptance is concerned, Mr. Naphade has drawn our attention to the enquiry report submitted by the expert agency, conclusion of which reads thus:

> *"**CONCLUSION***
>
> *Thus, the anthropological study has revealed that the claimant K.P. Manu's case father K.P. Paulose and his mother Kunjamma belong to Christian Community of Pulayan origin. The investigation has revealed they still profess Christianity.*
>
> *In the Government Circular No. 18421/E2/87 SCSTDD dated 15.12.1987 it has been made clear that the religious status of parents will not affect the caste status of neo-converts provided they become major and copy of the said GO is marked here as Document-7. So the claimant after becoming major embraced Hinduism and revived his caste. The caste organisation to which he belongs has also accepted his conversion. It has been found that he has a registered marriage with Sylamma belonging to Christian community of Pulayan origin. The claimant and his children do not follow Christian religion."*

41. The community certificate which was produced by the appellant is as follows:

> *"AKHILA BHARTA AYYAPPA SEVA SANAGHOM*
> *HEAD OFFICE – KOTTAYAM*
>
> *At the request of Mr. K.P. JOHN and his family residing in Kanayannur Taluk, Mulamthuruthy Village, Ward-VI, Kaniyamol House, the persons listed below is converting today on behalf of Ayyappa Seva Sangham from Christian Pulayan community to Hindu Pulayan community, after performing Sudhi Karma according to the Hindu rites and customs.*
>
> *The new names adopted are mentioned against the old names of the persons listed below:*
>
> *Kottayam – 5/2/1984*

General Secretary

No.	Old Name	New Name	Date of Birth	Age
1.	K.P. John	K.P. Manu	31.1.1960	23
2.	K.P. Thomas	K.P. Babu	20.4.1968	15

For Akhila Bharata Ayyappa Seva Sangham
Sd/-
General Secretary"

42. Be it stated here that the said "Sangham" has been recognised as one of the agencies by the Government of Kerala as a competent organisation to issue the community certificate. There is no doubt that the appellant had converted himself and thereafter was accepted by the community. He has been taken within its fold.

43. At this juncture, certain findings recorded by the Scrutiny Committee require to be reproduced:

> *"The Committee examined the aspect whether the aforementioned decisions can have any application to the claimant's conversion to Hinduism in 1984. The Committee noted that neither the claimant nor his parents was born as Hindu and later converted to Christianity from Hinduism. In fact they are born as Christians. Hence there is no element of re-conversion in the claimant's case. Hence the question of reviving caste status as Pulayan (SC) on the ground that some of his ancestors were having Pulayan (SC) status does not arise. The claimant traces SC (Pulayan) status from generations back despite the fact that his ancestors in the descending generation, consistently opted to renounce Pulayan caste status and Hindu religious status by converting to Christianity. Ordinarily one gets his/her caste on the basis of his/her parents. In other words, one shall be, on birth deemed to be belonging to the caste of his/her parents. In the facts and circumstances of the claimant's case, the claimant and his parents were devoid of any caste identity right from their birth. It is significant to note that ten years after his conversion to Hinduism, the claimant has contracted marriage with a Christian lady, as per Special Marriage Act. Hence, the Committee found that the claimant's case does not come under the ambit of aforementioned verdicts."*

44. The said report has been given the stamp of approval by the High Court. In the impugned order, the Division Bench, after referring to the report, has held thus:

"The paternal as well as maternal grand father of the appellant belonged to Christian community and professed Christian faith. Patents of the appellant were born as Christians and they continued to profess Christianity. The appellant also was born as a Christian. Annexure-I Certificate shows that in the SSLC book he is shown as a person belonging to Christian religion. As rightly found by the respondent there is no caste by name 'Pulaya convert'. Neither the state government nor the revenue officials have the power to effect any alteration in the caste name contrary to the Presidential Order issued under the authority of the Constitution of India. Appellant cannot claim the caste status of Pulayan merely on the ground that he embraced Hinduism at the age of 24. His claim that he should be treated as one belonging to scheduled caste community has been rightly rejected by the respondent after considering all relevant facts and the law on the subject. Neither the appellant nor his parents had enjoyed the caste status of Pulayan. Hence by embracing Hinduism at the age of 24, the appellant who was born to Christian parents and professed Christian faith is not entitled to claim that he is Hindu-Pulaya."

45. The aforesaid reasoning is contrary to the decisions of this Court and also to what we have stated hereinbefore. As far as marriage is concerned, in our considered opinion, that should not have been considered as the central and seminal facet to deny the benefit. When the community has accepted and the community, despite the marriage, has not ex-communicated or expelled, the same would not be a disqualification.

46. The committee, as we find, has placed reliance on ***S. Swvigaradoss v. Zonal Manager, F.C.I.***[22] The said decision requires to be adverted to. In the said case, the parents of the petitioner, initially belonged to Adi Dravid by caste, hailing from Kattalai village in Tirunelveli District, Tamil Nadu and they had, before his birth, converted into Christian religion. The petitioner had filed a suit contending, inter alia, that after he had become a major, he has continued as Adi Dravid. The suit was decreed but eventually, it was reversed in second appeal. The Court referred to Article 341(1) of the Constitution, decisions in ***B. Basavalingappa v. D. Munichinnappa***[23], ***Bhaiyalal v. Harikishan Singh***[24], ***Srish Kumar Choudury v. State of Tripura***[25],

22 (1996) 3 SCC 100

23 AIR 1965 SC 1269

24 AIR 1965 SC 1557

25 (1990) Supp SCC 220

Kumari Madhuri Patel v. Addl. Commissioner, Tribal Development[26] and opined thus: (*S. Swvigaradoss case*[22], SCC pp. 102-03, para 8)

> *"The Courts, therefore, have no power except to give effect to the notification issued by the President. It is settled law that the Court would look into the public notification under Article 341(1) or Article 342(1) for a limited purpose. The notification issued by the President and the Act of Parliament under Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 and the Schedules appended thereto can be looked into for the purpose to find whether the castes, races or tribes are (sic or) parts of or groups within castes, races or tribes shall be Scheduled Castes for the purposes of the Constitution. Under the Amendment Act, 1976, again Parliament has included or excluded from schedules appended to the Constitution which are now conclusive. Schedule I relates to Scheduled Castes and Schedule II relates to Scheduled Tribes. Christian is not a Scheduled Caste under the notification issued by the President. In view of the admitted position that the petitioner was born of Christian parents and his parents also were converted prior to his birth and no longer remained to be Adi-Dravida, a Scheduled Caste for the purpose of Tirunelveli District in Tamil Nadu as notified by the President, petitioner cannot claim to be a Scheduled Caste. In the light of the constitutional scheme civil court has no jurisdiction under Section 9 of CPC to entertain the suit. The suit, therefore, is not maintainable. The High Court, therefore, was right in dismissing the suit as not maintainable and also not giving any declaration sought for."* *[Emphasis supplied]*

47. The two principles that have been stated in the aforesaid paragraph are (i) that a court can look into the Notification by the President and the act of the Parliament under the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 and the schedule appended thereto for the limited purpose to find whether the castes, races or tribes are parts or groups within the caste, races or tribes, especially scheduled castes for the purpose of Constitution, and it is because what has been included or excluded therein are conclusive; and (ii) that a person born to Christian parents, who initially belonged to the Scheduled Caste, even after his reconversion cannot claim to be a Scheduled Caste. As far as first proposition of law is concerned, there can be no cavil over the same and we respectfully concur. As far as the second principle is concerned, it is essential to note that the authorities of larger Bench in *Y. Mohan Rao*[2], *Kailash Sonkar*[9] and *S. Anbalagan*[10] were not brought to the notice of the Court. Irrefragably, the second principle runs contrary to the proposition laid

26 (1994) 6 SCC 241

down in the Constitution Bench in *Y. Mohan Rao*[2] and the decisions rendered by the three-Judge Bench.

48. When a binding precedent is not taken note of and the judgment is rendered in ignorance or forgetfulness of the binding authority, the concept of per incuria comes into play. In ***A.R. Antulay v. R.S. Nayak***[27], Sabyasachi Mukherji, J. (as His Lordship then was) observed that: (SCC p. 652, para 42)

> *"42. .... 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."*

At a subsequent stage of the said authority, it has been held that: (*A.R. Antulay case*[27], SCC p. 654, para 47)

> *"47. .... It is a settled rule that if a decision has been given per incuriam the court can ignore it."*

49. In ***Union of India and Others v. R.P. Singh***[28], the Court observed thus: (SCC p. 348, para 19)

> *"19. In **Siddharam Satlingappa Mhetre v. State of Maharashtra**[29], while dealing with the issue of "per incuriam", a two-Judge Bench, after referring to the dictum in **Young v. Bristol Aeroplane Co. Ltd**[30]. and certain passages from Halsbury's Laws of England and **Union of India v. Raghubir Singh**[31], had ruled thus: (Siddharam Satlingappa Mhetre case[29], SCC p. 743, para 138)*
>
> > *"138. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a coequal strength is also binding on a Bench of Judges of coequal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored a Constitution Bench judgment of this Court*

27 (1988) 2 SCC 602
28 (2014) 7 SCC 340
29 (2011) 1 SCC 694
30 1944 KB 718
31 (1989) 2 SCC 754

*in **Sibbia case**[32] which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 CrPC. Consequently, the judgments mentioned in paras 124 and 125 of this judgment are per incuriam."*

50. Tested on the aforesaid principles, it can safely be concluded that the judgment in *S. Swvigaradoss*[22], as far as the second principle is concerned, is per incuriam.

51. In the instant case, the appellant got married to a Christian lady and that has been held against him. It has also been opined that he could not produce any evidence to show that he has been accepted by the community for leading the life of a Hindu. As far as the marriage and leading of Hindu life are concerned, we are of the convinced opinion that, in the instant case, it really cannot be allowed to make any difference. The community which is a recognised organisation by the State Government, has granted the certificate in categorical terms in favour of the appellant. It is the community which has the final say as far as acceptance is concerned, for it accepts the person, on reconversion, and takes him within its fold. Therefore, we are inclined to hold that the appellant after reconversion had come within the fold of the community and thereby became a member of the scheduled caste. Had the community expelled him the matter would have been different. The acceptance is in continuum. Ergo, the reasonings ascribed by the Scrutiny Committee which have been concurred with by the High Court are wholly unsustainable.

52. Consequently, the appeal is allowed and the judgment and order of the High Court, findings of the Scrutiny Committee and the orders passed by the State Government and the second respondent are set aside. The appellant shall be reinstated in service forthwith with all the benefits relating to seniority and his caste, and shall also be paid backwages upto 75% within eight weeks from today. There shall be no order as to costs.

❑❑❑

32 (1980) 2 SCC 565

(2015) 6 Supreme Court Cases 353

Bhuwan Mohan Singh v. Meena

(Before Dipak Misra and V. Gopala Gowda, JJ.)

Bhuwan Mohan Singh . . Appellant;
Versus
Meena And Others . . Respondents.

Criminal Appeal No. 1331 of 2014†,
decided on July 15, 2014

A. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Object of — Duty of husband towards wife to provide proper maintenance, and said duty continues until when — Maintenance of wife for her sustenance — "Sustenance" does not mean animal existence but signifies leading life in similar manner as she would have lived in house of her husband — Husband has bounden duty to enable wife to live life with dignity according to their social status and strata — Regard being had to solemn pledge at the time of marriage and also in consonance with statutory law that governs the field, it is the obligation of husband to see that wife does not become a destitute, a beggar — A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust" — It is totally impermissible — In fact, it is sacrosanct duty to render financial support even if husband is required to earn money with physical labour, if he is able-bodied — There is no escape route unless there is an order from court that wife is not entitled to get maintenance from husband on any legally permissible grounds — Constitution of India — Art. 21 — Words and Phrases — "Sustenance" — Family and Personal Laws — Maintenance**

B. **Criminal Procedure Code, 1973 — Ss. 125 and 354(6) — Maintenance — When payable from date of application — Family Court took 9 yrs in granting maintenance for wife and her son during which period it granted adjournments in routine manner — Wife left to state of vagrancy and destitution during long pendency of proceedings — In circumstances, held, High Court justified in granting maintenance from date of her application — Family and Personal Laws — Maintenance**

C. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Delay in granting — Proceedings summary in nature are intended to provide speedy remedy**

† Arising out of SLP (Crl) No. 1565 of 2013. From the Judgment and Order dated 28-5-2012 in SBCRR No. 1526 of 2011, passed by the High Court of Rajasthan at Jaipur.

— Application under S. 125 filed by wife (respondent) claiming from husband maintenance for herself and for son — Proceedings continued for 9 yrs during which period Family Court granted adjournments in routine manner and finally granted maintenance — Held, improper — Proceedings enormously delayed — Such delay defeats purpose of the provision — Family and Personal Laws — Maintenance

D. **Family and Personal Laws — Family Courts Act, 1984 — S. 7 — Application for grant of maintenance — Duty of Family Court — Adjournments in routine manner should not be granted — Dilatory tactics of parties should be sternly dealt with — Delay in adjudication is not only against human rights but also against basic embodiment of dignity of person — Family Court should strike a balance by avoiding procrastination of proceedings but without showing undue haste being conscious about dealing with sensitive issues relating to marriage and ancillary matters — Human and Civil Rights — Human Rights/Rights of Man — Delay in granting maintenance by Family Court — Constitution of India — Art. 21 — Family and Personal Laws — Maintenance**

The marriage between the appellant and the respondent was solemnised on 27-11-1997 as per Hindu rites and rituals, and in the wedlock a son was born on 16-12-1998. The respondent, under certain circumstances, had to leave the marital home and thereafter she filed an application on 28-8-2002 under Section 125 CrPC in the Family Court, claiming Rs 6000 per month towards maintenance. During the continuance of the Family Court proceedings, a number of adjournments were granted, some taken by the husband and some by the wife.

The Family Judge being dissatisfied with the material brought on record came to hold on 24-8-2011 that the respondent wife was entitled to maintenance and, accordingly, awarded monthly maintenance of Rs 2500 to the respondent wife and Rs 1500 to the second respondent son and directed that the maintenance be paid from the date of the order. The respondent wife filed a revision petition before the High Court contending that the maintenance should have been granted from the date of application, and that she had received nothing during the proceedings and suffered immensely. Accepting the contention, the High Court directed that the maintenance should be granted from the date of filing of the application.

Dismissing the husband's appeal, the Supreme Court

Held :

The Family Court, while dealing with an application under Section 7 of the Family Courts Act, which includes determination of grant of maintenance to persons as entitled

under the provision, should not allow adjournments in an extremely liberal manner remaining oblivious of the Objects and Reasons of the Act and also keeping the windows of wisdom closed and the sense of judicial responsiveness suspended to the manifest perceptibility of vagrancy, destitution, impecuniosity, struggle for survival and the emotional fracture, a wife is likely to face under these circumstances and further exhibiting absolute insensitivity to her condition, who, after losing support of the husband who has failed to husband the marital status denies the wife to have maintenance for almost nine years as that much time is consumed to decide the lis and, in addition, to restrict the grant of maintenance to the date of order on some kind of individual notion. Both the approaches, not only defeat the command of the legislature but also frustrate the hope of wife and children who are deprived of adequate livelihood and whose aspirations perish like mushroom and possibly the brief candle of sustenance joins the marathon race of extinction. This delay in adjudication by the Family Court is not only against human rights but also against the basic embodiment of dignity of an individual. (Para 1)

The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and Sensitive issues pertaining to the marriage and issues ancillary thereto. This does not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. It is hoped that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the Objects and Reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc. (Para 13)

K.A. Abdul Jaleel v. T.A. Shahida, (2003) 4 SCC 166 : 2003 SCC (Cri) 810, *relied on*

In the case at hand the proceeding before the Family Court was conducted without being alive to the Objects and Reasons of the Family Courts Act and the spirit of the provisions under Section 125 CrPC. The Supreme Court in a number of decisions has observed that the proceedings under Section 125 CrPC are of summary nature and are intended to prevent vagrancy and destitution. Section 125 CrPC was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial

home for the reasons provided in the provision so that some suitable arrangements can be made by the court and she can sustain herself and also her children if they are with ▪ her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able-bodied. There is no escape route unless there is an order from the court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds. (Paras 13 and 2)

DukhtarJahan v. Mohd. Farooq, (1987) 1 SCC 624 : 1987 SCC (Cri) 237; *Vimala (K.) v. Veeraswamy (K.),* (1991) 2 SCC 375 : 1991 SCC (Cri) 442; *Kirtikant D. Vadodaria v. Srare of Gujarat,* (1996) 4 SCC 479 :"1996 SCC (Cri) 762; *Chaturbhuj v. Sita Bai,* (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356; *Nagendrappa Natikarv. Neelamma,* (2014) 14 SCC 452 : (2015) 1 SCC (Cri) 407 : (2015) 1 SCC (Civ) 346, *relied on*

Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 : 1978 SCC (Cri) 508; *Savitaben Somabhai Bhatiya v. Srare of Gujarat,* (2005) 3 SCC 636 : 2005 SCC (Cri) 787, cited

In this case, there was enormous delay in disposal of the proceeding under Section 125 CrPC and most of the time the husband had taken adjournments and sometimes the court dealt with the matter showing total laxity. The wife sustained herself as far as she could in that state for a period of nine years. The circumstances required grant of maintenance from the date of application and by so granting the High Court has not committed any legal infirmity. However, it is directed, as prayed for the appellant husband, that he may be allowed to pay the arrears along with the maintenance awarded at present in a phased manner. The respondent wife did not object to such an arrangement being made. Hence it is directed that while paying the maintenance as fixed by the Family Court Judge per month by 5th of each succeeding month, the arrears shall be paid in a proportionate manner within a period of three years from the date of this decision. (Para 16)

Shail Kumari Devi v. Krishan Bhagwan Pathak, (2008) 9 SCC 632 : (2008) 3 SCC (Cri) 839, *relied on*

Meena v. Scare of Rajasthan, Criminal Revision Petition No. 1526 of 2011, order dated 28-5-2012 (Raj), *affirmed*

Krishna Jain v. Dharam Raj Jain, 1992 Cri LJ 1028 (MP), *held, approved*

K. Sivaram v. K. Mangalamba, 1990 Cri LJ 1880 (AP), *held, partly overruled and partly approved*

R-D/53539/CVR

Advocates who appeared in this case:

Jay Kishor Singh, Advocate, for the Appellant;

Ms Ruchi Kohli, Brijesh Sharma and Mohit Paul, Advocates, for the Respondents.

Chronological list of cases cited on page(s)

1. (2014) 14 SCC 452 : (2015) 1 SCC (Cri) 407 : (2015) 1 SCC (Civ) 346, Nagendrappa Natikarv. Neelamma 360a

2. Criminal Revision Petition No. 1526 of 2011, order dated 28-5-2012 (Raj), Meena v. State of Rajasthan 358c-d

3. (2008) 9 SCC 632 : (2008) 3 SCC (Cri) 839, Shail Kumari Devi v. Krishan Bhagwan Pathak 361a, 361b-c, 361f

4. (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356, Chaturbhuj v. Sita Bai 359e-f

5. (2005) 3 SCC 636 : 2005 SCC (Cri) 787, Savitaben Somabhai Bhatiya v. State of Gujarat 360a

6. (2003) 4 SCC 166 : 2003 SCC (Cri) 810, K.A. Abdul Jaleel v. T.A. Shahida 360b

7. (1996) 4 SCC 479 : 1996 SCC (Cri) 762, Kirtikant D. Vadodaria v. State of Gujarat 359c

8. 1992 Cri LJ 1028 (MP), Krishna Jain v. Dharam Raj Jain 361b-c, 361d-e

9. (1991) 2 SCC 375 : 1991 SCC (Cri) 442, Vimala (K.) v. Veeraswamy (K.) 359b

10. 1990 Cri U 1880 (AP), K. Sivaram v. K. Mangalamba (**held, partly overruled and partly approved**) 361e

11. (1987) 1 SCC 624 : 1987 SCC (Cri) 237, Dukhtar Jahan v. Mohd. Farooq 359a

12. (1978) 4 SCC 70 : 1978 SCC (Cri) 508, Capt. Ramesh Chander Kaushal v. Veena Kaushal 359f-g

The Judgment of the Court was delivered by

Dipak Misra, J. — Leave granted. The two issues that pronouncedly emanate in this appeal by special leave are whether the Family Court while deciding an application under Section 7 of the Family Court Act, 1984 (for brevity, "the Act") which includes determination of grant of maintenance to the persons as entitled under that provision, should allow adjournments in an extremely liberal manner remaining oblivious of objects and reasons of the Act and also keeping the windows of wisdom closed and the sense of judicial responsiveness suspended to the manifest perceptibility of vagrancy, destitution, impecuniosity, struggle for survival and the emotional fracture, a wife likely to face under these circumstances and further exhibiting absolute insensitivity to her condition, who, after loosing support of the husband who has failed to husband the marital status denies the wife to have maintenance for almost nine years as that much time is consumed to decide the lis and, in addition, to restrict the grant of maintenance to the date of order on some kind of individual notion. Both the approaches, as we perceive, not only defeat the command of the legislature but also frustrate the hope of wife and children who are deprived of adequate livelihood and whose aspirations perish like mushroom and possibly the brief candle of sustenance joins the marathon race of extinction. This delay in adjudication by the Family Court is not only against human rights but also against the basic embodiment of dignity of an individual.

2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape

route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.

3. Presently to the facts which lie in an extremely small compass. The marriage between the appellant and the husband was solemnized on 27.11.1997 as per Hindu rites and ritual, and in the wedlock a son was born on 16.12.1998. The respondent, under certain circumstances, had to leave the marital home and thereafter filed an application on 28.8.2002 under Section 125 of the Code in the Family Court, Jaipur, Rajasthan, claiming Rs.6000/- per month towards maintenance. The Family Court finally decided the matter on 24.8.2011 awarding monthly maintenance of Rs.2500/- to the respondent-wife and Rs.1500/- to the second respondentson. Be it stated, during the continuance of the Family Court proceedings, number of adjournments were granted, some taken by the husband and some by the wife. The learned Family Judge being dissatisfied with the material brought on record came to hold that the respondent-wife was entitled to maintenance and, accordingly, fixed the quantum and directed that the maintenance to be paid from the date of the order.

4. Being dissatisfied with the aforesaid order the respondent-wife preferred S.B. Criminal Revision Petition No. 1526 of 2011 before the High Court of Judicature at Rajasthan and the learned single Judge, vide order dated 28.5.2012[1], noted the contention of the wife that the maintenance should have been granted from the date of application, and that she had received nothing during the proceedings and suffered immensely and, eventually, directed that the maintenance should be granted from the date of filing of the application.

5. Criticizing the aforesaid order, it is submitted Mr. Jay Kishor Singh learned counsel for the appellant that when number of adjournments were sought by the wife, grant of maintenance from the date of filing of the application by the High Court is absolutely illegal and unjustified. It is his submission that the wife cannot take advantage of her own wrong.

6*. Mr. Mohit Paul, learned counsel for the respondents would submit that the Family Court adjourned the matter sometimes on its own and the enormous delay took place because of non-cooperation of the husband in the proceedings and, therefore, the wife who was compelled to sustain herself and her son with immense difficulty should not be allowed to suffer. It is proponed by him that the High Court by modifying the order and directing that the maintenance should be granted from the

1 Meena v. State of Rajasthan, Criminal Revision Petition No. 1526 of 2011, order dated 28-5-2012 (Raj)

* Ed.: Para 6 corrected vide Official Corrigendum No. F.3/Ed. B.J./46/2014 dated 28-8-2014

date of filing of the application has not committed any legal infirmity and hence, the order is inexceptionable.

7. At the outset, we are obliged to reiterate the principle of law how a proceeding under Section 125 of the Code has to be dealt with by the court, and what is the duty of a Family Court after establishment of such courts by the Family Courts Act, 1984. In ***Smt. Dukhtar Jahan v. Mohammed Farooq***[2], the Court opined that: (SCC P. 361 para 16)

> *"16. ... proceedings under Section 125 of the Code, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner."*

8. A three-Judge Bench in ***Vimla (K.) v. Veeraswamy (K.)***[3], while discussing about the basic purpose under Section 125 of the Code, opined that Section 125 of the Code is meant to achieve a social purpose. 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.

9. A two-Judge Bench in ***Kirtikant D. Vadodaria v. State of Gujarat and another***[4], while adverting to the dominant purpose behind Section 125 of the Code, ruled that: (SCC p. 489, para 15)

> *"15. ... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."*

10. In ***Chaturbhuj v. Sita Bai***[5], reiterating the legal position the Court held: (SCC p. 320, para 6)

2 (1987) 1 SCC 624

3 (1991) 2 SCC 375

4 (1996) 4 SCC 479

5 (2008) 2 SCC 316

> *"6. ... Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain* ***Ramesh Chander Kaushal v. Veena Kaushal***[6] *falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. 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. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in* ***Savitaben Somabhai Bhatiya v. State of Gujarat***[7]*."*

11. Recently in ***Nagendrappa Natikar v. Neelamma***[8], it has been stated that it is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children.

12. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in ***K.A. Abdul Jaleel v. T.A. Shahida***[9], while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: (SCC p. 170, para 10)

> *"The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."*

13. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue

6 (1978) 4 SCC 70

7 (2005) 3 SCC 636

8 2013 (3) SCALE 561

9 (2003) 4 SCC 166

haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

14. While dealing with the relevant date of grant of maintenance, in ***Shail Kumari Devi and another v. Krishan Bhagwal Pathak alias Kishun B. Pathak***[10], the Court referred to the Code of Criminal Procedure (Amendment) Act, 2001 (Act 50 of 2001) and came to hold that : (SCC p. 639, para 21)

> *"21. ... even after the amendment of 2001, an order for payment of maintenance can be paid by a court either from the date of order or when express order is made to pay maintenance from the date of application, then the amount of maintenance may be paid from that date, i.e., from the date of application."*

The Court referred to the decision in ***Krishna Jain v. Dharam Raj Jain***[11] wherein it has been stated that: (*Shail Kumari Devi case*[10], SCC p. 645, para 37)

> *"37. ... to hold that, normally maintenance should be made payable from the date of the order and not from the date of the application unless such order is backed by reasons would amount to inserting something more in the sub-section which the legislature never intended. The High Court had observed that it was unable to read in sub-section (2) laying down any rule to award maintenance from the date of the order or that the grant from the date of the application is an exception."*

The High Court had also opined that whether maintenance is granted from the date of the order or from the date of application, the Court is required to record reasons as required under sub-section (6) of Section 354 of the Code.

10 (2008) 9 SCC 632

11 1992 Cri LJ 1028 (MP)

15. After referring to the decision in Krishna Jain (supra), the Court adverted to the decision of the High Court of Andhra Pradesh in ***K. Sivaram v. K. Mangalamba***[12] wherein it has been ruled that the maintenance would be awarded from the date of the order and such maintenance could be granted from the date of the application only by recording special reasons. The view of the learned single Judge of the High Court of Andhra Pradesh stating that it is a normal rule that the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance was not accepted by this Court. Eventually, the Court ruled thus: (*Shail Kumari Devi case*[10], SCC p. 647, para 43)

> *"43. We, therefore, hold that while deciding an application under Section 125 of the Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however, are required to be recorded by the court. In our judgment, no such requirement can be read in sub-section (1) of Section 125 of the Code in absence of express provision to that effect."*

16. In the present case, as we find, there was enormous delay in disposal of the proceeding under Section 125 of the Code and most of the time the husband had taken adjournments and some times the court dealt with the matter showing total laxity. The wife sustained herself as far as she could in that state for a period of nine years. The circumstances, in our considered opinion, required grant of maintenance from the date of application and by so granting the High Court has not committed any legal infirmity. Hence, we concur with the order of the High Court. However, we direct, as prayed by the learned counsel for the respondent, that he may be allowed to pay the arrears along with the maintenance awarded at present in a phased manner. Learned counsel for the appellant did not object to such an arrangement being made. In view of the aforesaid, we direct that while paying the maintenance as fixed by the learned Family Court Judge per month by 5th of each succeeding month, the arrears shall be paid in a proportionate manner within a period of three years from today.

17. Consequently, the appeal, being devoid of merits, stands dismissed.

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12 1990 Cri LJ 1880 (AP)

2015 Supreme Court Cases OnLine SC 1229

Krishna Bhatacharjee Vs. Sarathi Choudhury

(Before Dipak Misra and Prafulla C. Pant. JJ.)

Krishna Bhatacharjee ... Appellant
Versus
Sarathi Choudhury and Anr. ... Respondents

Criminal Appeal No. 1545 of 2015 (@ SLP(Crl) No. 10223 OF 2014)
Decided on November 20, 2015

A. **Family and Personal Laws — Hindu Law — Hindu Marriage Act, 1955 — Ss. 10 and 13 — Decree for divorce and decree of judicial separation — Distinction — In a decree for divorce, there is a severance of status and the parties do not remain as husband and wife — However, in judicial separation, the relationship between husband and wife continues and the legal relationship continues as it has not been snapped**

B. **Criminal Law — Protection of Women from Domestic Violence Act, 2005 — Ss. 2(a) and 12 — Judicial separation — If wife still entitled to benefits under the Act — Marriage between wife and husband was solemnised on 27-11-2005 — Judicial separation was decreed on 22-5-2010 — Wife filed an application under S. 12 — Application rejected on the ground that claim for stridhan was not entertainable as she had ceased to be an "aggrieved person" under S. 2(a) — Held, in judicial separation, the relationship between husband and wife continues — Therefore, view that the parties having been judicial separated, the wife has ceased to be an "aggrieved person" is wholly unsustainable — Matter remitted to Magistrate to proceed with the application under S. 12 on merits**

C. **Criminal Law — Criminal Procedure Code, 1973 — S. 468 — Limitation — Applicability — Retention of stridhan by husband or family — If continuing offence — As long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under S. 12 of the Protection of Women from Domestic Violence Act, 2005 — Held, concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the stridhan and they remain the custodians — In the present case, wife claims that the husband had stopped payment of monthly maintenance from January 2010 — Wife filed application under S. 12 of 2005 Act on 22-5-2010 — Held, on facts, application**

was not barred by limitation — High court had fallen into a grave error by dismissing the application being barred by limitation

D. **Criminal Law — Criminal Procedure Code, 1973 — S. 468 — Limitation — Continuing offence — What is — Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all — Continuing offence arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with — Therefore, on every occasion that such disobedience or non — compliance occurs and reoccurs, there is the offence committed —- Determination of continuing offence depend upon the language of the statute which creates that offence, the nature of the offence and the purpose which is intended to be achieved by constituting the particular act as an offence**

The Judgment of the Court was delivered by

Dipak Misra, J. — Leave granted.

2. The appellant having lost the battle for getting her Stridhan back from her husband, the first respondent herein, before the learned Magistrate on the ground that the claim preferred under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'the 2005 Act') was not entertainable as she had ceased to be an "aggrieved person" under Section 2(a) of the 2005 Act and further that the claim as put forth was barred by limitation; preferred an appeal before the learned Additional Sessions Judge who concurred with the view expressed by the learned Magistrate, and being determined to get her lawful claim, she, despite the repeated non-success, approached the High Court of Tripura, Agartala in Criminal Revision No. 19 of 2014 with the hope that she will be victorious in the war to get her own property, but the High Court, as is perceivable, without much analysis, declined to interfere by passing an order with Spartan austerity possibly thinking lack of reasoning is equivalent to a magnificent virtue and that had led the agonised and perturbed wife to prefer the present appeal, by special leave.

3. Prior to the narration of facts which are essential for adjudication of this appeal, we may state that the 2005 Act has been legislated, as its Preamble would reflect, to provide for more effective protection of the rights of the women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The 2005 Act is a detailed Act. The dictionary clause of the 2005 Act, which we shall advert to slightly

at a later stage, is in a broader spectrum. The definition of "domestic violence" covers a range of violence which takes within its sweep "economic abuse" and the words "economic abuse", as the provision would show, has many a facet.

4. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts where under the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. It should be borne in mind that helpless and hapless "aggrieved person" under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct. The principle "justice to the cause is equivalent to the salt of ocean" should be kept in mind. The court of law is bound to uphold the truth which sparkles when justice is done. Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence.

5. Presently to the narration of the facts. The marriage between the appellant and the respondent No. 1 was solemnised on 27.11.2005 and they lived as husband and wife. As the allegations proceed, there was demand of dowry by the husband including his relatives and, demands not being satisfied, the appellant was driven out from the matrimonial home. However, due to intervention of the elderly people of the locality, there was some kind of conciliation as a consequence of which both the husband and the wife stayed in a rented house for two months. With the efflux of time, the husband filed a petition seeking judicial separation before the Family Court and eventually the said prayer was granted by the learned Judge, Family Court. After the judicial separation, on 22.5.2010 the appellant filed an application under Section 12 of the 2005 Act before the Child Development Protection Officer (CDPO), O/O the District Inspector, Social Welfare & Social Education, A.D. Nagar, Agartala, Tripura West seeking necessary help as per the provisions contained in the 2005 Act. She sought seizure of Stridhan articles from the possession of the husband. The application which was made before the CDPO was forwarded by the said authority to the learned Chief Judicial Magistrate, Agartala Sadar, West Tripura by letter dated 1.6.2010. The learned Magistrate issued notice to the respondent who filed his written objections on 14.2.2011.

6. Before the learned Magistrate it was contended by the respondent that the application preferred by the wife was barred by limitation and that she could not have raised claim as regards Stridhan after the decree of judicial separation passed by the competent court. The learned Magistrate taking into consideration the admitted fact that respondent and the appellant had entered into wedlock treated her as an "aggrieved person", but opined that no "domestic relationship" as defined under Section 2(f) of the 2005 Act existed between the parties and, therefore, wife was not entitled to file the application under Section 12 of the 2005 Act. The learned Magistrate came to hold that though the parties had not been divorced but the decree of judicial separation would be an impediment for entertaining the application and being of this view, he opined that no domestic relationship subsisted under the 2005 Act and hence, no relief could be granted. Be it stated here that before the learned Magistrate, apart from herself, the appellant examined three witnesses and the husband had examined himself as DW-1. The learned Magistrate while dealing with the maintainability of the petition had noted the contentions of the parties as regards merits, but has really not recorded any finding thereon.

7. The aggrieved wife preferred criminal appeal No. 6(1) of 2014 which has been decided by the learned Additional Sessions Judge, Agartala holding, inter alia, that the object of the 2005 Act is primarily to give immediate relief to the victims; that as per the decision of this Court in ***Inderjit Singh Grewal v. State of Punjab***[1] that Section 468 of the Code of Criminal Procedure applies to the proceedings under the 2005 Act and, therefore, her application was barred by time. Being of this view, the appellate court dismissed the appeal.

8. On a revision being preferred, the High Court, as is demonstrable from the impugned order, after referring to the decision in Inderjit Singh Grewal (supra), has stated that the wife had filed a criminal case under Section 498(A) IPC in the year 2006 and the husband had obtained a decree of judicial separation in 2008, and hence, the proceedings under the 2005 Act was barred by limitation. That apart, it has also in a way expressed the view that the proceedings under the 2005 Act was not maintainable.

9. In our prefatory note, we have stated about the need of sensitive approach to these kinds of cases. There can be erroneous perception of law, but as we find, neither the learned Magistrate nor the appellate court nor the High Court has made any effort to understand and appreciate the stand of the appellant. Such type of cases and at such stage should not travel to this Court. We are compelled to say so as we are of

1 (2011) 12 SCC 588

the considered opinion that had the appellate court and the High Court been more vigilant, in all possibility, there could have been adjudication on merits. Be that as it may.

10. The facts that we have enumerated as regards the "status of the parties", "judicial separation" and "the claim for Stridhan" are not in dispute. Regard being had to the undisputed facts, it is necessary to appreciate the scheme of the 2005 Act. Section 2(a) defines "aggrieved person" which 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 "domestic relationship" which 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(g) defines the term "domestic violence" which has been assigned and given the same meaning as in Section 3. Sub-section (iv) of Section 3 deals with "economic abuse". As in the facts at hand, we are concerned with the "economic abuse", we reproduce Section 3(iv) which reads as follows:-

> ***"Section 3. Definition of domestic violence.***
>
> *(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."

11. Section 8(1) empowers the State Government to appoint such number of Protection Officers in each district as it may consider necessary and also to notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under the 2005 Act. The provision, as is manifest, is mandatory and the State Government is under the legal obligation to appoint such Protection Officers. Section 12 deals with application to Magistrate. Sub-sections (1) and (2) being relevant are reproduced below:-

"Section 12. Application to Magistrate.-(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act: Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent: Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off."

12. Section 18 deals with passing of protection orders by the Magistrate. Section 19 deals with the residence orders and Section 20 deals with monetary reliefs. Section

28 deals with procedure and stipulates that all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. Section 36 lays down that the provisions of the 2005 Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

13. Having scanned the anatomy of the 2005 Act, we may now refer to a few decisions of this Courts that have dealt with the provisions of the 2005 Act. In ***V.D. Bhanot v. Savita Bhanot***[2] the question arose whether the provisions of the 2005 Act can be made applicable in relation to an incident that had occurred prior to the coming into force of the said Act. Be it noted, the High Court had rejected the stand of the respondent therein that the provisions of the 2005 Act cannot be invoked if the occurrence had taken place prior to the coming into force of the 2005 Act. This Court while dealing with the same referred to the decision rendered in the High Court which after considering the constitutional safeguards under Article 21 of the Constitution vis-à-vis the provisions of Sections 31 and 33 of the 2005 Act and after examining the Statement of Objects and Reasons for the enactment of the 2005 Act, had held that it was with the view of protecting the rights of women under Articles 14, 15 and 21 of the Constitution that Parliament enacted the 2005 Act 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 and further that a petition under the provisions of the 2005 Act 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. After analyzing the verdict of the High Court, the Court concurred with the view expressed by the High Court by stating thus:-

> *"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."*

2 (2012) 3 SCC 183

14. In ***Saraswathy v. Babu***[3] a two-Judge Bench, after referring to the decision in *V.D. Bhanot* (supra), reiterated the principle. It has been held therein:-

> *"We are of the view that the act of the respondent husband squarely comes within the ambit of Section 3 of the DVA, 2005, which defines "domestic violence" in wide terms. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the DVA, 2005 cannot be taken into consideration while passing an order. This is a case where the respondent husband has not complied with the order and direction passed by the trial court and the appellate court. He also misleads the Court by giving wrong statement before the High Court in the contempt petition filed by the appellant wife. The appellant wife having being harassed since 2000 is entitled for protection order and residence order under Sections 18 and 19 of the DVA, 2005 along with the maintenance as allowed by the trial court under Section 20(1)(d) of the DVA, 2005. Apart from these reliefs, she is also entitled for compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent husband. Therefore, in addition to the reliefs granted by the courts below, we are of the view that the appellant wife should be compensated by the respondent husband. Hence, the respondent is hereby directed to pay compensation and damages to the extent of Rs 5,00,000 in favour of the appellant wife."*

15. In the instant case, as has been indicated earlier, the courts below as well as the High Court have referred to the decision in Inderjit Singh Grewal (supra). The said case has to be understood regard being had to the factual exposè therein. The Court had referred to the decision in ***D. Velusamy v. D. Patchaiammal***[4] wherein this Court had considered the expression "domestic relationship" under Section 2(f) of the Act and judgment in Savitaben ***Somabhai Bhatiya v. State of Gujarat***[5] and distinguished the said judgments as those cases related to live-in relationship without marriage. The Court analyzing the earlier judgments opined that the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage. The said judgments were distinguished on facts as those cases related to live-in relationship without marriage. The Court opined that the parties therein had got married and the decree of the civil court for divorce subsisted and that apart a suit to declare the said judgment and

3 (2014) 3 SCC 712

4 (2010) 10 SCC 46

5 (2005) 3 SCC 636

decree as a nullity was still pending consideration before the competent court. In that background, the Court ruled that:-

> *"In the facts and circumstances of the case, the submission made on behalf of Respondent 2 that the judgment and decree of a civil court granting divorce is null and void and they continued to be the husband and wife, cannot be taken note of at this stage unless the suit filed by Respondent 2 to declare the said judgment and decree dated 20-3-2008 is decided in her favour. In view thereof, the evidence adduced by her particularly the record of the telephone calls, photographs attending a wedding together and her signatures in school diary of the child cannot be taken into consideration so long as the judgment and decree of the civil court subsists. On a similar footing, the contention advanced by her counsel that even after the decree of divorce, they continued to live together as husband and wife and therefore the complaint under the 2005 Act is maintainable, is not worth acceptance at this stage."*
>
> *[Emphasis supplied]*

16. It may be noted that a submission was advanced by the wife with regard to the applicability of Section 468 CrPC. While dealing with the submission on the issue of limitation, the Court opined:-

> *"..... in view of the provisions of Section 468 CrPC, that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Sections 28 and 32 of the 2005 Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006 which make the provisions of CrPC applicable and stand fortified by the judgments of this Court in* ***Japani Sahoo v. Chandra Sekhar Mohanty,*** *(2007) 7 SCC 394, and* ***NOIDA Entrepreneurs Assn. v. NOIDA,*** *(2011) 6 SCC 508."*

17. As it appears, the High Court has referred to the same but the same has really not been adverted. In fact, it is not necessary to advert to the said aspect in the present case.

18. The core issue that is requisite to be addressed is whether the appellant has ceased to be an "aggrieved person" because of the decree of judicial separation. Once the decree of divorce is passed, the status of the parties becomes different, but that is not so when there is a decree for judicial separation. A three-Judge Bench in ***Jeet Singh and Others Vs. State of U.P.***[6] though in a different context, adverted to the

6 (1993) 1 SCC 325

concept of judicial separation and ruled that the judicial separation creates rights and obligations. A decree or an order for judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage. It affords an opportunity for reconciliation and adjustment. Though judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy and the parties can live keeping their status as wife and husband till their lifetime.

19. In this regard, we may fruitfully refer to the authority in ***Hirachand Srinivas Managaonkar v. Sunanda***[7] wherein the issue that arose for determination was whether the husband who had filed a petition seeking dissolution of the marriage by a decree of divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 can be declined relief on the ground that he had failed to pay maintenance for his wife and daughter despite an order of the court. The husband was appellant before this Court and had filed an application under Section 10 of the Hindu Marriage Act, 1955 for seeking judicial separation on the ground of adultery on the part of the appellant. Thereafter, the appellant presented the petition for dissolution of marriage by decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of more than one year after passing of the decree for judicial separation. The stand of the wife was that the appellant having failed to pay the maintenance as ordered by the court, the petition for divorce filed by the husband was liable to be rejected inasmuch he was trying to get advantage of his own wrong for getting the relief. The High Court accepted the plea of the wife and refused to grant the prayer of the appellant seeking divorce. It was contended before this Court that the only condition for getting divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 is that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of the decree for judicial separation in a proceeding to which both the spouses are parties. It was urged that if the said condition is satisfied the court is required to pass a decree of divorce. On behalf of the wife, the said submissions were resisted on the score that the husband had been living in continuous adultery even after passing of the decree of judicial separation and had reasonably failed to maintain the wife and daughter. The Court proceeded to analyse Section 13(1-A)(i) of the Hindu Marriage Act, 1955. Analysing the provisions at length and speaking about judicial separation, it expressed that after

7 (2001) 4 SCC 125

the decree for judicial separation was passed on the petition filed by the wife it was the duty of both the spouses to do their part for cohabitation. The husband was expected to act as a dutiful husband towards the wife and the wife was to act as a devoted wife towards the husband. If this concept of both the spouses making sincere contribution for the purpose of successful cohabitation after a judicial separation is ordered then it can reasonably be said that in the facts and circumstances of the case the husband in refusing to pay maintenance to the wife failed to act as a husband. Thereby he committed a "wrong" within the meaning of Section 23 of the Act. Therefore, the High Court was justified in declining to allow the prayer of the husband for dissolution of the marriage by divorce under Section 13(1-A) of the Act.

20. And, the Court further stated thus:-

> *"... The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and readjustment. The decree may fall by a conciliation of the parties in which case the rights of the respective parties which float from the marriage and were suspended are restored. Therefore the impression that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."*

21. It is interesting to note that an issue arose whether matrimonial offence of adultery had exhausted itself when the decree for judicial separation was granted and, therefore, it cannot be said that it is a new fact or circumstance amounting to wrong which will stand as an obstacle in the way of the husband to obtain the relief which he claims in the divorce proceedings. Be it stated that reliance was placed on the decision of Gujarat High Court in ***Bai Mani v. Jayantilal Dahyabhai***[8]. This Court did not accept the contention by holding that living in adultery on the part of the husband is a continuing matrimonial offence, and it does not get frozen or wiped

8 AIR 1979 Guj 209

out merely on passing of a decree for judicial separation which merely suspends certain duties and obligations of the spouses in connection with their marriage and does not snap the matrimonial tie. The Court ruled that the decision of the Gujarat High Court does not lay down the correct position of law. The Court approved the principle stated by the Madras High Court in the case of ***Soundarammal v. Sundara Mahalinga Nadar***[9] in which a Single Judge had taken the view that the husband who continued to live in adultery even after decree at the instance of the wife could not succeed in a petition seeking decree for divorce and that Section 23(1)(a) barred the relief.

22. In view of the aforesaid pronouncement, it is quite clear that there is a distinction between a decree for divorce and decree of judicial separation; in the former, there is a severance of status and the parties do not remain as husband and wife, whereas in the latter, the relationship between husband and wife continues and the legal relationship continues as it has not been snapped. Thus understood, the finding recorded by the courts below which have been concurred by the High Court that the parties having been judicial separated, the appellant wife has ceased to be an "aggrieved person" is wholly unsustainable.

23. The next issue that arises for consideration is the issue of limitation. In the application preferred by the wife, she was claiming to get back her stridhan. Stridhan has been described as saudayika by Sir Gooroodas Banerjee in "Hindu Law of Marriage and Stridhan" which is as follows:-

> *"First, take the case of property obtained by gift. Gifts of affectionate kindred, which are known by the name of saudayika stridhan, constitute a woman's absolute property, which she has at all times independent power to alienate, and over which her husband has only a qualified right, namely, the right of use in times of distress."*

24. The said passage, be it noted, has been quoted ***Pratibha Rani v. Suraj Kumar and Another***[10]. In the said case, the majority referred to the stridhan as described in "Hindu Law" by N.R. Raghavachariar and Maine's "Treatise on Hindu Law". The Court after analyzing the classical texts opined that:-

> *"It is, therefore, manifest that the position of stridhan of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes — she may spend the whole of it or give it away at her own*

9 AIR 1980 Mad 294

10 (1985) 2 SCC 370

pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. It may be further noted that this right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt."

25. In the said case, the Court ruled:-

"... a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife nor can he burden her with losses of business by using the said property which was never intended by her while entrusting possession of stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under Section 406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only a custodian of the stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property."

26. The decision rendered in the said case was referred for a fresh look by a three-Judge Bench. The three-Judge Bench ***Rashmi Kumar (Smt) v. Mahesh Kumar Bhada***[11] while considering the issue in the said case, ruled that :-

"9. A woman's power of disposal, independent of her husband's control, is not confined to saudayika but extends to other properties as well. Devala says: "A woman's maintenance (vritti), ornaments, perquisites (sulka), gains (labha), are her stridhana. She herself has the exclusive right to enjoy it. Her husband has no right to use it except in distress…." In N.R. Raghavachariar's Hindu Law — Principles and Precedents, (8th Edn.) edited by Prof. S. Venkataraman, one of the renowned Professors of Hindu Law para 468 deals with "Definition of Stridhana". In para 469 dealing with "Sources of acquisition" it is stated that the sources of acquisition of property in a woman's possession are: gifts before marriage, wedding gifts, gifts subsequent to marriage etc. Para 470 deals with "Gifts to a maiden".

11 (1997) 2 SCC 397

Para 471 deals with "Wedding gifts" and it is stated therein that properties gifted at the time of marriage to the bride, whether by relations or strangers, either Adhiyagni or Adhyavahanika, are the bride's stridhana. In para 481 at page 426, it is stated that ornaments presented to the bride by her husband or father constitute her Stridhana property. In para 487 dealing with "powers during coverture" it is stated that saudayika meaning the gift of affectionate kindred, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure.

10. It is thus clear that the properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof."

27. After so stating the Court proceeded to rule that stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family. Further, the Court observed that it is always a question of fact in each case as to how the property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom. Thereafter, the Court adverted to the concept of entrustment and eventually concurred with the view in the case of Pratibha Rani (supra). It is necessary to note here that the question had arisen whether it is a continuing offence and limitation could begin to run everyday lost its relevance in the said case, for the Court on scrutiny came to hold that the complaint preferred by the complainant for the commission of the criminal breach of trust under Section 406 of the Indian Penal Code was within limitation.

28. Having appreciated the concept of Stridhan, we shall now proceed to deal with the meaning of "continuing cause of action". In ***Raja Bhadur Singh v. Provident***

Fund Inspector and Others[12] the Court while dealing with the continuous offence opined that the expression "continuing offence" is not defined in the Code but that is because the expressions which do not have a fixed connotation or a static import are difficult to define. The Court referred to the earlier decision in ***State of Bihar v. Deokaran Nenshi***[13] and reproduced a passage from the same which is to the following effect:-

> *"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."*

29. The Court further observed :-

> *"This passage shows that apart from saying that a continuing offence is one which continues and a non-continuing offence is one which is committed once and for all, the Court found it difficult to explain as to when an offence can be described as a continuing offence. Seeing that difficulty, the Court observed that a few illustrative cases would help to bring out the distinction between a continuing offence and a non-continuing offence. The illustrative cases referred to by the Court are three from England, two from Bombay and one from Bihar."*

30. Thereafter, the Court referred to the authorities and adverted to *Deokaran Nenshi* (supra) and eventually held:-

> *"The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence..."*

12 (1984) 4 SCC 222

13 (1972) 2 SCC 890

31. Regard being had to the aforesaid statement of law, we have to see whether retention of stridhan by the husband or any other family members is a continuing offence or not. There can be no dispute that wife can file a suit for realization of the stridhan but it does not debar her to lodge a criminal complaint for criminal breach of trust. We must state that was the situation before the 2005 Act came into force. In the 2005 Act, the definition of "aggrieved person" clearly postulates about the status of any woman who has been subjected to domestic violence as defined under Section 3 of the said Act. "Economic abuse" as it has been defined in Section 3(iv) of the said Act has a large canvass. Section 12, relevant portion of which have been reproduced hereinbefore, provides for procedure for obtaining orders of reliefs. It has been held in *Inderjit Singh Grewal* (supra) that Section 498 of the Code of Criminal Procedure applies to the said case under the 2005 Act as envisaged under Sections 28 and 32 of the said Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006. We need not advert to the same as we are of the considered opinion that as long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act. We are disposed to think so as the status between the parties is not severed because of the decree of dissolution of marriage. The concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the stridhan and they remain the custodians. For the purpose of the 2005 Act, she can submit an application to the Protection Officer for one or more of the reliefs under the 2005 Act. In the present case, the wife had submitted the application on 22.05.2010 and the said authority had forwarded the same on 01.06.2010. In the application, the wife had mentioned that the husband had stopped payment of monthly maintenance from January 2010 and, therefore, she had been compelled to file the application for stridhan. Regard being had to the said concept of "continuing offence" and the demands made, we are disposed to think that the application was not barred by limitation and the courts below as well as the High Court had fallen into a grave error by dismissing the application being barred by limitation.

32. Consequently, the appeal is allowed and the orders passed by the High Court and the courts below are set aside. The matter is remitted to the learned Magistrate to proceed with the application under Section 12 of the 2005 Act on merits.

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ARTICLES & LECTURES

WOMEN EMPOWERMENT AND GENDER JUSTICE*

The issue of gender justice and women empowerment has been a concern in many nations and in many an arena for some centuries. Though there has been formal removal of institutionalized discrimination, yet the mindset and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of indignity and prejudice. The malady sometimes pounces with ungenerous monstrosity giving a free play to the inferior endowments of nature in a man thereby making the whole concept a ridicule, destabilising the entire edifice. The recent incident in the Capital of the Nation not only exhibits how such treatment is basically an anathema to the concept of gender justice but also exposes the barbaric mindset annihilating the values of basic civilization. The days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should be a matter of history. Gender equality and women empowerment are the call of the day and attempts are to be made to achieve satisfactory results. Everybody should be prepared to fight for the idea and actualize the conceptual vision in practicality.

Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the rights of women and claiming equal treatment. Initially, in the West, it was a fight to get the right to vote and the debate was absolutely ineffective and, in a way, sterile. In 1792, in England, Mary Wollstonecraft in "A Vindication of the Rights of Women" advanced a spirited plea for claiming equality for, "the Oppressed half the Species". In 1869, "In Subjection of Women" John Stuart Mill stated, "the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other". On March 18, 1869 Susan B. Anthony proclaimed "Join the union girls, and together say, "Equal pay, for Equal work". The same personality again spoke in July 1871 : "Women must not depend upon the protection of man but must be taught to protect themselves".

Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American Man of Letters, stated "A sufficient measure of civilization is the influence of the good women". Speaking about the democracy in America, Alexa De Tocqueville wrote thus: "If I were asked .... to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women". One of the greatest Germans has said : The Eternal Feminine draws us upwards".

* on 15.06.2013 at Tamil Nadu State Judicial Academy during the Special Training Programme for all District Judges and Chief Judicial Magistrates

Lord Denning in his book ***Due Process of Law*** has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom - develop her personality to the full – as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

At one point, the U.N. Secretary General, Kofi Annan, has stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good govenance."

Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."

International Conventions and Treaties on Gender Equality

The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights.

The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this Convention and other Declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus: -

> *"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community... The World Conference on Human Rights urges governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection of human rights of women and the girl child."*

The Declaration on the Elimination of Violence Against Women (1993) is a comprehensive statement of international standards with regard to the protection of

women from violence. The Declaration sets out the international norms which States have recognized as being fundamental in the struggle to eliminate all forms of violence against women.

The other relevant International Instruments on Women are : (i) Universal Declaration of Human Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

Gender Justice on the Constitutional bedrock

The Preamble of our Constitution is "a key to open the mind of the makers of the Constitution which may show the general purpose for which they make the Constitution. It declares the rights and freedoms which the people of India intended to secure to all citizens. The Preamble begins with the words "WE, THE PEOPLE OF INDIA....." which includes men and women of all castes, religions, etc. It wishes to render "EQUALITY of status and or opportunity" to every man and woman. The Preamble again assures "dignity of individuals" which includes the dignity of women. On the basis of the Preamble, several important enactments have been brought into operation, pertaining to every walk of life – family, succession, guardianship and employment – which aim at providing the protecting the status, rights and dignity of women. Our compassionate Constitution, the Fountain Head of all laws, is gender sensitive.

The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. It is apt to refer to certain constitutional provisions which are significant in this regard:

(i) Equality before law ***(Article 14)***.

(ii) The State not to discriminate against any citizen on grounds only of religion, race caste, sex, place of birth or any of them ***(Article 15(i))***.

(iii) The State to make any special provision in favour of women and children ***(Article 15(3))***.

(iv) The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (Article 39(a)); and equal pay for equal work for both men and women ***(Article 39(d))***.

(v) The State to make provision for securing just and humane conditions of work and for maternity relief ***(Article 42)***.

(vi) The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation ***(Article 46)***.

(vii) To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women ***(Article 51(A)(e))***.

(viii) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat ***(Article 243 D(3))***.

(ix) Not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women ***(Article 243 D(4))***.

(x) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality ***(Article 243 T(3))***.

(xi) Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide ***(Article 243 T(4))***.

Reservation under Articles 243 D (3), D (4), T (3) and T (4) are meant to empower the woman politically.

Some Articles play a major role in the field of women empowerment. Article 15(3) empowers the State to make special provisions for them. The well-being of a woman is an object of public interest and it is to be achieved to preserve the strength and vigour of the race. This provision has enabled the State to make special statutory provisions exclusively for the welfare of women.

Article 39(a), requires the State to direct its policy towards securing that the citizens, men and women equally have the right to an adequate means of livelihood. Under Article 39(d), the State shall direct its policy towards securing equal pay for equal work for both men and women. This Article draws its support from Article 14 and 16 and its main objective is the building of a welfare society and an equalitarian social order in the Indian Union. To give effect to this Article, the Parliament has enacted the Equal Remuneration Act, 1976 which provides for payment of equal remuneration to men and women workers and prevents discrimination on the ground of sex. Further, Article 39(e) is aimed at protecting the health and strength of workers, both men and women.

A very important and useful provision for women's welfare and well-being is incorporated under Article 42 of the Constitution. It imposes an obligation upon the State to make provisions for securing just and humane conditions of work and for maternity relief. Some of the legislations which promoted the objectives of this Article are the Workmen's Compensation Act, 1923, the Employees State Insurance Act, 1948, the Minimum Wages Act, 1948, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965, and the like.

Presently to summarize the precedents and observations which have came from the constitutional philosophy.

In ***Valsamma Paul***[1], it has been ruled that human rights for women comprehends gender equality and it is also traceable to the Convention for Elimination of All Forms of Discrimination Against Women. Human rights for women, including girl child are inalienable, integral and an indivisible part of universal human rights. The full development of personality, fundamental freedoms and equal participation by women in political, social, economic and cultural life are held to be concomitants for national development, social and family stability and growth—cultural, social and economical. All forms of discrimination on grounds of gender are violative of fundamental freedoms and human rights.

Conferment of equal status on women apart from being a constitutional right has been recognized as a human right. In ***Bodhisattwa Gautam***[2], the Court observed that women have the right to be respected and treated as equal citizens. Accentuating on the concept, it proceeded to state thus: -

> *"9. ...Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and*

1 (1996) 3 SCC 545 : 1996 SCC (L&S) 772

2 (1996) 1 SCC 490

wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world."

In ***Kharak Singh***[3], the Court has recognized that a person has complete rights of control over his body organs and his 'person' under Article 21. It can also said to be including the complete right of a woman over her reproductive organs.

In ***Chandrima Das***[4], - it was case of gang-rape of a Bangladeshi national by the employees of the Indian Railway in a room at Yatriniwas at Howrah Station. These employees managed the Yatriniwas, the Government contended that it could not be held liable under the law of torts as the offence was not committed during the course of official duty. However, the Court did not accept this argument and stated that the employees of Union of India, who are deputed to run the railways and to manage the establishment, including the Railway Stations and Yatrinivas are essential components of the government machinery which carries on the commercial activity. If any such employee commits an act of tort, the Union Government of which they are the employees can, subject to other legal requirement being satisfied be held vicariously liable in damages to the person wronged by those employees. The victim was awarded by the Court with a compensation of Rs.10 lakhs for being gang raped in Yatrinivas of Railways. Since the right is available to non-citizens also, the reach of the right is very wide.

In ***Vishakha***[5], the Court took a serious note of the increasing menace of sexual harassment at workplace and elsewhere. Considering the inadequacy of legislation on the point, the Court defined sexual harassment and laid down instruction for the employers and thereafter the Court observed as under :

"Each incident of sexual harassment of woman at workplace results in violation of fundamental rights of "Gender Equality" and the "Right to Life and Liberty".

Fundamental Duties towards women enshrined in the Constitution

Article 51-A under Part IV-A of the Constitution of India lays down certain Fundamental Duties upon every citizen of India which were added by the Forty Second

3 AIR 1963 SC 1295

4 (2000) 2 SCC 465

5 AIR 1997 SC 301

Amendment of the Constitution in 1976. The later part of Clause (e) of Article 51-A, which relates to men, given a mandate and imposes a duty on Indian citizens "to renounce practices derogatory to the dignity of women". The duties under Article 51-A are obligatory on citizens, but it should be invoked by the courts while deciding cases and also should be observed by the State while making statutes and executing laws.

Protection of Property Rights and Equal Treatment in Employment

Economic empowerment is a necessary fulcrum of empowerment. The Constitutional Courts in many an authority have laid emphasis on said conception and interpreted the provisions to elevate the status of women and to empower them.

In ***Thota Manikayamma***[6] the Court, while interpreting Section 14 of the Hindu Succession Act, 1956 converting the women's limited ownership of property into full ownership, has observed as follows:-

> *"21..... Article 15(3) relieves from the rigour of Article 15(1) and charges the State to make special provision to accord to women socio-economic quality ..... It would mean that the court would endeavour to give full effect to legislative and constitutional vision of socio-economic equality to female citizen by granting full ownership or property to a Hindu female. As a fact Article 15(3) as a forerunner to common code does animate to make law to accord socio-economic equality to every female citizen of India irrespective of religion, race, caste or religion."*

When the matter relating to mother as natural guardian was questioned, the Court held that relegation of mother to inferior position to act as a natural guardian is violation of Articles 14 and 15 and hence, the father cannot claim that he is the only natural guardian. The guardianship right of women has undergone a sea change by this interpretation given by the Court in ***Gita Hariharan***.[7]

In ***Gayatri Devi Pansari***[8] The Court has also upheld an Orissa Government Order reserving 30% quota for women in the allotment of 24 hours medical stores as part of self-employment scheme. Thus, the language of Article 15 (3) is in absolute terms and does not appear to restrict in any way the nature or ambit of special provisions which the State may make in favour of women or children.

6 (1991) 4 SCC 312

7 AIR 1999 SC 1149

8 AIR 2000 SC 1531 : (2000) 4 SCC 221

In this context it is useful to refer to the decision rendered in the case of ***Sellammal***[9], wherein the Court held that the Hindu Marriage Act will override the U.P. Jamindari Abolition and Land Reforms Act and also held that exclusive right to male succession may be suspended till female dependent adopt another mode of livelihood.

Many a time question arises with regard to rights of women qua property. Various High Courts have interpreted Section 27 of the Hindu Marriage Act in a different manner. As far as the High Court of Madhya Pradesh is concerned the Court in the case of ***Ashok Kumar Chopra***[10], held that 'Stridhan' is the property of the wife in her individual capacity and the husband is merely trustee of that property and the husband is liable to return that property and value thereof under the substantive law and in equity. The power has been conferred by the M.P. High Court on the matrimonial courts in respect of certain properties.

In this regard it is necessary to refer that Hindu women who were not entitled to right to property have been given equal share along with male heir and they have presently been given equal rights.

The concept of equality is the bedrock of gender justice. In the case of ***Neera Mathur***[11], a female candidate was required to furnish information about her menstrual period, last date of menstruation, pregnancy and miscarriage. When the matter came before the Court, their Lordships held that such declarations were improper. The Court directed that the Corporation would do well to delete such column in the declaration.

In the case of ***Gayatri Devi Pansari***[12], the Court, while setting aside the decision of the High Court, ruled thus:

> *"Otherwise, by the mere fact of any lapse or omission on the part of the ministerial officers to identify a shop, the legitimate claims of a lady applicant could not be allowed to suffer defeating the very purpose and object of reservation itself. The view taken by the High Court has the consequence of overriding and defeating the laudable object and aim of the State Government in formulating and providing welfare measures for the rehabilitation of women by making them self-reliant by extending to them employment opportunities. Consequently, we are of the view that the High Court below ought not to have interfered with the selection of appellant for running the 24 hours' medical store in question."*

9 AIR 1977 SC 1265

10 AIR 1996 MP 226

11 AIR 1992 SC 392

12 (2000) 4 SCC 221

In ***Miss C.B. Muthamma, IFS***[13] the constitutional validity of Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 and Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961 was challenged before the Court. The impugned provision Rule 8(2) requires a woman member of the service to obtain permission of the Government in writing before her marriage is solemnized and at any time after the marriage, a woman member of the service may be required to resign from the service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. Further, Rule 18(4) also runs in the same prejudicial strain, which provides that no married woman shall be entitled as a right to be appointed to the service. The petitioner complained that under the guise of these rules, she had been harassed and was shown hostile discrimination by the Chairman, UPSC from the joining stage to the stage of promotion. The Court held that these Rules are in defiance of Articles 14, 16 and 21.

In ***Maya Devi***[14], the requirement that a married woman should obtain her husband's consent before applying for public employment was held invalid and unconstitutional. The Court observed that such a requirement is an anachronistic obstacle to women's equality.

At this juncture, it is noteworthy that in ***Associate Banks Officers Association***[15], wherein the Court held that women workers are in no way inferior to their male counterparts, and hence, there should be no discrimination on the ground of sex against women. In ***Yeshaswinee Merchant***[16], the Court has held that the twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. The Constitution does not prohibit the employer to consider sex while making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan.

The Court in ***Vijay Lakshmi***[17], has observed that Rules 5 and 8 of the Punjab University Calender, Vol. III providing for appointment of a lady principal in a women's or a lady teacher therein cannot be held to be violative of either Article 14 or Article 16 of the Constitution, because the classification is reasonable and it has a nexus with the object sought to be achieved. In addition, the State Government is empowered to make such special provisions under Article 15(3) of the Constitution. This power is not restricted in any manner by Article 16.

13 AIR 1979 SC 1858 : (1979) 4 SCC 260

14 (1986) 1 SCR 743

15 AIR 1998 SC 32

16 (2003) 6 SCC 277

17 AIR 2003 SC 3331

In ***Municipal Corporation of Delhi***[18], the Court held that the benefits under the Maternity Benefits Act, 1961, extend to employees of the Municipal Corporation who are casual workers or workers employed on daily wage basis. Upholding the claim of non-regularised female workers for maternity relief, the Court has stated:

> *"Since Article 42 specifically speaks of 'just and human conditions of work' and 'maternity' relief, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of."*

In ***Nargesh Meerza***[19] the Air India and Indian Airlines Regulations were challenged as violative of Article 14. Regulation 46 provided that an air hostess was to retire from service upon attaining the age of 35 years or on marriage if it took place within four years of her joining service or on first pregnancy, whichever occurred earlier. Regulation 47 empowered the Managing Director, at a time beyond the age of retirement, upto the age of 45 years, if an air hostess was found medically fit. The Court struck down the Regulation providing for retirement of the air hostess on her first pregnancy, as unconstitutional, void and violative of Article 14. The Court explained that the Regulation did not prohibit marriage after four years of joining service and if an air hostess after having fulfilled the first condition became pregnant, there was no reason why pregnancy should stand in the way of her continuing in service. After utilizing her service for four years, to terminate her service if she became pregnant, court said, amounted to compelling the poor air hostess, not to have any children. If thus amounted to interfere with and divert the ordinary course of human nature. It was held not only a callous and cruel act but an open insult to Indian womanhood. Court also said that it was not only manifestly unreasonable and arbitrary but contained the equality of unfairness and exhibited naked despotism and was, therefore, clearly violative of Article 14.

M/s Mackunnon Mechenize and co.[20], - the question involved in the said case was getting of equal pay for equal work. In the said context the Court ruled that when lady stenographers and male stenographers were not getting equal remuneration that was discriminatory and any settlement in that regard did not save the situation. The Court also expressed the view that discrimination between male stenographers and lady stenographers was only on the ground of sex and that being not permissible the employer was bound to pay the same remuneration to both of them when they were doing practically the same kind of work.

18 AIR 2000 SC 1274
19 AIR 1981 SC 1829
20 AIR 1987 SC 1281

Reservation of seats for women in election to local bodies and the concept of empowerment:

The Parliament has succeeded in its efforts to provide for reservation of seats for women in elections to the Panchayat and the Municipalities. Reservation of seats for women in Panchayats and Municipalities have been provided in Article 243D and 243T of the Constitution of India. Parts IX and IXA have been added to the Constitution by the 73rd and 74th Amendment Acts with Articles 243, 243A to 243D and Articles 243P to 243ZG. According to Article 243D(3), "not less than one-third, (including the number of seats reserved for women belonging to the Scheduled Castes and Scheduled Tribes) of the total number of seats to be filled up by direct election in every Panchayat, shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat. Article 243T(3) of the Constitution provides similar provisions for reservation of seats for women in direct election in the government. There are also provisions in the State enactment, by virtue of the constitutional mandate, to reserve the office of Chairperson and the Presidents in certain Municipal Corporations and Municipalities, Zila Panchayats and Janpad Panchayats for women. It is noteworthy to state here that under the Consumer Protection Act, there is a provision that one of the members shall be a woman and under the Family Court Act, preference is given to women for appointment. Sometimes question arises as to what extent equality is to be extended. The people who put this elementary question forget or deliberately do so that all men are born equal; and the division of bifurcation by the society between man and woman is the craftsmanship of male chauvinism. It has to be borne in mind that in the absence of equality of gender, human rights remain in an inaccessible realm. In most of the nations women are ascribed a secondary role. The secondary role has to be metamorphosed to the primary one to bring woman at the equal stratum. To achieve so, a different outlook in law has to be perceived. The perceptual shift is absolutely essential, in a way mandatory. For this reason, various provisions have been engrafted in the Constitution to confer some special and equal rights on women.

Presently, it is essential to sit in a time machine and penetrate to the past.

In ***T. Sudhakar Reddy***[21], the petitioner challenged the validity of Section 31(1)(a) of the Andhra Pradesh Cooperative Societies Rules, 1964. These provisions provide for nomination of two women members by the Registrar to the Managing Committee of the Cooperative Societies, with a right to vote and to take part in the meetings of the committee. These provisions were upheld in the interest of women's participation in

21 1993 Supp. (4) SCC 439

cooperative societies and opined that it will be in the interest of the economic development of the country.

In ***P.B. Vijaya Kumar***[22], the legislation made by the State of Andhra Pradesh providing 30% reservation of seats for women in local bodies and in educational institutions was held valid by the Court and the power conferred upon the State under Article 15(3) is so wide which would cover the powers to make the special legal provisions for women in respect of employment or education. This exclusive power is an integral part of Article 15(3) and thereby, does not override Article 16 of the Constitution.

In ***Rakesh Kumar Gupta***[23], the Court while concurring with the view taken by the High Court of Allahabad in respect of reservation of 50% passed in favour of female candidate has opined thus: -

> *"14. The Division Bench took the view that Article 15(3) of the Constitutional enables the State Government to make special provision for women and children notwithstanding the prohibition contained in Article 15(1). Particularly viewed in the background of the fact that a large number of young girls below the age of 10 years were taught in the primary school and recognizing that it would be preferable that such young girls are taught by women, the reservation of 50% of the posts in favour of the female candidates was held to be justified. The classification made was justified and cannot be styled as arbitrary or liable to be hit by the Article 14."*

In the State of Madhya Pradesh an amendment was brought into force in the M.P. Municipal Corporation Act, 1956 and the M.P. Municipalities Act, 1962 by enhancing the reservation in favour of women from 30% to 50% in municipal corporation and municipalities. The constitutional validity of the amended provisions was challenged on the backdrop of Articles 14 and 15 of the Constitution of India.

In ***Ashok Kumar Malpani***[24] the High Court, after adverting to the concept of reservation and the decisions relating to reservation in various fields, upheld the constitutional validity. In that context, the Bench observed:-

> *"The legislation, in our considered opinion, is a real deep inroad into encouraging the participation of women in the decision making process at the ground level of democracy. Women in India are required to participate more in a democratic set-up especially in the ground democratic polity. Not*

22 AIR 1995 SC 1648

23 AIR 2005 SC 2540

24 2009 (IV) MPJR 179 = AIR 2010 MP 64

for nothing, it has been said "educate a man and you educate an individual; educate a woman and you educate a family".

The colossal complaint made by the learned counsel for the petitioners that if women come into the arena of the decision making process, it will be amthema to the administrative set-up as the bureaucrats shall take over the administration in view of the inadequacies of women, in our considered opinion, is a premature thinking based on a priori notions and beyond the scope of constitutional tolerance. Democracy is a basic feature of our Constitution and it has to develop from the ground reality level. The participation of socially and educationally backward classes and women could really nurture and foster democracy in the country. Be it noted, though the issue of gender justice has been gaining ground in many nations and in many an area for some centuries and the traditional view of gender injustice has been given quite a quietus and treated as an event of bygone days, yet the malady still remains and deserved to be remedied.

It would not be inappropriate to state here that if the dynamics of women reservation are understood in proper perspective, it would be quite clear that the number of women representatives at various layers of democratic setup is really quite low.

It would not be inapposite to state that women have entered into the Indian Panchayat Raj Institutions by virtue of the Constitutional Amendment but their active participation in the decision making process in actuality remains at abysmal level. It is because their interest in the democratic setup of election has still not been accentuated for the simon pure reason that they have to negotiate and wrestle with the powerful members of the society. The submission of the learned counsel for the petitioners is that women are contesting in the election is of utmost significance and that would irrefragably exposit that they are conscious and there is no justification to marginalise the equality clause. We are of the view that participation in the election and losing the same can never be equated with the decision making process. One can only be a party to the decision making process when one is on the floor of the House as a representative and that is how the recognition of decision making process can be conferred on women. As the affidavit filed by the State would show their success in the election process is extremely low, we are disposed to think, the reservation, an act of special affirmation and a protective discrimination, is a warrant which has been done by the State Legislature in its wisdom. Therefore, the submission that such reservation is not necessary and, in fact, does tantamount to reverse reservation do not deserve acceptance.

It cannot be totally ostracised from the compartment of equality that unless law assists women in an accentuated manner, the basic tenet of the concept of equality would not be achieved and women will be put in the category of non-achievers.

In a democracy where Rule of Law governs, the democractic polity it can only be advanced in a cultivated society. It is absolutely imperative to have the help of women where they are given certain rights. The truth is self-evident and that is how the fathers of the Constitution had perceived it.

The High Court eventually ruled that Article 243T does not put a ceiling by using the terms 'not less than 1/3rd'. In fact, it prescribes for the minimum reservation but does not create any kind of impediment on the part of the State Legislature to enhance the percentage of reservation for women and that the stand of the petitioners to the effect that if the reservation of seats for women upto 50% is sustained, it will usher in bad governance as the bureaucratic setup would take up the entire policy making decision is totally baseless and, in fact, is absolutely premature.

Offences against women and issue of gender justice

Madhukar Narayan Mardikar[25] - The High Court observed that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a Government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any person to violate her as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.

In ***Ramdev Singh***[26], while emphasising that the Court should deal with cases of sexual offences sternly and severely, it has been observed that sexual violence apart from being a dehumanising act is an unlawful intrusion on the right of privacy and sanctity of a female. It has been further held that rape is a crime against basic human rights.

In ***Kundula Bala Subrahmaniam***[27], the Court gave some indications in dealing with the case of dowry related violence. The Court observed that such cases ought to be dealt with in a more realistic manner and criminals should not be allowed to escape on account of procedural technicalities or insignificant lacunae in the evidence and the courts are expected to be sensitive in cases involving crime against women.

25 (1996) 1 SCC 57

26 (2004) 1 SCC 421 : 2004 SCC (Cri) 307.

27 (1993) 2 SCC 684

In ***Stree Atyachar Virodhi Parishad***[28], The Court observed, "We are referring to these provisions only to emphasize that it is not enough if the legal order with the sanction above moves forward for protection of women and preservation of societal values. The criminal justice system must equally respond to the needs and notions of the society. The investigating agency must display a live concern. The Court must also display greater sensitivity to criminality and avoid on all courts 'soft justice'."

In ***Rupen Deo Bajaj***[29], the Court said that the offence under Section 354 IPC should not be treated lightly as it is quite a grave offence. In certain western countries privacy to person and even privacy to procreation are regarded as very sacrosanct rights and if this offence is studied in that prospect the offence would clearly show that it affects the dignity of women and, therefore, the accused of this offence, when proved, should be appropriately dealt with.

A judge should refrain himself from giving stigmatic observations on the character of the prosecutrix. It should be kept in mind that a finding recorded in this sphere is to be treated as irresponsible. A woman who is even acquainted to sexual intercourse has every right to refuse to submit herself to sexual intercourse as a woman is not a vulnerable object or prey for being sexually assaulted by any one. This is the view expressed by their Lordships of the Court in the case of ***Ganula Satya Murthy***[30]. It is appropriate to mention here that in the said case, the Court also observed that it is an irony that while we are celebrating women's rights in all spheres we show little or no concern for their honour. Their Lordships further observed that the Courts must deal with rape cases with utmost sensitivity and appreciate the evidence of the totality on the background of the entire case and not in isolation.

A.K. Chopra[31] – The accused-respondent tried to molest a woman employee (Secretary to Chairman of a Delhi based Apparel Export Promotion Council) Miss X, a clerk-cum-typist on 12th August, 1988 at Taj Hotel, Delhi. The respondent persuaded Mix X to accompany him while taking dictation from the Chairman, so that her typing was not found fault with. While Miss X was waiting in the room, the respondent taking advantage of the isolated place tried to sit too close to her and touched her despite her objections; and tried to molest her physically in the lift while coming to the basement, but she saved herself by pressing emergency button, which made the door lift open. In appeal of the case Court held that in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of case and not

28 (1989) 1 SCC 715

29 (1995) 6 SCC 194

30 AIR 1997 SC 1588

31 AIR 1999 SC 625

swayed away by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression 'molestation' or 'physical assault'.... The sexual harassment of a female employee at the place of work is incompatible with the dignity and honour of a female and need to be eliminated and that there can be no compromise with such violation.

Recently, in ***Jugendra Singh***[32] the Court, while commenting on rape and its consequences, observed thus:

> *49. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu. The cry of the collective has to be answered and respected and that is what exactly the High Court has done by converting the decision of acquittal to that of conviction and imposed the sentence as per law.*[33]

In Gurnaib Singh, decided on 10.5.2013, Court has opined that respect of a bride in her matrimonial home glorifies the solemnity and sanctity of marriage, reflects the sensitivity of a civilized society and, eventually, epitomizes her aspirations dreamt of in nuptial bliss. But, the manner in which sometimes the brides are treated in many a home by the husband, in-laws and the relatives creates a feeling of emotional numbness in the society. It is a matter of great shame and grave concern that brides are burnt or otherwise their life-sparks are extinguished by torture, both physical and mental, because of demand of dowry and insatiable greed and sometimes, sans demand of dowry, because of the cruelty and harassment meted out to the nascent brides treating them with total insensitivity destroying their desire to live and forcing them to commit suicide a brutal self-humiliation of "Life".

Offence of rape is regarded as one of the most heinous crimes. Every person's physical body is a temple in itself. No one has the right to encroach and create turmoil. When there is any kind of invasion or trespass, it offends one's right. The right of a woman to live in her physical frame with dignity is an epitomization of sacrosanctity. An

32 Jugendra Singh v. State of U.P., (2012) 6 SCC 297 : (2012) 3 SCC (Cri) 129.

33 Ibid., 311, para 49.

impingement or incursion creates a sense of trauma in the mind of the person. Not only does the body suffer but the mind also goes through such agony and tormentation that one may not be in a position to forget throughout her life. She becomes a different person in the eyes of the society for no fault of her. That apart the offence of rape is an offence which creates a dent in the social marrow of the collective and a concavity in the morality of the society. A sense of fear looms large and the menace is extremely arduous to cross over. The perversity ushers in a sense of despondency and mass melancholia. While dealing with offences of this nature a judge has to be exceedingly sensitive. A desensitized approach is not appreciated. It is the bounden duty of the judge to show greater sensitivity. The Judge should show careful attention and greater sensitivity as has been highlighted by the Court in the case of Mange Ram[34].

An aspect which needs to be stated here is that a woman who has been raped is not an accomplice. She is the victim of a carnal desire. In a case of rape, corroboration need not be searched for by the judge if in the particular circumstances of the case before him he is satisfied that it is safe to rely on the evidence of the prosecutrix. The evidence of the prosecutrix should be appreciated on the basis of the probability and conviction can be based solely on such testimony if her evidence is credible, unimpeachable and inspires confidence. There is no rule of law that her testimony can not be acted upon without corroboration in material particulars. If the prosecutrix is able to give a vivid account of how she was subjected to sexual harassment and the intercourse the same can be placed reliance upon and the conviction can be recorded. This is the view of the Court in the decisions rendered in the cases of ***Gurmeet Singh***[35], ***N.K***[36]. and ***Padam Lal Pradhan***[37].

In the case of ***Gurmeet Singh***[38], the Court observed as under :

> *"21. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecuterix as to the details of the rape The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not*

34 AIR 2000 SC 2798
35 (1996) 2 SCC 384
36 AIR 2000 SC 1812
37 (2000) 10 SCC 112
38 (1996) 2 SCC 384

sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the Court while every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility her version through cross-examination, the court must also ensure that cross-examination, is not made a means of harassment or causing humiliation of the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings, what shad been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as 'discrepancies and contradiction' in her evidence."

While dealing with this offence certain more decisions are also to be kept in mind so that they can be applied in the facts of the case. In the case of ***M.M. Mardikar***[39], it has been emphatically laid down that there is no rule of law of prudence requiring corroboration of the victims in a case of rape. Lack of corroboration by medical evidence, non-raising of alarm, no-evidence of showing resistance and such other ancillary factors. From these angles the prosecution is disbelieved or the Court arrives at the conclusion that there is consent. The Court in the case of ***Mange Ram***[40], has clearly laid down that if the prosecutrix submits her body under fear or terror the same would never amount to consent. In the said case their Lordships also held that in the absence of any violence to the body of the victim in all circumstances would not give rise to inference of consent. In this context, it is profitable to refer to the observation made in the case of. ***N.K.***[41], wherein the Court held that the absence of injuries on the person of the prosecutrix is no necessary to falsify the allegation or be regarded as an evidence of consent on the part of the prosecutrix. Their Lordships have further held that it would depend upon the facts and circumstances of each case. In the aforesaid case the statement of the father of the prosecutrix was treated to be admissible under Section 157 of the Evidence Act as her father's statement corroborating her testimony under section 8 of the said Act as evidence of her conduct. The Court laid stress on the testimony of the father keeping in view the tradition of the society where a father would not come to depose to jeopardise the prospects of marriage of his daughter.

At this stage, it is apposite to refer to a passage from the decision rendered in the case of ***Bharwada Bhoginibhai Hirjibhai***[42], wherein the Court observed thus:-

39 AIR 1991 SC 207
40 AIR 2000 SC 2798
41 AIR 2000 SC 1812
42 AIR 1983 SC 753

> *"Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society."*

The Court further proceeded to hold as under: -

> *"A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had even occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbors. She would face the risk of losing the love and respect of her own husband and near relatives and of her matrimonial home and happiness being shattered. If she is unmarried she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built in assurance, that the charge is genuine rather than fabricated."*

A victim of rape suffers from deathless shame. To acquit an accused because of loopholes in the prosecution would be adding insult to injury. In the case of defective investigation the court has to be circumspect in evaluating the evidence but it would not be correct in acquitting the accused for the said defect. If the courts pave that path it would tantamount to playing into the hands of the investigating officer, if the investigation has been designedly made defective. Another aspect which I intend to highlight is that as per law laid down by the court and also the provisions in the statute book the trial of a rape case is to be held in camera and it should be the duty of the Court to see that she is not harassed.

In ***Gyan Chand***[43], the Court reiterated the principle that minor inconsistencies should not be given weightage. In the said case the Court also emphasised that the Court should shoulder a great responsibility while considering a rape case and such cases must be considered with utmost sensitivity. The Court should examine the broader probabilities of the case and not get swayed away by minor contradictions.

43 AIR 2001 SC 2075

Another fact is delay in filing of FIR. In a case of rape it is dependent upon the facts of each case. The prosecuterix does not immediately rush to the Police Station to lodge and FIR. She has to overcome the trauma. There is consultation with the family members and a decision is taken. All these circumstances are to be kept in mind.

It is noticed that some judges unnecessarily give emphasis on the presence of spermatozoa in the victim's private parts. It is to be borne in mind that the definition of rape has a different connotation. A mild penetration would meet the ingredients of the crime. There may be several circumstances, which affect the presence of the spermatozoa, and hence, emphasis on the same is unwarranted.

Every trial Judge should be vigilant and alert. He should see to it that the trial is properly conducted and the prosecutrix is not unnecessarily harassed. In this context, one may profitably quote a line by Edmund Burke:

> *"A Judge is not placed in the high situation merely as a passive instrument of the parties. He has duty of his own, independent of them and that duty is to be investigate truth."*
>
> *In this regard reference to the observation of Lumpkin, J, in the case of Epps V. State is seemly : "Counsel seek only for their client's success, but the Judge must watch that justice triumphs."*

When one talks about gender equality one cannot be unobservant with regard to the dowry problem which has become an incurable menace to the society. One would not be very much incorrect to say that it has corroded the core and kernel of the society. Enactments have been made to check the evils of dowry. Definition has been given defining dowry death. Section 113(b) has been inserted in the Evidence Act raising presumption as to dowry death in certain circumstances. All force and energy should be exerted to repress and check the move of this despot. Sometimes it is felt that despite denunciation from all quarters the malignancy of dowry permeates. It appears to be wholly ubiquitous. While dealing with the offence relating to this sphere the Court has to adopt a realistic yardstick.

In this context, I may refer with profit to the reflection of a woman author who has spoken with quite a speck of sensibility :

"Dowry is an intractable disease for women,

a bed of arrow for annihilating self-respect,

but without the boon of wishful death."

In these lines the agony of the woman is writ large.

Court's concern in eve-teasing cases

In ***S. Samuthiram***[44] the Court observed that every citizen in this country has right to live with dignity and honour which is a fundamental right guaranteed under Article 21 of the Constitution of India. Sexual harassment like eve-teasing of women amounts to violation of rights guaranteed under Articles 14 and 15 as well. Eve-teasing today has become pernicious, horried and disgusting practice. Consequences of not curbing such a menace are at times disastrous. There are many instances where girls of young age are being harassed, which sometimes may lead to serious psychological problems and even committing suicide. The necessity of a proper legislation to curb eve-teasing is of extreme importance. Thereafter, taking note of the absence of effective uniform law, certain directions were issued to curtail the menace. The said directions include to depute plain-clothed female police officers in the precincts of bus-stands and stops, railway stations, metro stations, cinema theatres, shopping malls, parks, beaches, public service vehicles, places of worship, etc. so as to monitor and supervise incidents of eve-teasing. The persons in charge of educational institutions, places of worship, cinema theatres, railway stations, busstands have to take steps as they deem fit to prevent eve-teasing, to establish women helpline in various cities and towns and also to control eve-teasing in public service vehicles either by the passengers or the persons in charge of the vehicle.

Future Protection: Female foeticide

While dealing with violation of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994, apart from giving series of directions, emphasis was also made on practice of female foeticide in ***Voluntary Health Association of Punjab***[45]. In the said case it has been said that Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, ego-centric traditions, pervert perception of societal norms, and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.

44 (2013) 1 SCC 598.

45 2013 (3) SCALE 195

Further discussing about the repercussion of female foeticide it has been opined that every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it.

Reference was made to the scriptural comments and postulates. The Court referred to three Shlokas that have been referred in ***Nikku Ram and others***[46], wherein the judgment commenced with the line

''यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता:''

["Yatra naryastu pujyante ramante tatra dewatah"] (where woman is worshipped, there is abode of God). The second line being significant was reproduced. It is as follows: -

''यत्र तास्तु न पूजयन्ते सर्वास्तत्राफला: क्रिया:''

[Yatra tastu na pujyante sarvastatraphalah kriyah]

A free translation of the aforesaid is reproduced below:-

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

Two other references that were given are stated below: -

''भतृभातृपितृज्ञातिश्रचश्रूश्रयशुरदेवरै:।
बन्धुविष्च स्त्रिय: पूज्या: भूषणाच्छादनाशने:।।''

[Bhaartr bhratr pitrinjnati swasruswasuradevarain[
[Bandhubhsca striyah pujyah bhusnachhandanasnaih||]

A free translation of the aforesaid is as follows:-

"The women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

Yet again, the sagacity got reflected in following lines: -

''अतुलं यत्र ततेज: सर्वदेवशरीरजम।
एकस्थं तदभून्नारी व्यासलोकत्रयं त्विष।।''

46 (1995) 6 SCC 219

[Atulam yatra tattejah sarvadevasarirajam Ekastham
tadabhunnari vyaptalokatryam tvisa]

A free translation of the aforesaid is reproduced below:-

"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman."

In ***Vishal Jeet v. Union of India***[47] the Court in Public Interest Litigation, after issuing certain directions, observed thus: -

> *"We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, devadasi system and jogin tradition and will also at the same time protect and safeguard the interests of the children by preventing the sexual abuse and exploitation."*

Conclusion

It is common knowledge that despite constitutional safeguards, statutory provisions and plethora of pronouncements to support the cause of equality of women, changes in social attitudes and institutions have not significantly occurred. But, there has to be total optimism to achieve the requisite goal. It is necessary to accelerate this process of change by deliberate and planned efforts so that the pernicious social evil of gender inequality is buried deep in its grave. Laws written in black and white are not enough to combat the evil. A socially sensitive judge is indeed a better statutory armour in cases of crimes against women than penal statutes.

Awakening of the collective consciousness is the need of the day. A problem as multifaceted as women's self-actualization is too important to be left to a single section of the society. This responsibility has to be shared by the State, community organizations, legislators who frame the laws and the judiciary which interprets the Constitution and other laws in order to give a stimulus to the legal reform in the field of gender justice and to usher in the new dawn of freedom, dignity and opportunity for both the sexes equally.

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47 AIR 1990 SC 1412.

Relationship between Constitutional Concepts and Criminal Jurisprudential Perspective*

Our glorious and organic Constitution fundamentally defines the character of the State with the avowed purpose of sustenance and endurance on certain paradigms, norms and parameters regard being had to the central idea of good governance in a Welfare Republic having justice placed on Constitutional principles at its zenith. Every Constitution essentially consists of such principles which determine the totality of the constitutional order and make up the "spirit of the Constitution." The core of the Constitution is the conscience of the Constitution and if it is destroyed, then the entire Constitution is wiped out. Dispensation of justice as requisite in law is an essential constitutional value and judiciary at all levels is wedded to the same. Therefore, there has to be a pledge, a sacred one, to live upto the challenges living with solidity and never having to bow down.

Certain fundamental elements of Constitutional Rule are: (i) that it is rule in the public or general interest, (ii) it is lawful rule in the sense that the government is carried on by constitutional principles and not by arbitrary action and (iii) that it means the government of citizens.

The Preamble of our Constitution and every word of it, is sacrosanct. Some may feel reproduction of the Preamble in an address would be pedestrian, yet, I with all devotion at my command shall quote it, for it vibrates our Constitutional spiritualism. It not only introduces one to the Constitutional philosophy and morality but also opens the gate for every citizen to pave the path of Constitutional religion. Hence, I quote:-

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [1][SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the [2][unity and integrity of the Nation];

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* Lecture delivered by Honble Lordship at Tamilnadu Judical Academy on 14.6.2014

1 Subs. By the Constitution (Forty-second Amendment) Act, 1976, S. 2, for "SOVEREIGN DEMOCRATIC REPUBLIC" (w.e.f. 3-1-1977).

2 Subs. By s. 2 ibid., for "unity of the Nation" (w.e.f. 3-1-1977).

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY

ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

The aforequoted words can take an entire book to be explained. Regard being had to the context, I shall refer to a few terms.

The term 'democratic' signifies that India has a responsible and parliamentary form of government which is accountable to an elected legislature and hence, it has been declared as a basic feature of the Constitution. Dr. Ambedkar observed in his closing speech in the Constituent Assembly on November 25, 1949:-

> *"The principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They from a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative"*

Thus, the trinity, in one insegregable compartment, constitutes the heart of our democracy as understood in the constitutional bedrock.

> *The Preamble lays emphasis on the principle of equality which is basic to our Constitution. While understanding the concept of equality, I think it apt to reproduce a few line from* ***M. Nagaraj***[3]*: -*
>
> *"The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction."*

Democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity. Socialistic concept of society has to be implemented in the true spirit of the Constitution. The Constitution ensures economic democracy along with political democracy.

3 M. Nagaraj and others vs. Union of India and others (2006) 8 SCC 212

The term secularism has been held in ***Kesavananda Bharati***[4] and ***S.R. Bommai***[5] as a basic feature of our Constitution. The Court has further declared that secularism is a part of fundamental law and an inalienable segment of the basic structure of the country's political system. As has been held in ***Dr. Praveen Bhai Thogadia***[6] it means that the State should have no religion of its own and no one could proclaim to make the State have one such or endeavour to create a theocratic State. Persons belonging to different religions live throughout the length and breadth of the country. Each person, whatever be his religion, must get an assurance from the State that he has the protection of law to freely profess, practise and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of one's own presumptions of good social order. As per Sawant, J. in S. R. Bommai case, religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution and it has been accepted as a goal not only because it is the historical legacy and a need of national unity and integrity but also as a creed of universal brotherhood and humanism. I emphasise on the words "universal humanism".

The Constitution is the supreme law of the land and all state organs –Legislature, Judiciary and Executive are bound by it. The Constitution has provided for separation of powers between the Legislature, Executive and Judiciary and therefore each organ must act within the limits prescribed for it. A notable feature of the Constitution is that it accords a dignified and crucial position to the judiciary. The Judiciary has to play a vital and important role, not only in preventing and remedying abuse and misuse of power, but also in eliminating exploitation and injustice. The Judiciary in India, has to be keenly alive to its social responsibility and accountability to the people of the country. It is required to dispense justice not only between one person and another, but also between the State and the citizens. Thus, the duty is onerous, but all of you have joined this institution to live upto the solemn pledge. Your duty is called divine but that should not make anyone feel exalted, because there is a hidden warning behind the said divine sanctity. That is the warning of law and the constant watchdog – "our monumental Constitution". That divine duty bestowed on all of us, I would humbly put, is ingrained in the essential serviceability of the institution.

Having placed justice on a different pedestal and its dispensation as a part of divine duty with the appendage of warning, I may pave the already travelled path by many and pose a question, how would one understand the word "justice"? "Justice" is called mother of

4 Kesavanananda Bharati vs. State of Kerala AIR 1973 SC 1461

5 S.R. Bommai vs. Union of India AIR 1994 SC 1918

6 State of Karnataka vs. Dr. Praveen Bhai Thogadia AIR 2004 SC 2081

all virtues and queen of all values. In a Constitutional set up, it does not tolerate individual prejudices, notions, fancies, ideas or, for that matter, idiosyncrasies. It does not perceive any kind of terminological inexactitude or misplaced sympathy. "Justice", one can humbly announce, is the filament of any civilized society. In this regard, one may appreciably reproduce what ***Daniel Webster***[7] had to say:-

"Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together.

Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement, and progress of our race. And whoever labors on this edifice, with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society.

In this context, it is useful to reproduce a passage from ***Jilubhai Nanbhai Kachar***[8] wherein the Court observed thus: -

"Roscoe Pound, a sociological jurist whose writings have virtually opened new vistas in the sphere of justice, stated that 'the justice meant not as an individual or ideal relations among men but a regime in which the adjustment of human relations and ordering of the human conduct for peaceful existence'. According to him, "the means of satisfying human claims to have things and to do things should go around, as far as possible, with least friction and waste". In his "***A Survey of Social Interests***", 57th Harvard Law Review, 1 at p. 39, (1943), he elaborated thus:

> *"Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh more in our civilisation with the least sacrifice of the scheme of interests as a whole."*

In his ***Theory of Justice***, 1951 Edn., at p. 31, he stated that:

> *"The law means to balance the competing interests of an individual along with the social interests of the society."*

7 WEBSTER, Daniel, in Life and Letters of Joseph Story (William W. Story, ed., Boston: Charles C. Little and James Brown, 1851), Volume II, p. 624.

8 Jilubhai Nanbhai Kachar and others vs. State of Gujarat and others 1995 Supp (1) SCC 596

In his work, ***Justice according to Law***, he observed:

> *"We come to an idea of maximum satisfaction of human wants or expectations. What we have to do in social control and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can." According to him, therefore, that the claims or interests, namely, individual, physical, social or public interest should harmoniously be reconciled "to the balancing of social interests through the instrument of social control; a task assigned to public law for that matter"."*

Justice has been, if not the only, at least one of the foremost goals of human endeavour from the earliest times. It may have been pursued with greater scientific vigour and intensity in some societies than the others, but societies all over the world have strived for it in some form or the other. India, which is one of the most ancient surviving society, has through the ages developed its own conceptions of justice which were conceived and formulated by those who led our struggle for freedom from the British rule. These conceptions of justice have crystallized into constitutional principles that are the guiding light for the laws and their implementation in the civil and criminal justice system. It is the latter that I shall deal with.

Having stated about the broader spectrums of justice, keeping in view the subject-matter, I would concentrate on the primary facet of justice which concerns itself with the delivery of justice in accordance with law by the courts to determine the lis between two individuals or between an individual and a State or, to put it in another way, justice that is dispensed with in accordance with law on proper adjudication remembering that it is the law's answer to the cry of justice.

Presently, I shall proceed to interlink the relationship between certain constitutional concepts and the criminal jurisprudential perspective. My effort would be to reflect upon the connective values, direct or indirect. Some are connected with Fundamental Rights, some with Directive Principles of State Policy and others with Fundamental Duties and there is also linkage with acceptable constitutional norms and values as interpreted by the Apex Court. Several principles of criminal procedure and trials have emerged from the Constitution either in association with the Code or independently which courts are expected to respect and observe.

Coming to Fundamental Rights, we must understand, they are basically fundamental to the very existence of human being on the mother earth. In ***M. Nagaraj***, the Constitution Bench opined: -

> *"It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."*

SPEEDY TRIAL

Having stated about the status of Fundamental Rights, let me focus on speedy trial which is an inseparable facet of Article 21 of the Constitution. The said Article reads as follows: -

"21. Protection of life and personal liberty. –

No person shall be deprived of his life or personal liberty except according to procedure established by law."

Recently, in ***Mohd. Hussain***[9], a three-Judge Bench has observed thus: -

> *"Speedy justice and fair trial to a person accused of a crime are integral part of Article 21; these are imperatives of the dispensation of justice. In every criminal trial, the procedure prescribed in the Code has to be followed, the laws of evidence have to be adhered to and an effective opportunity to the accused to defend himself must be given."*

The concept of speedy trial has an inextricable association with liberty. Liberty is a cherished principle in the bosom of every human Soul. In ***Dharmendra Kirthal***[10], the Court had to say this: -

> *"There can never be any shadow of doubt that sans liberty, the human dignity is likely to be comatosed. The liberty of an individual cannot be allowed to live on the support of a ventilator."* And again: -
>
> *"38. When the liberty of an individual is atrophied, there is a feeling of winter of discontent. Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders."*

9 Mohd. Hussain @ Julfikar Ali v. State (Government of NCT of Delhi) (2012) 9 SCC 408

10 Dharmendra Kirthal v. State of Uttar Pradesh (2013) 8 SCC 368)

In ***Manu Sharma***[11], the Court has opined that in Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence, an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

Thus, we perceive that the constitutional emphasis is on speedy and fair trial. The effort must be to scan the provisions in the Code of Criminal Procedure which empowers the trial Judge to exercise the power in an apposite manner in order to show respect to the constitutional mandate as interpreted by the Apex Court. For the said purpose, one may look at a very significant provision incorporated in Section 309 of the Code of Criminal Procedure. It reads as follows: -

> *"309. Power to postpone or adjourn proceedings. – (1) In very inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:*
>
> *Provided that when the inquiry or trial relates to an offence under sections 376 to 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.*
>
> *(2) If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:*
>
> *Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:*

11 Manu Sharma vs. State (NCT of Delhi), (2010) 5 SCC 1

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that –

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-inchief or cross-examination of the witness, as the case may be."

I must clarify that the last two provisos have been inserted by Act 5 of 2009 with effect from 1.11.2010. Even prior to the amendment, as per the statutory command, there is a requirement that the trial should be held as expeditiously as possible and when the examination of witnesses has begun it is to be continued from day to day until all the witnesses in attendance have been examined. Of course, the power also rests with the Court to adjourn beyond the following day by recording reasons. Almost five and a half decades back, a three-Judge Bench in ***Talab Haji Hussain***[12], speaking about criminal trial, had said thus: -

"... a fair trial has naturally two objects in view; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view. It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the

12 Halab Haji Hussain vs. Madhukar Purshottam Mondkar and another, AIR 1958 SC 376

guilty are the objects of a criminal trial and so there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice."

Thereafter, their Lordships proceeded to state that an accused person by his conduct cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to fair trial is removed and trials are allowed to proceed smoothly without any interruption or obstruction.

In ***Krishnan and another***[13], though in a different context, the Court has observed that the object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out, but the recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. The Court further observed that these malpractices need to be curbed and public justice can be ensured only when the trial is conducted expeditiously.

In ***Swaran Singh***[14], the Court expressed its anguish and stated: -

"36. … It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only is a witness threatened, he is abducted, he is maimed, he is done away with, or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice."

In ***Ambika Prasad***[15], while commenting on the threat meted out to the informant in that case and adjournment sought by the counsel for the defence to cross-examine the said witness, the Court was compelled to say: -

"11. … At this stage, we would observe that the Sessions Judge ought to have followed the mandate of Section 309 CrPC of completing the trial by examining the witnesses from day to day and not giving a chance to the accused to threaten or win over the witnesses so that they may not support the prosecution."

13 Krishnan and another vs. Krishnaveni and another, (1997) 4 SCC 241

14 Swaran Singh vs. State of Punjab (2000) 5 SCC 668

15 Ambika Prasad vs. State (Delhi Admn.) (2000) 2 SCC 646

In ***Shambhu Nath Singh***[16], while deprecating the practice of a Sessions Court adjourning the case in spite of the presence of the witnesses willing to be examined fully, the Court ruled thus: -

> *"11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to subsection (2) has imposed another condition, namely,*
>
> *"provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing". (emphasis supplied)*
>
> *12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court."*

16 State of U.P. vs. Shambhu Nath Singh (2001) 4 SCC 667

In ***Mohd. Khalid***[17], the Court, while not approving the deferment of the cross-examination of witness for a long time and deprecating the said practice, observed that grant of unnecessary and long adjournments lack the spirit of Section 309 of the Code of Criminal Procedure. When a witness is available and his examination is over, unless compelling reasons are there, the trial court should not adjourn the matter on the mere asking.

Recently, in ***Gurnaib Singh***[18], a two-Judge Bench was compelled to observe that on a perusal of the dates of examination-in-chief and cross-examination and the adjournments granted, it neither requires Solomon's wisdom nor Aurgus-eyed scrutiny to observe that the trial was conducted in an absolute piecemeal manner as if the entire trial was required to be held at the mercy of the counsel. This was least expected of the learned trial Judge. The criminal-dispensation system casts a heavy burden on the trial Judge to have control over the proceedings. The criminal-justice system has to be placed on a proper pedestal and it cannot be left to the whims and fancies of the parties or their counsel. A trial Judge cannot be a mute spectator to the trial being controlled by the parties, for it is his primary duty to monitor the trial and such monitoring has to be in consonance with the Code of Criminal Procedure. Eventually, the Court was constrained to say thus: -

> *"35. We have expressed our anguish, agony and concern about the manner in which the trial has been conducted. We hope and trust that the trial courts shall keep in mind the statutory provisions and the interpretation placed by this Court and not be guided by their own thinking or should not become mute spectators when a trial is being conducted by allowing the control to the counsel for the parties. They have their roles to perform. They are required to monitor. They cannot abandon their responsibility. It should be borne in mind that the whole dispensation of criminal justice at the ground level rests on how a trial is conducted. It needs no special emphasis to state that dispensation of criminal justice is not only a concern of the Bench but has to be the concern of the Bar. The administration of justice reflects its purity when the Bench and the Bar perform their duties with utmost sincerity. An advocate cannot afford to bring any kind of disrespect to fairness of trial by taking recourse to subterfuges for procrastinating the same.*

A larger Bench in ***P. Ramachandra Rao***[19] observed that it is the constitutional obligation of the State to dispense speedy justice, more so in the field of criminal law, and paucity of funds or resources is no defence to denial of right to justice emanating from

17 Mohd. Khalid vs. State of West Bengal (2002) 7 SCC 334

18 Gurnaib Singh vs. State of Punjab (2013) 7 SCC 108

19 P. Ramachandra Rao vs. State of Karnatana, (2012) 4 SCC 578

Articles 21, 19 and 14 and the Preamble of the Constitution as also from the Directive Principles of State Policy. It is high time that the Union of India and the various States realize their constitutional obligation and do something concrete in the direction of strengthening the justice delivery system.

I have deliberately quoted in extenso from number of authorities as the recent trends of conducting trial had pained many. When there is violation of Section 309 of the Code, as is perceptible, it hampers two concepts, namely, speedy and fair trial. Thus, it is not merely a statutory violation but also offends the constitutional value. I have been told that there are difficulties, but when law forbids certain things or grants very little room, difficulties should be ignored. Remember, there is the fate of the accused on one hand and the hope of the victim or his/her family members on the other and above all the cry of the collective for justice. And never forget, your reputation which is the greatest treasure possessed by man this side of the grave rests on one hand and the difficulties projected by parties on the other. I can only repeat that you are required to be guided by constitutional conscience, nothing more, nothing less.

FAIR TRIAL

In ***Best Bakery case***[20], considering the jurisprudence of fair trial, powers of the criminal court under the Code and the Evidence Act including retrial of a criminal case, the Court observed:

> *"33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation—peculiar at times and related to the nature of crime, persons involved— directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system."*

In the said case, it was also opined that in a criminal case, the fair trial is the triangulation of interest of the accused, the victim and the society. The learned Judges further ruled that "interest of the society are not to be treated completely with disdain and as persona non grata". The said decision was explained in ***Satyajit Banerjee***[21] wherein it was held that the law laid down in ***Best Bakery case*** in the aforesaid extraordinary circumstances cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in every case where acquittal of accused is for want of adequate or reliable evidence. In Best Bakery case, the first trial was

20 Zahira Habibulla H. Sheikh vs. State of Gujarat (2004) 4 SCC 158

21 Satyajit Banerjee vs. State of W.B. (2005) 1 SCC 115

found to be a farce and is described as 'mock trial'. Therefore, the direction for retrial, was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by the Court in ***Best Bakery case***.

In ***Mohd. Hussain***[22], the Court, drawing the distinction between speedy trial and fair trial, has expressed thus: -

"40. "Speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered."

In ***Mangal Singh***[23], while determining various aspects of speedy trial, the Court observed that it cannot be solely and exclusively meant for the accused. The victim also has a right, as observed by the Court: -

> *"14. … Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence."*

22 Mohd. Hussain alias Julfikar Ali vs. State (Government of NCT of Delhi) 2012 9 SCC 408

23 Mangal Singh vs. Kishan Singh (2009) 17 SCC 303

In ***Himanshu Singh Sabharwal***[24], it was observed that the principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm.

In ***Rattiram***[25], while giving emphasis on fair trial, it has been held as follows: -

> *"Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing."*

My singular purpose of highlighting the distinction is that trial Judges have to remain alert and alive to the right of the accused as well as to the right of the victim and that alertness has to be judicially manifest and must get reflected from the procedure adopted and the ultimate determination. That demonstration is the litmus test.

LEGAL AID

Presently, I shall focus on the facet of legal aid. The right to legal aid is statutorily ensured by ***Section 304*** of the Code and constitutionally by Articles 21,22 and 39 A. Right to legal aid in criminal proceedings is absolute and a trial and conviction in which the accused is not represented by a lawyer is unconstitutional and liable to be set aside as

24 Himanshu Singh Sabharwal vs. State of M.P. & ors., AIR 2008 SC 1943

25 Rattiram vs. State of M.P. (2012) 4 SCC 516

was held in ***Khatri (III) v. State of Bihar***[26]; ***Suk Das v. Union Territory of Arunachal Pradesh***[27]; ***Mohd. Ajmal Amir Kasab v. Maharshtra***[28] and ***Rajoo v. MP***[29].

Article 39-A of the Constitution, inter alia, articulates the policy that the State shall provide free legal aid by a suitable legislation or schemes to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Court in ***Mohd Hussain***[30] held that in a trial before the Court of Sessions, if the accused is not represented by a pleader and does not have sufficient means, the court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same. The right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22(1) of the Constitution, has further been fortified by the introduction of the Directive Principles of State Policy embodied in Article 39A of the Constitution by the 42nd Amendment Act of 1976 and enactment of Sub-Section 1 of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include the right to be heard through Counsel.

In ***Hussainara Khatoon***[31], the Court observed that it is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation. The Court further observed as under:-

> *"Legal aid is in fact the delivery system of social justice. It is intended to reach justice to the common man who, as the poet sang:*

"Bowed by the weight of centuries he leans

Upon his hoe and gazes on the ground,

26 (1981) 1 SCC 635

27 (1986) 2 SCC 401

28 (2012) 9 SCC 1

29 (2012) 8 SCC 553

30 AIR 2012 SC 750

31 Hussainara Khatoon and ors. vs. Home Secretary, State of Bihar, Patna, (1980) 1 SCC 108

The emptiness of ages on his face,

And on his back the burden of the World."

We hope and trust that every State Government will take prompt steps to carry out its constitutional obligation to provide free legal services to every accused person who is in peril of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality."

In ***Mohd. Ajmal Amir Kasab***[32], the Court observed as under:-

> *"474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. We, accordingly, hold that it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings."*

In ***Mohd. Sukur Ali***[33], the Court observed as under:-

> *"Seervai who has said in his Constitutional Law of India, 3rd Edn., Vol. I, p. 857:*
>
> *"The right of a person accused of an offence, or against whom any proceedings were taken under the CrPC is a valuable right which was recognised by Section CrPC. Article 22(1), on its language, makes that right a constitutional right, and unless there are compelling reasons, Article 22(1) ought not to be cut down by judicial construction. … It is submitted*

32 Mohd.Ajmal Amir Kasab vs. State of Maharashtra, (2012) 9 SCC 1

33 Mohd. Sukur Ali vs. State of Assam, (2011) 4 SCC 729

that Article 22(1) makes the statutory right under Section 309 CrPC a constitutional right in respect of criminal or quasi-criminal proceedings."

12. We are fully in agreement with Mr Seervai regarding his above observations. The Founding Fathers of our Constitution were themselves freedom fighters who had seen civil liberties of our people trampled under foreign rule, and who had themselves been incarcerated for long period under the formula "Na vakeel, na daleel, na appeal" (No lawyer, no hearing, no appeal). Many of them were lawyers by profession, and knew the importance of counsel, particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22(1), and that provision must be given the widest construction to effectuate the intention of the Founding Fathers."

If an accused remains unrepresented by a lawyer, the trial court has a duty to ensure that he is provided with proper legal aid. Now I may sound a note of caution. Many of you might feel, what is the necessity of harping on grant of legal aid. It is because even recently I have come across cases where the accused have been tried without being represented by a counsel. When the constitutional as well as statutory commands are violated by some, it is the duty of the Judicial Academy to ingrain that into the intellectual marrows of the judicial officers. So, I have highlighted on that object.

RIGHT AGAINST SELF INCRIMINATION

The right against self-incrimination in Article 20 (3) and Section 161(2) of the Code gives an accused person the right not be a witness against himself which includes the right to be informed that he has a right to call a lawyer before answering any of the questions put to him by the police. In this context, I may usefully quote a passage from ***Nandini Satpathi's case***[34]: -

"20. Back to the constitutional quintessence invigorating the ban, on self incrimination. The area covered by Article 20(3) and Section 161(2) is substantially the same. So much so, we are inclined to the view, terminological expansion apart, that Section 161(2) of the Cr.P.C. is a parliamentary gloss on the constitutional clause."

The Court, repelling the suggestion as to truncated and narrow interpretation, observed:

"Such a narrow meaning may emasculate a necessary protection. There are only two primary queries involved in this clause that seals the lips into

34 Nandini Satpathi vs. P.L. Dani, (1978) 2 SCC 424

permissible silence, (i) Is the person called upon to testify 'accused of any offence', (ii) Is he being compelled to be witness against himself ?

We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on selfaccusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like-not legal penalty for violation. "So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, **if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3).**"

As per ***Section 41 D*** of the Code, when any person is arrested and interrogated by the police, he is entitled to meet an advocate of his choice during interrogation, though not throughout the interrogation. Also oral or written statement conveying personal knowledge likely to lead to incrimination by itself or furnishing a link in the chain of evidence comes within the prohibition of Article 20(3). Accordingly, narcoanalysis, polygraph and brain electrical activation profile tests are not permissible under Article 20 (3) and any evidence collected through them cannot be produced in the courts as laid down in ***Selvi v. Karnataka***[35] and ***Mohd. Ajmal Amir Kasab v. Maharashtra***[36].

LAW AND ORDER IN A DEMOCRACY AS A CONSTITUTIONAL NORM AND THE CONCEPT OF SENTENCING

In ***Ramlila Maidan Incident***[37], it has been held that the term 'social order' has a very wide ambit which includes 'law and order', 'public order' as well as 'security of the State'. In other words, 'social order' is an expression of wide amplitude. It has a direct nexus to

35 (2010) 7 SCC 263

36 (2012) 9 SCC 1

37 Ramlila Maidan Incident vs. Home Secretary, Union of India and ors. (2012) 5 SCC 1

the Preamble of the Constitution which secures justice - social, economic and political - to the people of India. An activity which could affect 'law and order' may not necessarily affect public order and an activity which might be prejudicial to public order, may not necessarily affect the security of the State. Absence of public order is an aggravated form of disturbance of public peace which affects the general course of public life, as any act which merely affects the security of others may not constitute a breach of public order. The 'security of the State', 'law and order' and 'public order' are not expressions of common meaning and connotation. To maintain and preserve public peace, public safety and the public order is the unequivocal duty of the State and its organs. To ensure social security to the citizens of India is not merely a legal duty of the State but also a constitutional mandate. There can be no social order or proper state governance without the State performing this function and duty in all its spheres.

Sentencing, in the context of law and order and the role of the court in imposition of adequate sentence as regards offence is extremely significant. In ***Shailesh Jasvantbhai***[38], the Court observed: -

"Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: 'State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."

The Court, in ***Jameel's case***[39], held that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is the

38 Sailesh Jasvantbhai vs. State of Gujarat (2006) 2 SCC 359

39 Jameel vs. State of U.P. (2010) 12 SCC 532

duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing in mind and proceed to impose a sentence commensurate with the gravity of the offence.

Recently, in ***Sumer Singh***[40], noticing inadequate sentence of seven days of imprisonment for an offence punishable under Section 326 IPC, where the convict had chopped off the left hand of the victim from the wrist, the Court was constrained to observe: -

> *"It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption."*

Before parting with the case, the Court quoted a passage from Felix Frankfurter: -

> *"For the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guardians – those impersonal convictions that make a society a civilized community, and not the victims of personal rule."*[41]

40 Sumer Singh vs. Surajbhan Singh and others 2014 (6) SCALE 187

41 Frankfurter, Felix, in Clark, Tom C., "Mr. Justice Frankfurter: 'A Heritage for all Who Love the Law'".

In ***Gopal Singh v. State of Uttarakhand***[42], the Court opined that just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect — propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. There can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which have been indicated hereinbefore and also have been stated in a number of pronouncements by the Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

POWER OF ARREST

The power of arrest has been regulated under the Code in order to protect the fundamental rights under Arts 21 and 22. Under **Section 41B** of the Code, every police officer while making an arrest is required to (a) bear an accurate, visible and clear identification of his name which will facilitate easy identification; (b) prepare a memorandum of arrest which shall be— (i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made; (ii) countersigned by the person arrested; and (c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest. The power of the police to arrest has been further regulated by **Section 46** and **Section 49**.

42 (2013) 7 SCC 545

Article 22 (2) is violated if remand orders **(Section 167 of the Code)** are given by a judge without the production of the accused under **Section 57** of the Code within 24 hours of arrest. In all cases, the courts are expected to ensure if an alleged act constitutes any crime before remanding a person to police or judicial custody as has been held in the cases of ***Bhim Singh***[43] and ***D.K. Basu***[44] and other cases wherein directions have been given in respect of arrested persons and persons in police custody.

Recently, the principle was highlighted in ***Hema Mishra***[45]: -

> *"Above mentioned provisions make it compulsory for the police to issue a notice in al such cases where arrest is not required to be made under Clause (b) of Sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India."*

SUMMONING

The Code takes care that the summoning power of the court is regulated and the rights of the accused and witnesses are protected under Art 21. **Section 53** provides that non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when it is reasonable to believe that the person will not voluntarily appear in court; or the police authorities are unable to find the person to serve him with a summon; or it is considered that the person could harm someone if not placed into custody immediately. **Section 54** provides that as far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants, either bailable or non-bailable, should never be issued without proper scrutiny of facts and complete application of mind due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive. As per Section 55, in complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance, should issue bailable

43 Bhim Singh vs. J & K, (1985) 4 SCC 677

44 D.K. Basu vs. State of WB, (1997) 1 SCC 416

45 Km. Hema Mishra vs. State of U.P. and ors. AIR 2014 SC 1066

warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, the Code 'cautions' courts at the first and second instance to refrain from issuing non-bailable warrants.

ISSUE OF NON-BAILABLE WARRANT ON THE CONSTITUTIONAL TOUCHSTONE

In ***Raghuvansh Dewanchand Bhasin***[46], it has been opined that it needs little emphasis that since the execution of a non-bailable warrant directly involves curtailment of liberty of a person, warrant of arrest cannot be issued mechanically but only after recording satisfaction that in the facts and circumstances of the case it is warranted. The courts have to be extra-cautious and careful while directing issuance of non-bailable warrant, else a wrongful detention would amount to denial of the constitutional mandate as envisaged in Article 21 of the Constitution of India. At the same time, there is no gainsaying that the welfare of an individual must yield to that of the community. Therefore, in order to maintain the rule of law and to keep the society in functional harmony, it is necessary to strike a balance between an individual's rights, liberties and privileges on the one hand, and the State on the other. Indeed, it is a complex exercise. Thereafter, the Court referred to the authority in ***Inder Mohan Goswami***[47] wherein the Court had issued certain guidelines to be kept in mind while issuing non-bailable warrant. While concurring with the observations, the learned Judges in ***Raghuvansh Dewanchand Bhasin*** observed thus:-

> *"... we feel that in order to prevent such a paradoxical situation, we are faced with in the instant case, and to check or obviate the possibility of misuse of an arrest warrant, in addition to the statutory and constitutional requirement."*

The said guidelines are to be followed as an endeavour to put into practice the directions stated therein. I am not enumerating the directions but it is the command of law which has to be followed and, be it stated, the said guidelines were issued keeping in view the constitutional principle and the statutory norms that is the bond between the constitutional concepts and criminal jurisprudential perspective.

DOUBLE JEOPARDY

The constitutional doctrine of double jeopardy which finds expression in Art 20 (2) has statutory recognition in **Section 300 Cr.PC.**

46 Raghuvansh Dewanchand Bhasin vs. State of Maharashtra, AIR 2011 SC 3393

47 Inder Mohan Goswami vs. State of Uttaranchal (2017) 121 SCC 1

In the case of ***Maqbool Hussasin***[48], the Constitution Bench, while discussing the concept of double jeopardy, ruled that: -

> *"The fundamental right which is guaranteed in Art. 20(2) enunciates the principle of autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence." (Per Charles J. in Reg. vs. Miles (1890) 24 Q.B.D. 423 (A).) To the same effect is the ancient maxim "Nimo Bis Debet Puniri Pro Uno Delicto", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "Pro Eadem Causa" that is for the same cause."*

Placing reliance on the same, a two-Judge Bench, in ***Sangeetaben Mahendrabhai Patel***[49], opined that: -

> *"14. This Court in Maqbool Hussain held that the fundamental right which is guaranteed under Article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy" i.e. a person must not be put in peril twice for the same offence. The doctrine is based on the ancient maxim nemo debet bis punire pro uno delicto, that is to say, that no one ought to be punished twice for one offence.* ***The plea of autrefois convict or autrefois acquit avers that the person has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other and not that the facts relied on by the prosecution are the same in the two trials. A plea of autrefois acquit is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter."***

Be it reiterated, the said principle is ingrained in Section 300 of the Code and to understand the concept, it is necessary to appreciate the ratio laid down by the Apex Court

48 Mazbool Hussain vs. State of Bombay, AIR 1953 SC 325

49 Sangeetaben Mahendrabhai Patel vs. State of Gujarat and another, (2012) 7 SCC 621

in the cases of ***S.A. Venkataraman***[50], ***Om Prakash Gupta***[51], ***Veereshwar Rao Agnihotri***[52], ***Leo Roy Frey***[53], ***S.L. Apte***[54], ***Bhagwan Swarup Lal Bishan Lal***[55] and ***L.R. Melwani***[56].

NATURAL JUSTICE AND ITS SIGNIFICANCE UNDER THE CODE

Natural justice, under the Constitution of India, may not be existing as a definite principle but it is read in by the Courts to the great heights engrafted in Chapter III of the Constitution. This is a facet of constitutional humanistic principle. In this context, I may usefully quote a passage from ***Nawabkhan Abbaskhan***[57]:-

> *"In Indian constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by Courts into those great rights enshrined in Part III as the quintessence of reasonableness. We are not unmindful that from Seneca's Medea, the Magna Carta and Lord Coke to the constitutional norms of modem nations and the Universal Declaration of Human Rights it is a deeply rooted principle that "the body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished nor destroyed in any way" without opportunity for defence and one of the first principles of this sense of justice is that you must not permit one side to use means of influencing a decision which means are not known to the other side."*

Section 235(2) of the Code provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law. Interpreting the said provision, the Court in ***Allauddin Mian***[58] opined that: -

> *"The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the uestion of sentence. This is all the more necessary since the courts are generally required to make the choice from a*

50 S.A. Venkataraman vs. Union of India, AIR 1954 SC 375

51 Om Prakash Gupta vs. State of U.P. AIR 1957 SC 458

52 State of M.P. vs. Veereshwar Rao Agnihotri, AIR 1957 SC 592

53 Leo Roy Frey vs. Supt., District Jail AIR 1958 SC 119

54 State of Bombay vs. S.L. Apte AIR 1961 SC 578

55 Bhagwan Swarup Lal Bishan Lal vs. State of Maharahstra AIR 1965 SC 682

56 Collector of Customs vs. L.R. Melwani AIR 1970 SC 962

57 (1974) 2 SCC 121

58 Allauddin Mian and others vs. State of Bihar, (1989) 3 SCC 5

wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced subsection (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed."

Thereafter, the two-Judge Bench proceeded to rule thus: -

"We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of subsection (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record."

Be it noted, the said principle was reiterated in ***Ajay Pandit***[59] placing reliance on ***Santa Singh***[60] and ***Muniappan***[61].

From the aforesaid, the life link and the living constituent between the statutory provisions and the constitutional principles are perceptible. And that makes the duty of the trial Judge extremely important in this regard.

LIBERTY AND GRANT OF BAIL

Enlargement of bail or grant of bail has an association with individual liberty. Emphasising the concept of liberty, the Court in ***Rashmi Rekha Thatoi***[62], has observed:-

59 Ajay Pandit alias Jagdish Dayabhai Patel vs. State of Maharashtra (2012) 8 SCC 43

60 Santa Singh vs. State of Punjab (1976) 4 SCC 190

61 Muniappan vs. State of T.N. (1981) 3 SCC 11

62 Rashmi Rekha Thatoi and anr. vs. State of Orissas and ors. (2012) 5 SCC 690

> *"4. The thought of losing one's liberty immediately brings in a feeling of fear, a shiver in the spine, an anguish of terrible trauma, an uncontrollable agony, a penetrating nightmarish perplexity and above all a sense of vacuum withering the very essence of existence. It is because liberty is deep as eternity and deprivation of it, infernal. Maybe for this the protectors of liberty ask, "How acquisition of entire wealth of the world would be of any consequence if one's soul is lost?" It has been quite often said that life without liberty is eyes without vision, ears without hearing power and mind without coherent thinking faculty. It is not to be forgotten that liberty is not an absolute abstract concept. True it is, individual liberty is a very significant aspect of human existence but it has to be guided and governed by law. Liberty is to be sustained and achieved when it sought to be taken away by permissible legal parameters. A court of law is required to be guided by the defined jurisdiction and not deal with matters being in the realm of sympathy or fancy."*

Thereafter, the Court quoted a passage from E. Barrett Prettyman, Speech at Law Day Observances (Pentagon, 1962), as quoted in Case and Comment, Mar-Apr 1963, 26, who had spoken thus: -

> *"In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematised restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect realisation, of each separate human mind, soul and body; not in mute, motionless meditation but in flashing, thrashing activity."*

Despite the fact that we have put liberty on the pedestal, yet it is not absolute. I have referred to this decision solely for the purpose that while granting bail, the court dealing with the application for bail has to follow the statutory command bearing in mind the constitutional principle of liberty which is not absolute.

In ***Ash Mohammad***[63], while discussing the concept of liberty and the legal restrictions which are founded on democratic norms, the Court observed that the liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes, it causes a sense of vacuum. Needless to emphasise, the sacrosanctity of liberty is paramount in a civilised society. However, in a democratic body polity which is wedded to the rule of law, an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society, an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well-accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialised. The life of an individual living in a society governed by the rule of law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmund Burke, while discussing about liberty opined, "it is regulated freedom". Thereafter, the two-Judge Bench proceeded to observe: -

> *"18. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilised milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organised society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquillity and safety which every well-meaning person desires. Not for nothing J. Oerter stated:*
>
> *"Personal liberty is the right to act without interference within the limits of the law."*

63 Ash Mohammad vs. Shiv Raj Singh alias Lalla Babu and another (2012) 9 SCC 446

19. Thus analysed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardised, for the rational collective does not countenance an anti-social or anti-collective act."

Be it stated, in the said case, a history-sheeter, involved in number of cases pertaining to grave offences under IPC and other Acts, was enlarged on bail and the Apex Court treated the order of bail as one of impropriety and set it aside.

CONCLUSION

In conclusion, I must state that I have made a humble endeavour to present to you the inter-connectivity between our constitutional norms and concepts and criminal jurisprudence, for I have observed on many an occasion that some of the judicial officers feel themselves alienated in their own perception from the organic document. You can never be stranger to our compassionate and humane Constitution in your adjudicating process. I am certain, you are always reminded of your statutory duty but your alertness with humility would increase to keep the constitutional principles close to your heart and soul. That would elevate your work, the mindset and the sense of justice. Continuous learner of law, wherever his position is, has to remind intellectually humble and modest because such kind of modesty nourishes virtues and enables a man to achieve accomplishments. It encourages your sense of duty and disciplines your responsibility. That apart, I would not be very much wrong, if I say, when modesty and self-discipline get wedded to each other, one can assert what is right and these assertions could not be an expression of egotism but, on the contrary, it would be an ornament to your prosperity of knowledge. Lastly, I would suggest to you to learn with delight so that it would enrich your mind you shall never feel the burden.

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Human Rights in Constitutional Context

Life is a glorious perfection of nature, a masterpiece of creation. It is majestic and sublime. Human being is the epitome of the infinite prowess of the divine designer. Great achievements and accomplishments in life are possible if one is permitted to lead a life that is respected by others. It has been said "life is action, the use of one's powers" and one can use powers if he has real faith in life. The term "life" as employed under Article 21 of the Constitution of India does never mean a basic animal existence but conveys living of life with utmost nobleness and human dignity— dignity which is an ideal worth fighting for and worth dying for. Dignity of life takes within its fold some of the finer aspects of human civilisation. Reverence for human rights is a fundamental principle of morality and denial of the same is not only humiliation to humanity but also expression of antagonism to the concept of creative intelligence. Human rights in their basic denotation and conceptual connotation are fundamental, universal and inalienable. They refer to those justifiable rights and conditions of life, fulfilment of which enables a human being to realise his/her worth and helps to lead a life of dignity and honour, inherent to all human beings, irrespective of nationality, place of residence, sex, ethnic origin, colour, religion, language or status. These rights are natural, indivisible and form the cornerstone of morality, legal rights, civilisation and democratic body polity. They create space for life and living and foster respect of oneself and for others. When these rights are concretised, they create a society where diversity and differences amongst people are not only accepted but also mutually respected.

The conception of human rights includes the weak, meek, the underprivileged and the vulnerable. It gives emphasis on social, economic, political and psychological development of every member of the society. When it is called universal, it assumes the status of Everestine pillar of international human rights law. One is compelled to sit in the time machine and look at the Universal Declaration of Human Rights, 1948 which enumerates numerous human rights giving stress on equality, non-discrimination and dignity.

It is apt to note that our compassionate, organic and rights- based Constitution was drafted at the same time as the Universal Declaration of Human Rights. The words used in the Preamble of our Constitution capture and epitomise the human rights in their conceptual quint essentiality. The basic concept gets further accentuated in the fundamental rights and directive principles of State policy. The human rights inhered in the constitutional provisions and the Protection of Human Rights Act, 1993, with the passage of time, have gained immense signification and the judiciary has invented new

tools to balance and secure the human rights in many a sphere. The result is the expansion of the rights both jurisprudentially and practically to attain the constitutional vision of justice as conceived of by our Founding Fathers. They have pyramided such rights as every human being everywhere at all times is entitled to have.

Our Constitution is the greatest document on human rights in many a form. In ***Kesavananda Bharati***[1] it has been stated that Parts III and IV of the Constitution essentially form the basic element of the Constitution without which its identity will completely change. A number of provisions in Parts III and IV are fashioned on the UN Declaration of Human Rights. It has been observed that rights mainly proceed on the basis of human rights. Emphasis has been laid that whether one calls them "natural" or gives some other name, basically they are to secure the requisite human rights i.e. liberty and equality and to secure justice, political, social and economic as mentioned in the Preamble because these rights are inherent in the genus of human rights.

Emphasising on the integrated scheme and the grand amalgam of the fundamental rights and the directive principles of State policy and what our Constitution visualises, the Court in ***Maneka Gandhi***[2] stated that there can never be a divorce between the natural law and the constitutional law, as such a divorce would be disastrous because that would corrode the inherent or natural human rights of an individual recognised by and embodied in our Constitution.

In ***Minerva Mills Ltd.***[3] it has been lucidly stated that the relationship between the civil and economic rights is one of interdependence. The Court, by stating the concept of principle of interdependence, has established the holistic and integrated nature of all human rights and the human rights have been placed at the centre of Indian polity to be used as an instrument to achieve social justice. Needless to emphasise, social justice deals with all aspects of human life. Harold J. Laski remarked, "The more equal are the social rights of citizens, the more likely they are to be able to utilise their freedom in realms worthy of exploration." The purpose of social justice is to maintain or to restore equilibrium in the society and it envisages equal treatment of equal persons in equal or essentially equal circumstances. Social solidarity is brought by enforcing the concept of social justice, and that is achieved by galvanising human rights. Human rights as a conceptual eventuality has taken high pedestal in many a jurisprudence. Prior to dwelling upon the same, reference may profitably be made to our ancient texts which have also been referred to in ***Kapila***

1 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

2 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

3 Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.

Hingorani[4] where the Court reproduced from the book Human Rights and Indian Values by Justice M. Rama Jois:

48. ... Samani prapa saha vonnbhaga
samane yoktray saha wo yunism
arah nabhimiv abhite:

All have equal rights in articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together with harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub. (Atharvaveda-Samjnana Sukta)[5] The Court observed that the right to equality of all human beings has been declared in the Vedas and are regarded as inviolable. In order to emphasise the dignity of the individual, it was said that all are brothers as all are the children of God. No one is inferior or superior. It is of utmost importance to note that right to equality was made a part of ***"dharma"*** long before the State came to be established.

In the said case, after referring to Articles 1 and 7 of the Universal Declaration of Human Rights, 1948, it has been opined that the said Declaration is similar to the declaration of equality made in the Rigveda. It has been observed that after the establishment of the State, the obligation to protect the right to equality was cast on the rulers and it was made a part of the "Rajadharma" i.e. the constitutional law. The following verse was usefully reproduced:

48. ... Yatha swarin bhutani dhara dharyate samam
tatha swarin bhutani bibharte parthivm vartam

Just as the mother earth gives equal support to all the living beings, a king should give support to all without any discrimination (Manu IX 31).

This also meant that the kings were required to afford equal treatment to all the citizens in the same manner in which a mother treats all her children.[6]

Coming to the expanse of human rights jurisprudence it is perceivable that it has expanded the sphere of Article 21 of the Constitution both horizontally and vertically. In ***Francis Coralie***[7] the Court held that the right to life includes the right to live with human dignity and all that goes along with it, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving, mixing and co-mingling with fellow human beings.

4 Kapila Hingorani (1) v. State of Bihar, (2003) 6 SCC 1.

5 Ibid., 24, para 48.

6 Ibid., 25, para 48.

7 Francis Coralie Mullin v. UT of Delhi, (1981) 1 SCC 608 : 1981 SCC (Cri) 212.

In number of cases starting with ***Rural Litigation and Entitlement Kendra***[8], the Court has held that the right to life includes the right to clean environment. In ***Vellore Citizens' Welfare Forum***[9], the Court recognised the precautionary principle in the Indian environmental law. In ***M.I. Builders (P) Ltd.***[10], the Court applied the "public trust" doctrine to protect and preserve public land and related it to sustainable development, precautionary principle, environmental impact assessment and biodiversity protection. With the passage of time, right to health was recognised as an integral part of the right to life. In ***Consumer Education and Research Centre***[11], the Court was concerned with the occupational health hazards faced by workers of the asbestos industry. Noticing that long years of exposure to harmful substances like asbestos could result in debilitating asbestosis, the Court mandated the provision of compulsory health insurance for every worker as enforcement of the worker's fundamental right to health. In ***Murli S. Deora***[12] the Court prohibited smoking in public places in the entire country on the ground that smoking is injurious to the health of passive smokers and issued directions to the Government to take effective steps to prohibit smoking in public places. In ***Parmanand Katara***[13], the Court was confronted with the situation where hospitals were refusing to admit accident victims and were directing them to specific hospital designed to admit "medico-legal cases". The Court held that this violated the right to life as the right would be rendered illusory if a citizen could be refused emergency medical treatment on account of an administrative arrangement between hospitals.

Right to shelter has become a facet of human right. In ***Gauri Shanker***[14], the right to shelter was recognised as a fundamental right under Articles 19(1)(e) and 21 and in ***Chameli Singh***[15] it was observed that:

> *5. … The difference between the need of an animal and a human being for shelter has to be kept in view. For an animal it is the bare protection of the body [while] for a human being it has to be a suitable accommodation which would allow him to grow in every aspect—physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home.*[16]

9 Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647.

10 (1999) 6 SCC 464.

11 Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42 : 1995 SCC (L&S) 604.

12 Murli S. Deora v. Union of India, (2001) 8 SCC 765.

13 Parmanand Katara v. Union of India, (1989) 4 SCC 286 : 1989 SCC (Cri) 721.

14 Gauri Shanker v. Union of India, (1994) 6 SCC 349.

15 Chameli Singh v. State of U.P., (1996) 2 SCC 549.

16 Ibid., 554, para 5.

Thereafter the Court ruled thus:

8. In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society.17 (emphasis supplied)

It further proceeded to observe:

8. … Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right. As is enjoined in the directive principles, the State should be deemed to be under an obligation to secure it for its citizens, of course subject to its economic budgeting. In a democratic society as a member of the organised civic community one should have permanent shelter so as to physically, mentally and intellectually equip oneself to improve his excellence as a useful citizen as enjoined in the fundamental duties and to be a useful citizen and equal participant in democracy.18

Right to speedy trial, insegregable facet of Article 21, has been recognised as an inalienable compartment of human rights. The concept of speedy trial engulfs fair delineation as well as expeditious procedure. In the name of speedy trial the fairness in trial cannot be allowed to take the back seat. It has its own importance. The very purpose of speedy trial is to see that life and liberty of a person is not taken away without following reasonable, fair and just procedure and the cumulative effect of the same is that there has to be a coherent analysis between the fairness of procedure and the conception of speedy trial.

In ***J. Jayalalithaa v. State of Karnataka,(2014) 2 SCC 401*** it has been held that denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. ***Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to***

17 Ibid., 555, para 8.

18 Ibid., 555-56, para 8.

get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution.

The facet of Article 21 has been sharpened by judicial creativity of the Supreme Court. One is tempted to quote a few lines from Sher Singh v. State of Punjab[19]:-

> *"The horizons of Article 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation."*

The factum of inordinate delay has not been appreciated by the court and, in fact, as has been stated above it has been made applicable to the interregnum period between the imposition of death sentence and its execution. In ***Smt. Triveniben v. State of Gujarat***[20] in his concurring opinion Jagannath Shetty, J., referring to the decision in ***Sunil Batra***[21], opined that nobody could succeed to give peace of mind to a condemned person despite being provided with all amenities of prison. In that context, the learned Judge observed thus:-

''चिंता चिंता दवायूर्मध्या
Chita Chinta Dwayoormadhya,
चिंता तत्र गरीयसी
Chinta Tatra Gariyasi,
चिंता दहती निर्जीवं
Chita Dahati Nirjivam,
चिंता दहती सजीवकम
Chinta Dahati Sajeevakam.

As between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there is every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed."

19 (1983) 2 SCC 344.
20 (1989) 1 SCC 678.
21 (1978) 4 SCC 494.

While talking about speedy trial, it has to be borne in mind that it cannot be regarded as exclusive right of the accused. The right of a victim has to be given due recognition. As has been stated in ***Mangal Singh***[22] it is a mistake to assume that delay in trial does not affect the victim. In fact, in certain cases, the victim may suffer more than the accused. The said principle has been reiterated in ***Rattiram***[23] observing that the courts are to remain sensitive to the collective cry and the right of the victim that springs from the crime he or she has suffered. Needless to say that there has to be a fair trial but it is also undesirable that every adjective facet of law has to be given the status of perfection.

The concept of liberty has been treated as a human right apart from being a constitutional right. It is to be borne in mind that no one would like to barter it for all the tea in China or for all the pearls of the sea. Liberty has inseparable nexus with every ligament of heart. It is an electric light. Not for nothing a great English poet has said, "Where liberty dwells, there is my country"[24]. Liberty, subject to valid restrictions in law, is a paramount human right.

In ***Mehmood Nayyar Azam***[25] the Court, addressing the factum of mental torture in the case of a person in custody, observed that:

> *27. … inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. It would also include a treatment that is inflicted [to cause] humiliation and compels a person to act against his will or conscience.*[26]

It has been further observed therein that torture is not merely physical but may even consist of mental and psychological torture calculated to create fear to submit to the demands of the police. Right to reputation is a facet of the right to life of a citizen under Article 21 of the Constitution. Any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of the law protects the dignity of a citizen in a society governed by law. A citizen while in custody is not denuded of his fundamental rights under Article 21 of the Constitution. The restrictions imposed must have the sanction of law by which his enjoyment of fundamental rights are curtailed but his basic human rights are not crippled. The police officers cannot treat him in an inhuman manner. On the contrary, they are under an obligation to protect his human rights and prevent all forms of atrocities.

22 (2009) 17 SCC 303 : (2011) 1 SCC (Cri) 1019.

23 Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481.

24 H.L. Mencken, A New Dictionary of Quotations (Alfred A. Knopf Inc., New York 1942) 682.

25 Mehmood Nayyar Azam v. State of Chhattisgarh, (2012) 8 SCC 1 : (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449.

26 Ibid., 14, para 27.

A convict of a crime while in prison is not reduced from being a person to a non- person. Any form of torture or cruelty or ill-treatment falls within the inhibition not only under Article 21 but also violates the human rights. In fact, the Court has granted compensation where custodial death or custodial torture has been proven by taking recourse to public law remedy.

Now coming to property and human rights, reference may be made to the recent observations of the Court in ***Tukaram Kana Joshi***[27] wherein it has been opined that the right to property is now considered to be not only a constitutional or a statutory right but also a human right. Though it is not a basic feature of the Constitution or a fundamental right, yet human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment, etc. Now, however, human rights are gaining an even greater multifaceted dimension. The right to property is considered very much to be a part of such new dimension. In the said case, distinction was made between a subject of medieval India and a citizen under our Constitution. Prior to that in ***Mukesh Kumar***[28], the Court observed that the right to property is now considered to be not only a constitutional or statutory right but also a human right and regard being had to expanded dimension right to property is also considered very much a part of the new dimension. In ***Darius Shapur Chenai***[29] it has been ruled that right to property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300-A of the Constitution protects such right.

Presently, to the gender equality in the context of human rights. The Court has, in many a pronouncement, laid emphasis on sensitivity. Sensitivity governs the future, in a way. It may be added without any hesitation that next to the Almighty we are indebted to a woman for life itself and the values worth living for. When a man degrades a woman, he falls into more degradation. In ***Valsamma Paul***[30], it has been ruled that human rights for women comprehends gender equality and it is also traceable to the Convention for Elimination of All Forms of Discrimination Against Women. Human rights for women, including girl child are inalienable, integral and an indivisible part of universal human rights. The full development of personality, fundamental freedoms and equal participation by women in political, social, economic and cultural life are held to be concomitants for national development, social and family stability and growth—cultural social and economical. All forms of discrimination on grounds of gender are violative of fundamental freedoms and human rights.

27 Tukaram Kana Joshi v. MIDC, (2013) 1 SCC 353.

28 State of Haryana v. Mukesh Kumar, (2011) 10 SCC 404 : (2013) 3 SCC (Civ) 769.

29 Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai, (2005) 7 SCC 627.

30 Valsamma Paul v. Cochin University, (1996) 3 SCC 5445 : 1996 SCC (L&S) 772.

Gender justice is absolutely and insegregably linked with human rights. Lord Denning in his book Due Process of Law had observed that a woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom—develop her personality to the full—as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

The World Conference on Human Rights, 1993 at Vienna condemned gender-based violence and all categories of sexual harassment and exploitation. A part of the Resolution reads thus:

> *"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community…. The World Conference on Human Rights urges governments, institution, intergovernmental and non-governmental organisations to intensify their efforts for the protection of human rights of women and the girl child."*

In ***Vishaka v. State of Rajasthan***[31] the Court invoked the text of the Convention for the Elimination of All Forms of Discrimination against Women and framed guidelines for establishment for redressal mechanisms to tackle sexual harassment of women at workplace and laid down the guidelines.

Recently, in ***S. Samuthiram***[32] the Court observed that every citizen in this country has right to live with dignity and honour which is a fundamental right guaranteed under Article 21 of the Constitution of India. Sexual harassment like eve-teasing of women amounts to violation of rights guaranteed under Articles 14 and 15 as well. Eve-teasing today has become pernicious, horried and disgusting practice. Consequences of not curbing such a menace are at times disastrous. There are many instances where girls of young age are being harassed, which sometimes may lead to serious psychological problems and even committing suicide. The necessity of a proper legislation to curb eve-teasing is of extreme importance. Thereafter, taking note of the absence of effective uniform law, certain directions were issued to curtail the menace.

31 (1997) 6 SCC 241 : 1997 SCC (Cri) 932.

32 Inspector General of Police v. S. Sanuthiram, (2013) 1 SCC 598.

Conferment of equal status on women apart from being a constitutional right has been recognised as a human right. In ***Bodhisattwa Gautam***[33], the Court, accentuating the concept, proceeded to state thus:

> *"9. … Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.*[34]

In ***State of Punjab v. Ramdev Singh***[35], while emphasising that the Court should deal with cases of sexual offences sternly and severely, it has been observed that sexual violence apart from being a dehumanising act is an unlawful intrusion on the right of privacy and sanctity of a female. It has been further held that rape is a crime against basic human rights. Recently, in ***Jugendra Singh***[36] the Court, while commenting on rape and its consequences, observed thus:

> *"49. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu. The cry of the collective has to be answered and respected and that is what exactly the High Court has done by converting the decision of acquittal to that of conviction and imposed the sentence as per law."*[37] *While dealing with violation of Pre-Conception and Pre- Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act,*

33 Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490 : 1996 SCC (Cri) 133.

34 Ibid., p. 500, paras 9-10.

35 (2004) 1 SCC 421 : 2004 SCC (Cri) 307.

36 Jugendra Singh v. State of U.P., (2012) 6 SCC 297 : (2012) 3 SCC (Cri) 129.

37 Ibid., 311, para 49.

1994, apart from giving series of directions, emphasis was also made on practice of female foeticide in ***Voluntary Health Association of Punjab v. Union of India and others***[38]*. In the said case it has been said that Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, ego-centric traditions, pervert perception of societal norms, and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.*

Further discussing about the repercussion of female foeticide it has been opined that every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it.

Reference was made to the scriptural comments and postulates. The Court referred to three Shlokas that have been referred in ***State of H.P. v. Nikku Ram and others***[39], wherein the judgment commenced with the line "यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता:" ["Yatra naryastu pujyante ramante tatra dewatah"] (where woman is worshipped, there is abode of God). The second line being significant was reproduced. It is as follows:

''यत्र तास्तु न पूज्यन्ते सर्वास्तत्राफला: क्रिया:''
[Yatra tāstu na pūjyante sarvāstatraphalāh kriyāh]

A free translation of the aforesaid is reproduced below:-

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

Two other references that were given are stated below:-

भृत भातृ पितृ ज्ञातिश्वश्रूश्वशुरदेवरै:।
बन्धु बिश्च स्त्रिय: पूज्या: भूषणाच्छादनाशनै:।''

38 2013 (3) SCALE 195.

39 (1995) 6 SCC 219.

[Bhārtr bhratr pitrijnāti śwaśrūswaśuradevaraih|
Bandhubhiśca striyah pūjyāh bhusnachhādanāśnaih||].

A free translation of the aforesaid is as follows:-

"The women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

Yet again, the sagacity got reflected in following lines: -

अतुलं यत्र तत्तेजः सर्वं देवशरीरजम
एकस्थं तदमून्नारी व्याप्त लोक तयं त्विषा:''

[Atulam yatra tattejah śarvadevasarirajam|
Ekastham tadabhūnnāri vyāptalokatrayam tvisā||]

A free translation of the aforesaid is reproduced below:-

> *"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman."*

Ultimately, while referring how to organise the camps, the Court observed that everyone should bear in mind that there has to be change in the mindset of the people, the grammar of the society and unacceptable beliefs inherent in the populace.

Right to education has been regarded by the Court as a human right. What has been envisaged under Article 21-A of the Constitution and the Right to Education Act, 2009 is not being referred. The emphasis is on human rights. In ***Election Commission of India v. St. Mary's School***[40] it has been ruled as follows:

30. The Human Rights Conventions have imposed a duty on the contracting States to set up institutions of higher education which would lead to the conclusion that the citizens thereof should be afforded an effective right of access to them. In a democratic society, a right to education is indispensable in the interpretation of right to development as a human right. (***See Leyla Sahin v. Turkey***[41].) Thus, right to development is also considered to be a basic human right.[42] Presently, the concept of innocence and fair trial may be delved into as far as the human rights conception is concerned. The Court in ***Noor Aga v. State of Punjab***[43] recognised that presumption of innocence is a human right as envisaged

40 (2008) 2 SCC 390.

41 Application No. 44774 of 1998, decided by the European Court of Human Rights on 10-11-2005.

42 (2008) 2 SCC 390, 402, para 30.

43 (2008) 16 SCC 41 : (2010) 3 SCC (Cri) 748.

under Article 14(2) of the International Covenant on Civil and Political Rights. It may be added that the Court observed that this particular right has limitations and cannot per se be equated with the fundamental right of liberty as adumbrated in Article 21 of the Constitution of India. While discussing noise pollution, the High Court of Madhya Pradesh in ***Sayeed Maqsood Ali v. State of M.P.***[44] has stated thus:

> *10. … Every citizen is entitled under Article 21 of the Constitution to live in a decent environment and has the right to sleep peacefully at night. Not for nothing it has been said that sleep is the best cure for waking troubles and the sleep of a labouring man is sweet. Sleep brings serenity. Lack of sleep creates lack of concentration, irritability and reduces efficiency. It cannot be lost sight of that silence invigorates the mind, energises the body and quietens the soul. That apart, solitude can be chosen as a companion by a citizen. No one has a right to affect the rights of others to have proper sleep, peaceful living atmosphere and undisturbed thought.*

No citizen can be compelled to suffer annoying effects of noise as that eventually leads to many a malady which includes cardiovascular disturbance, digestive disorders and neuropsychiatric disturbance.[45] Though the Court did not mention that it is a human right, yet from what has been stated therein, it can be stated with emphatic assurance that it is a human right. The High Court emphasised that diligent attempts are to be made to curb noise starting from the street to the stratosphere.

Balram Prasad v. Kunal Saha,(2014) 1 SCC 38, it has been held that the doctors, hospitals, the nursing homes and other connected establishments are to be dealt with strictly if they are found to be negligent with the patients who come to them pawning all their money with the hope to live a better life with dignity. **The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right.** We, therefore, hope and trust that this decision acts as a deterrent and a reminder to those doctors, hospitals, the nursing homes and other connected establishments who do not take their responsibility seriously.

The present generation has to keep itself alive to the situation and build a healthy society. It cannot afford to ponder like Hamlet "to be or not to be" or remain in a Parvati like situation "na jajau na tasthau". The existing generation must remind themselves of the message of a Latin poet "death plucks my ears and says, Live—I am coming". Positive action is the call of the day, for to live is to act.

44 AIR 2001 MP 220.

45 Ibid., 225, para 10.

The recognition of human rights in many a jurisprudence is likely to garner further canvas and cover more arena. In ***State of Jharkhand v. Harihar Yadav and others [(2014) 2 SCC 114]***, while dealing with the plight of the two corporations, namely, Bihar Hill Area Lift Irrigation Corporation (BHALCO) and Jharkhand Hill Area Lift Irrigation Corporation (JHALCO) inasmuch as they, after the bifurcation of State of Bihar took place to two States, namely, State of Bihar and State of Jharkhand, number of employees were not absorbed and they were paid salary, the Supreme Court referring to the concept of social justice which is the conscience of our Constitution that sustained Indian humanity, observed thus: - "If the present factual matrix is tested on the anvil of the aforesaid principles, there can be no trace of doubt that both the States and the Corporations have conveniently ostracized the concept of "model employer". It would not be wrong to say that they have done so with Pacific calmness, sans vision, shorn of responsibility and oblivious of their role in such a situation. Their action reflects the attitude of emotionlessness, proclivity of impassivity and deviancy with cruel impassibility. Neither of the States nor the Corporations have even thought for a moment about the livelihood of the employees. They have remained totally alien to the situation to which the employees have been driven to. In a State of good governance the Government cannot act like an alien. It has an active role to play. It has to have a constructive and progressive vision. What would have ordinarily happened had there not been bifurcation of the State and what fate of the employees of BHALCO would have faced is a different matter altogether. The tragedy has fallen solely because of the bifurcation. True it is, under the law there has been bifurcation and the Central Government has been assigned the role to settle the controversies that had to arise between the two States. But the experimentation that has been done with the employees as if they are guinea pigs is legally not permissible and indubitably absolutely unconscionable. It hurts the soul of the Constitution and no one has the right to do so." This reflects the anguish and concern of the Supreme Court when situations affecting human rights come up for consideration before it.

Human rights are to be inculcated in every individual. The various duties which have been enshrined under Article 51-A of the Constitution has its roots in the basic human development which would become sound and fury signifying nothing, if all human beings are not made aware of their human rights as well as human duties. That should be the basic tenet of everyone's life. Creation of harmony amongst all should be the accepted motto. The thought and action must synchronise to respect another individual and create a social order where everyone is in a position to realise his goal and fulfil his desires with dignity.

Everyone in this country is expected to say with serenity that I am a human and whatever concerns humanity is of interest to me, for it is essential not to live one's life but to live and respect others because it is exquisitely beautiful to all and one cannot afford to shatter the life of anyone. That should be the barometer as well as the stem of human life.

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Literature in the Law Takes Dullness Out of a judgment...
Justice Dipak Misra's judgments which bristle with literary quotations and extracts do qualify for inclusion in the excellent anthology, language of the Law by Louis-Blom Cooper.

...Soli Sorabjee
Eminent Jurist

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