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H.J.S. P.C.S. (J) A.P.O. & CLAT

Year – 2023

Secret of success is to know something

nobody else knows

NO. 10 OF 2023

NEWSLETTER

October 2023

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V.S. DREAM COACHING

1. Study Material-Law

Significance of Fundamental Duties in Nation Building

Democracy, justice, liberty, equality and fraternity form the bedrock on which our Republic stands. These are the values that form our collective inheritance. These values have been accorded primacy in our Constitution in the form of fundamental rights and fundamental duties of the citizens.

Observance of the fundamental duties mentioned in the Constitution by the citizens creates the proper environment for the enjoyment of fundamental rights. Roughly speaking, duty is an act, that one ought to do. In other words, it is an obligatory act. Duties may either be moral or legal. For example, there is a legal duty upon the owner of a motor vehicle to have valid vehicle insurance.

Since this duty is irrespective of knowledge and negligence it is exclusively legal and not a moral duty. On the other hand, there is no legal duty to refrain from offensive curiosity about one's neighbour, even if the satisfaction of it does them harm. Not stealing is both, one's moral and legal duty. Law enforces the performance of a legal duty or punishes the disregard of it.

To ascribe a duty, man is to claim that he ought to perform a certain act. However, not all acts that a man ought to perform constitute duties. Under Article 51A of the Indian Constitution, 11 Fundamental Duties are enumerated. These duties are important for every citizen of India.

We have been granted Fundamental Rights and it is appropriate to reciprocate by doing our Fundamental Duties with a sense of commitment. With duties, we may contract obligations. A typical example is an obligation that results from making a promise. Our Fundamental Duties clearly state that we must honour the Constitution, and respect the National Flag and National Anthem. We must be patriotic and defend our country. We must not damage public properties. We must preserve our precious natural environment. We must pursue education with a scientific mind. We must avoid violence. We must strive for excellence.

By doing our Fundamental Duties we are building our nation. We are making our communities live in harmony. No matter how diverse we are, we can live in unity. We can live with one another with a spirit of tolerance. Everyone wins if

we are carrying out our Fundamental Duties. The sum of it all will result in an ideal citizen, being a great asset to the community and contributing to nation-building.

Fundamental duties were added by the Forty-second Amendment of the Constitution in 1976. Such duties are generally not found in the Constitutions-based Western liberal traditions. They are invariably found in socialist constitutions. But they are also found in non-socialist constitutions. To some extent, their Constitution may also be associated with the cultural traditions of a society.

Thus, Asian and African societies give greater emphasis to duties than Western Societies. Before the inclusion of fundamental duties, it was criticised that, the Constitution ignored the Indian tradition of duties and spoke only about rights[1]. Reference to duties however finds a place even in international instruments such as the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights[2].

Inclusion of duties in the Constitution is not found necessary because they can always be imposed by the State in the absence of or consistently with fundamental rights. Their inclusion, however, reminds us that the Constitution presents an integrated scheme of which the fundamental or any other constitutional rights are only a part. The scheme must be so seen as one. Constitution and its scheme envisage responsible citizens.

In that sense, fundamental duties perform an educative role. They also have legal value in the sense that any laws which implement fundamental duties cannot be invalid on the ground of conflict with fundamental rights unless such conflict is irreconcilable. The rights must be reconcilable with duties. The reconciliation may be on the same lines between fundamental rights and directive principles because like them duties also constitute a scheme of rights.

A duty in one citizen implies the rights of other citizens. Thus, the duty to renounce the practices derogatory to the dignity of women implies a right in every woman not to be subjected to such practices. The same is the case with other duties[3]. It may be said that duties are not self-executing. The State must make laws for their implementation. In the absence of such laws, for example, a mandamus cannot be sought against an individual who does not observe his duties under Article 51A[4]. But, in appropriate cases, as in Visakha[5], if non-observance of duty by one citizen can be established as a violation of the right of another appropriate remedy may be provided by the courts.

Concerning the duty under clause (a) to Article 51A, it has been held that proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing[6]. Similarly, flying of National Flag freely with respect and dignity is consistent with the duty in clause (a) of Article 51A[7].

While the pandemic was widespread, it was a sacred national duty of every citizen to follow the precautions suggested by our scientists and experts. As our nation is celebrating Azadi Ka Amrit Mahotsav and marching towards Amrit Kaal, we must discharge this duty till the crisis is behind us.

Patriotism strengthens the sense of duty among citizens. Whether you are a lawyer or doctor, a shopkeeper or office worker, a sanitation employee or labourer, doing one's duty well and efficiently is the first and foremost contribution you make to the nation.

Only if we express our affection and gratitude to our nation, we can emerge as a strong and sensitive new India. All of us must serve our place of birth and our country in whatever way we can. If all our work is sincerely for the development of our birthplaces, then the whole country will benefit from the outcome of such local development. India is an ancient civilisation but a young republic.

For us, nation-building is a constant endeavour. We should be confident that India is better placed today to meet the challenges of the future. The moral value of fundamental duties would not be to smoothen rights but to establish a democratic balance by making people conscious of their duties equally as they are conscious of their rights.

[1]Kane, P. V. (1962). History of Dharmasastra (Ancient and Medieval Religious and civil law in India)-Vol V, Part II. pp. 1664-65.
[2]See Article 29 of UDHR read with Preamble to the ICCPR
[3]Union of India v. Naveen Jindal, (2004) 2 SCC 510
[4]Surya Narain v. Union of India, AIR 1982 Raj 1
[5]Visakha v. State of Rajasthan, AIR 1997 SC 3011
[6]Bijoe Emmanuel v. State of Kerala, AIR 1987 SC 748
[7]Union of India v. Naveen Jindal, (2004) 2 SCC 510

B. Important Cases October 2023

Important Supreme Court Cases
October 2023

S.N.	Subject	Case Reference
1.	Magistrate can dismiss a defamation complaint by applying the exceptions under section 499 of the Indian Penal Code, 1860 even before even summoning the accused	M/s Iveco Magirus Brandschutztechnik Gmbh Vs. Nirmal Kishore Bhartiya and Anr., Criminal Appeal No. 1959 of 2012, decided on 05-10-2023
2.	Section 106 of the Indian Evidence Act does not inherently impose a burden on the accused but comes into play when the accused fails to provide any explanation regarding facts that should be within their knowledge, facts that could support theories compatible with their innocence.	Balvir Singh Vs. State of Uttarakhand, Criminal Appeal No. 301 of 2015 with Criminal Appeal No. 2430 of 2014, decided on 06-10-2023
3.	Will can't be presumed to be valid merely because it is registered. Mere registration would not sanctify a document by attaching to it an irrebuttable presumption of genuineness.	Dhani Ram (D) through LRS. & Ors. Vs. Shiv Singh, Civil Appeal No. 8172 of 2009, decided on 06-10-2023
4.	Distinction between "common intention" and "common object"	Chandra Pratap Singh Vs. State of Madhya Pradesh, Criminal Appeal No. 1209 of 2011, decided on 09-10-2023
5.	At the stage of framing of charges, the accused does not have the right to produce any material or documents to contest the case.	State of Gujarat Vs. Dilipsingh Kishorsinh Rao, Criminal Appeal No. 2504 of 2023, decided on 09-10-2023
6.	Prosecution must prove accused was aware of offences likely to be committed to achieve common object under Sec. 149 IPC.	Naresh @ Nehru Vs. State of Haryana, Criminal Appeal No.1786 of 2023, decided on 09-10-2023
7.	Marriage is considered 'pious' in Indian society. Divorce on ground of 'irretrievable breakdown of marriage' is not always desirable.	Dr. Nirmal Singh Panesar Vs. Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar, Civil Appeal No. 2045 of 2011, decided on 10-10-2023

8.	Explains the principles relating to plea of alibi and delaying in registering FIR.	Kamal Prasad and Ors. Vs. State of Madhya Pradesh (Now State of Chhattisgarh), Criminal Appeal No. 1578 of 2012, decided on 10-10-2023
9.	Refuses to recognize same-sex marriages by 3:2 majority. Asks Union Govt. to form committee to determine rights of queer unions. Justice S. Ravindra Bhat, Justice Hima Kohli and Justice P.S. Narasimha were in majority view and refused to recognize same sex marriage. CJI D.Y. Chandrachud and Justice Sanjay Kishan Kaul dissents.	Supriyo @ Supriya Chakraborty & Anr. Vs. Union of India, Writ Petition (Civil) No. 1011 of 2022, decided on 17-10-2023
10.	Principles to be followed in case of multiple dying declarations	Abhishek Sharma Vs. State (Govt. of NCT of Delhi), Criminal Appeal No. 1473 of 2011, decided on 18-10-2023
11.	Section 5 of Limitation Act, 1963 (Extension of prescribed period in certain cases) cannot be used to extend the time limit prescribed, when a lesser time period has been specifically provided under the relevant act for a particular purpose.	Debasish Paul and Anr. Vs. Amal Boral, Civil Appeal No. 6565 of 2023, decided on 18-10-2023
12.	Directions to the Union government, and all State/UT governments to ensure the effective implementation of the provisions of the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) read with its Rules	Initiatives for Inclusion Foundation & Anr. Vs. Union of India & Ors., Writ Petition (Civil) No. 1224 of 2017, decided on 19-10-2023
13.	Right to remain silent not be used against accused under Sec. 313 Cr.P.C.	Indrakunwar Vs. State of Chhattisgarh, Criminal Appeal No. 1730 of 2012, decided on 19-10-2023
14.	Conviction under Sec. 498-A IPC can be upheld despite acquittal under Sec. 304-B IPC	Paranagouda and Anr. Vs. State of Karnataka and Anr., [Criminal Appeal No._____ of 2023 @ SLP (Crl.) No. 12216 of 2022, decided on 19-10-2023

15.	Issues twelve directions for speedy disposals of Civil Cases	Yashpal Jain Vs. Sushila Devi & Ors., Civil Appeal No. 4296 of 2023, decided on 20-10-2023
16.	Under Section 47 CPC, the Executing Court can only go into questions that are limited to the execution of decree and can never go behind the decree.	Pradeep Mehra Vs. Harijivan J. Jethwa, Civil Appeal No. 6375 of 2023, decided on 30-10-2023

IN THE SUPREME COURT OF INDIA

M/s Iveco Magirus Brandschutztechnik Gmbh
Vs.
Nirmal Kishore Bhartiya and Anr.

Criminal Appeal No. 1959 of 2012

HEADNOTE – Magistrate can dismiss a defamation complaint by applying the exceptions under section 499 of the Indian Penal Code, 1860 even before even summoning the accused.

JUDGMENT

Dipankar Datta, J.

THE APPEAL

1. This appeal, by special leave, is at the instance of a German company ("the appellant", hereafter). It assails a short five-line order of a learned Judge of the High Court of Delhi ("learned Judge", hereafter) dated 10th December 2010. By such order, the learned Judge dismissed a petition1 under section 482 of the Code of Criminal Procedure, 1973 ("Cr. PC", hereafter) presented by the appellant as not maintainable relying on the decision of this Court in Iridium India Telecom Ltd. v. Motorola Incorporated & Ors.2 and a Bench decision of the High Court of Delhi in Morgan Tetronics Ltd. v. State & Anr.3.

CHALLENGE BEFORE THE HIGH COURT OF DELHI

2. Appellant had approached the High Court of Delhi taking exception to an order dated 25th March 2010 passed by the Additional Chief Metropolitan Magistrate (SE), New Delhi ("Trial Court", hereafter) on a complaint4 lodged under section 200, Cr. PC by the respondent ("complainant", hereafter).

The Trial Court upon considering the complaint returned a prima facie finding in the said order that Mr. M.C. Aggarwal (accused no.1), the appellant (accused no. 2) and its District Manager (Asia), Mr. Lorenzo Boninsegna (accused no.3) were "jointly and severally responsible for writing, sending, publishing the above said letters containing malicious and defamatory statements and imputation against the complainant" and consequently summoned the three accused for offences under sections 500/107/34, Indian Penal Code ("IPC", hereafter).

FACTS

3. The undisputed and relevant facts leading to the summoning order impugned before the learned Judge is noticed hereunder:

i. Global Tender No. EQ/Global/2007-09/01 was floated by the Airports Authority of India ("AAI", hereafter) for supply of 40 (forty) Airfield Crash Fire Tenders at various airports across the country. The appellant, a Germany-based manufacturer of fire safety equipment, executed a Power of Attorney in favour of Mr. M.C. Aggarwal, the respondent no. 2 ("Aggarwal", hereafter), who happened to be the Managing Director of Brijbasi Hi-Tech Udyog Ltd. Aggarwal was appointed to be the local representative of the appellant in India and he was empowered, inter alia, to file suits and take all steps which were deemed expedient in furtherance of the tender process.

ii. The company of the complainant, Bhartiya Vehicles & Engineering Pvt. Ltd, was the Indian associate of one Rosenbauer International AG ("Rosenbauer", hereafter), another bidder in the aforementioned tender process.

iii. On 21st July 2008, AAI rejected the bid of the appellant and eventually awarded it to Rosenbauer. In the aftermath of the rejection, on various occasions in 2008, Aggarwal issued four letters in the nature of complaints to different authorities including the Minister of Civil Aviation, Government of India, the Chairman of AAI, the Chief Vigilance Officer, AAI, and the Central Vigilance Commissioner, Government of India, inter alia, complaining of favouritism and irregularities in the tender process. These letters allege that the complainant, through illegal and wrongful methods, persuaded AAI to award the tender to Rosenbauer. Enumeration of the contents of such letters is avoided, lest the same prejudices the rights of the parties.

iv. Dissatisfied with the inaction of the aforementioned authorities to look into the letters of complaint, Aggarwal, in his capacity as the local authorised representative of the appellant, invoked the writ jurisdiction of the High Court on or about 12th August 2008 by presenting a writ petition5 against the Union of India and AAI. It is pertinent to note that Bhartiya Vehicles & Engineering Pvt. Ltd., and Rosenbauer were also made parties to the proceedings. The writ petition was finally dismissed on 13th February 2009 vide a detailed order, which was not challenged thereafter.

v. On 30th April 2009, the complainant addressed a legal notice to the appellant and Aggarwal inter alia alleging that the contents of the aforementioned four letters of complaint given to the concerned authorities were defamatory. Pertinently, on 20th May 2009, the appellant responded to the legal notice inter

alia stating that it had not authorised Aggarwal to write any such letter, and that the appellant was also not involved in their preparation.

vi. It was in this context that the complainant lodged the complaint before the Trial Court alleging criminal defamation as well as its abetment under sections 107, 499, and 500 read with section 34 of the IPC against the accused.

vii. The Trial Court, after perusing the complaint and examining the witnesses in support thereof, ordered the accused to be summoned as it was of the opinion that a prima facie case was made out against them.

viii. The challenge by the appellant to the summoning order was spurned by the High Court vide the impugned order.

CONTENTIONS OF THE APPELLANT

4. On behalf of the appellant, learned counsel Ms. Viswanathan argued that the High Court committed grave miscarriage of justice in dismissing the petition by a cryptic order. She contended that several important questions of law were raised in the petition by the appellant. Although the objection as to whether a company is capable of being prosecuted on the ground that it is incapable of possessing necessary mens rea stood answered by the decisions relied on by the learned Judge, yet, according to her, the learned Judge should have considered the other objections raised by the appellant. Not having so considered, it was urged that the impugned order is indefensible.

5. Ms. Viswanathan, in support of the appeal, raised the following specific contentions:

i. The impugned order of the learned Judge omitted to consider that the complaint did not disclose any oral or written words, spoken or written by the appellant, or sign or visible representation made by it; and, in the absence of disclosure of any imputation made by the appellant, the key ingredient of the offence of defamation did not exist. The impugned order of the learned Judge failed to appreciate that issuance of a Power of Attorney cannot by law constitute an ingredient of an offence under section 499, IPC since agents, under section 188 of the Indian Contract Act, 1872, are authorised to do only lawful acts; and, as a corollary, execution of such power of attorney did not amount to authorisation or consent given to Aggarwal to commit any alleged act of defamation.

ii. The learned Judge erred in not considering that a writ petition instituted on behalf of the appellant cannot constitute an ingredient of an offence under section 499, IPC, since documents filed in civil cases are protected by an

"absolute privilege" and are also covered under the Fourth Exception to section 499, IPC.

iii. There has been a gross failure of justice in that the learned Judge ought to have corrected the manifest error committed by the Trial Court in issuing process against the accused without the Trial Court considering whether any of the exceptions to section 499, IPC was applicable on facts and in the circumstances of the present case.

iv. The impugned order of the learned Judge fails to explain why the decision of this Court in Rajendra Kumar Sitaram Pande v. Uttam6 was not followed, whereby law has been settled that issuance of process by a Magistrate without applying the exceptions to section 499, IPC is unreasonable, excessive and palpably wrong resulting in failure of justice.

v. The decision in Aroon Purie v. State of NCT of Delhi7 was also cited for the proposition that there is no rigid principle that the benefit of exception can only be afforded at the stage of trial.

6. Resting on the aforesaid contentions, Ms. Viswanathan prayed that the proceedings emanating from the complaint be quashed.

CONTENTIONS OF THE FIRST RESPONDENT

7. Mr. Taneja, learned counsel representing the complainant invited our attention to various documents forming part of his counter affidavit to the special leave petition. According to him, the appellant withheld relevant materials from this Court and obtained an ex parte interim order on 29th April 2011 as a sequel whereto the entire proceedings before the Trial Court have been brought to a grinding halt.

8. Our notice was first invited to the fact that Aggarwal had independently challenged the summoning order before the High Court of Delhi by presenting a petition8 under section 482, Cr. PC. By a detailed order dated 10th December 2010, the same learned Judge (who dismissed the petition of the appellant) noted that Aggarwal was taking defence under exceptions to section 499 IPC and that "the Court cannot take the defence of the petitioner into account to quash the summoning order or to quash the complaint". Based on such finding, the learned Judge rejected the challenge.

9. Mr. Taneja contended that the learned Judge on 10th December 2010 had considered the petitions of Aggarwal and the appellant, one after the other; and, although it is true that the learned Judge while dismissing the petition of the appellant dealt with the point that a company could be proceeded against in view

of Iridium India Telecom Ltd. (supra) and Morgan Tetronics Ltd. (supra) and did not assign separate reasons for spurning the appellant's challenge to the impugned order on the other grounds raised therein, the appellant was duly represented by its learned advocate when Aggarwal's petition was considered and in his presence, the order of dismissal was dictated.

What Mr. Taneja hinted at was that the learned Judge having passed a reasoned order rejecting Aggarwal's challenge to the summoning order, the learned Judge may not have considered it necessary to repeat the reasons twice over while dismissing the petition of the appellant.

10. Next, our attention was drawn by Mr. Taneja to the letters of complaint issued by Aggarwal before the various public authorities. It was contended that while acting on behalf of the appellant and also under its instructions, Aggarwal had made reckless and frivolous allegations against the complainant amounting to defamation and, in the process, lowered his reputation and fame in the eyes of the public.

He further contended that the appellant cannot feign ignorance of the letters of complaint issued by Aggarwal. Referring to the writ petition of the appellant presented before the High Court of Delhi, he pointed out that the self-same letters of complaint issued by Aggarwal were made part of such petition while challenging the appellant's disqualification in course of the tender process; and, if indeed, such letters were issued without knowledge and consent of the appellant, it defies logic as to why they were made part of the writ petition in the first place where the appellant was arrayed as the writ petitioner.

11. Relying on the decision of this Court in Supriya Jain v. State of Haryana9, it was argued by Mr. Taneja that it is not open to the Courts to quash a complaint based on additional material placed by the accused which is not part of the record of proceedings before the court below. According to him, the Power of Attorney is not a piece of evidence that has been admitted or accepted by the complainant and, thus, it requires proof by the appellant. Since the same is yet not proved by the appellant according to law, therefore, the same cannot be considered at this stage by this Court. Also, it is for the appellant to respond to the summons and to raise whatever defence is available to it by appearing before the Trial Court.

12. Reliance was also placed on several decisions by Mr. Taneja, some of which we propose to refer to a little later, to buttress his contention that the petition of the appellant was rightly dismissed and that the appeal deserves dismissal with costs.

THE QUESTIONS

13. Having heard learned counsel appearing for the appellant and the complainant and on consideration of the materials on record, we are of the view that the following questions of law emerge for an answer:

i. Whether, while considering a private complaint alleging defamation, the Magistrate before summoning the accused ought to confine himself to the allegations forming part of the petition only or he may, applying his judicial mind to the exceptions to section 499, IPC, dismiss the complaint holding that the facts alleged do not make out a case of defamation?

AND

ii. Whether and, if at all, to what extent, is it open to the High Courts to exercise inherent power saved by section 482, Cr. PC to quash proceedings for defamation by setting aside the summoning order upon extending the benefit of any of the Exceptions to section 499, IPC?

14. After answering the aforesaid questions, we wish to answer the following questions emerging from the facts and circumstances of the appeal:

a. Whether the appellant has made out any case for interference with the judicial orders of the Magistrate and the learned Judge under challenge?

b. Whether a company can be prosecuted for defamation when the alleged defamatory statements are made not by it (the company) but by its authorised agent?

c. Depending on the answers to the above, whether the benefit of the Fourth Exception to section 499, IPC, as claimed, should be accorded to the appellant?

ANALYSIS

15. A survey of the decisions of this Court which were cited and those mentioned in the cited decisions as well as some other decisions, which we had the occasion to read and consider while preparing this judgment, would provide guidance and pave the way for us to decide the fate of this appeal.

16. We would first consider the decisions cited by the parties and those decisions, though not cited by them, are traceable in such decisions, by maintaining the sequence of their origin.

17. In Balraj Khanna & Ors. v. Moti Ram10, the respondent lodged a complaint against the first appellant and 6 (six) others under section 500, IPC, alleging that they had levelled allegations against him which were defamatory in character. On 2 (two) grounds, the Magistrate dismissed the complaint. The respondent unsuccessfully applied for revision of the order of dismissal before the Additional Sessions Judge, whereafter he approached the High Court of Delhi with success. The High Court, while setting aside the orders impugned, directed further inquiry. After considering various foreign decisions as well as decisions of the High Courts of Orissa, Nagpur, Allahabad and Mysore that were cited, this Court in paragraph 29 held as follows:

"29. Before concluding the discussion, it is to be stated that the trial Magistrate has given an additional reason for dismissing the complaint. That reason is that the resolution passed by the Standing Committee on December 11, 1964 and the discussion preceding it by the members of the Standing Committee including the appellants, is covered by the Exceptions to Section 499 IPC. Unfortunately, the High Court also has touched upon this aspect and made certain observations.

In our opinion, the question of the application of the Exceptions to Section 499 IPC, does not arise at this stage. Rejection of the complaint by the Magistrate on the second ground mentioned above cannot be sustained. It was also unnecessary for the High Court to have considered this aspect and differed from the trial Magistrate. It is needless to state that the question of applicability of the Exceptions to Section 499 IPC, as well as all other defences that may be available to the appellants will have to be gone into during the trial of the complaint."

(underlining ours, for emphasis)

18. The next decision is Sewakram Sobhani v. R.K. Karanjia11, rendered by a Bench of 3 (three) Hon'ble Judges. The appeal was directed against an order passed by the Madhya Pradesh High Court in exercise of jurisdiction under section 397, Cr. PC, alternatively under section 482 thereof.

The respondent was the Chief Editor, Blitz. An article was published therein which was per se defamatory. Prosecution for an offence under section 500, IPC which was launched stood quashed by the impugned order on the ground that the case "clearly falls within the ambit of Exception 9 of Section 499 of the Indian Penal Code, 1860". The appeal was allowed by the majority and the order under challenge quashed. This is what the Court, speaking through Hon'ble A.P. Sen, J., said:

"6. The order recorded by the High Court quashing the prosecution under Section 482 of the Code is wholly perverse and has resulted in manifest miscarriage of justice. The High Court has prejudged the whole issue without a trial of the accused persons. The matter was at the stage of recording the plea of the accused persons under Section 251 of the Code.

The requirements of Section 251 are still to be complied with. The learned Magistrate had to ascertain whether the respondent pleads guilty to the charge or demands to be tried. The circumstances brought out clearly show that the respondent was prima facie guilty of defamation punishable under Section 500 of the Code unless he pleads one of the exceptions to Section 499 of the Code. It is for the respondent to plead that he was protected under Ninth Exception to Section 499 of the Penal Code. The burden, such as it is, to prove that his case would come within that exception is on him.

7. We are completely at a loss to understand the reasons which impelled the High Court to quash the proceedings." Hon'ble O. Chinnappa Reddy, J., in a concurring judgment, made an illuminating discussion which would also be relevant for answering one of the questions formulated by us touching upon the facts of this appeal. We quote the concluding paragraph of His Lordship's judgment, reading thus:

"18. Several questions arise for consideration if the Ninth Exception is to be applied to the facts of the present case. Was the article published after exercising due care and attention? Did the author of the article satisfy himself that there were reasonable grounds to believe that the imputations made by him were true? Did he act with reasonable care and a sense of responsibility and propriety? Was the article based entirely on the report of the Deputy Secretary or was there any other material before the author?

What steps did the author take to satisfy himself about the authenticity of the report and its contents? Were the imputations made rashly without any attempt at verification? Was the imputation the result of any personal ill will or malice which the author bore towards the complainant? Was it the result of any ill will or malice which the author bore towards the political group to which the complainant belonged? Was the article merely intended to malign and scandalise the complainant or the party to which he belonged?

Was the article intended to expose the rottenness of a jail administration which permitted free sexual approaches between male and female detenus? Was the article intended to expose the despicable character of persons who were passing off as saintly leaders? Was the article merely intended to provide salacious reading material for readers who had a peculiar taste for scandals?

These and several other questions may arise for consideration, depending on the stand taken by the accused at the trial and how the complainant proposes to demolish the defence. Surely the stage for deciding these questions has not arrived yet. Answers to these questions at this stage, even before the plea of the accused is recorded can only be a priori conclusions. 'Good faith' and 'public good' are, as we said, questions of fact and matters for evidence. So, the trial must go on."

(underlining ours, for emphasis)

19. The decision of another Bench of 3 (three) Hon'ble Judges in Shatrughna Prasad Sinha v. Rajabhau Surajmal Rathu12 outlined the contours for exercise of jurisdiction to quash a complaint for defamation. Paragraph 13 being relevant is set out below:

"13. As regards the allegations made against the appellant in the complaint filed in the Court of Judicial Magistrate, Ist Class, at Nasik, on a reading of the complaint we do not think that we will be justified at this stage to quash that complaint. It is not the province of this Court to appreciate at this stage the evidence or scope of and meaning of the statement.

Certain allegations came to be made but whether these allegations do constitute defamation of the Marwari community as a business class and whether the appellant had intention to cite as an instance of general feeling among the community and whether the context in which the said statement came to be made, as is sought to be argued by the learned Senior Counsel for the appellant, are all matters to be considered by the learned Magistrate at a later stage.

At this stage, we cannot embark upon weighing the evidence and come to any conclusion to hold, whether or not the allegations made in the complaint constitute an offence punishable under Section 500. It is the settled legal position that a court has to read the complaint as a whole and find out whether allegations disclosed constitute an offence under Section 499 triable by the Magistrate. The Magistrate prima facie came to the conclusion that the allegations might come within the definition of 'defamation' under Section 499 IPC and could be taken cognizance of.

But these are the facts to be established at the trial. The case set up by the appellant are either defences open to be taken or other steps of framing a charge at the trial at whatever stage known to law. Prima facie we think that at this stage it is not a case warranting quashing of the complaint filed in the Court of Judicial Magistrate, Ist Class at Nasik. To that extent, the High Court was right in refusing to quash the complaint under Section 500 IPC."

(underlining ours, for emphasis)

20. Then followed M.N. Damani v. S.K. Sinha13 where this Court, after applying the law laid down in Sewakram Sobhani (supra) and Shatrughna Prasad Sinha (supra), set aside the order of the Karnataka High Court and restored the order of the Magistrate issuing summons to the accused for offence under section 500, IPC.

21. In M.A. Rumugam v. Kittu Alias Krishnamoorthy14, the respondent filed a private complaint against the appellant for commission of the offence of defamation under section 500, IPC. Taking cognizance of the said complaint, the Magistrate issued summons to the appellant. Aggrieved thereby, he filed a petition before the High Court of Judicature at Madras praying to call for the records pertaining to the complaint petition filed by the respondent and to quash the same. Before the High Court, a contention was raised that the backdrop of events and the manner in which the complaint petition had to be filed by the appellant would clearly establish that the action on his part was not in good faith.

The said contention was negatived by the High Court. This Court had the occasion to consider the applicability of the provisions of section 482, Cr. PC for quashing of a complaint petition filed by the respondent against the appellant under section 500, IPC. While dismissing the appeal, the Court went on to apply the well-settled principle of law that those who plead exception must prove it and, therefore, the burden of proof that his action was bona fide would, thus, be on the appellant alone.

22. In Subramanian Swamy v. Union of India15, this Court considered the issue from a different angle. We can do no better than reproduce the contention and how the same was unhesitatingly repelled in the following words:

"209. We will be failing in our duty if we do not take note of the submission of Mr. Bhambhani, learned Senior Counsel. It is submitted by the learned Senior Counsel that Exceptions to Section 499 are required to be considered at the time of summoning of the accused but as the same is not conceived in the provision, it is unconstitutional. It is settled position of law that those who plead Exception must prove it.

It has been laid down in M.A. Rumugam that for the purpose of bringing any case within the purview of the Eighth and the Ninth Exceptions appended to Section 499 IPC, it would be necessary for the person who pleads the Exception to prove it. He has to prove good faith for the purpose of protection of the interests of the person making it or any other person or for the public good. The

said proposition would definitely apply to any Exception who wants to have the benefit of the same.

Therefore, the argument that if the said Exception should be taken into consideration at the time of issuing summons it would be contrary to established criminal jurisprudence and, therefore, the stand that it cannot be taken into consideration makes the provision unreasonable, is absolutely an unsustainable one and in a way, a mercurial one. And we unhesitatingly repel the same."

(underlining ours, for emphasis)

23. Now, we take up for consideration the first decision cited by Ms. Viswanathan, i.e., Rajendra Kumar Sitaram Pande (supra). The facts, the relevant issue and the finding - all are captured in paragraph 7, which we reproduce hereunder:

"The next question that arises for consideration is whether reading the complaint and the report of the Treasury Officer which was obtained pursuant to the Order of the Magistrate under sub-section (1) of Section 201, can it be said that a prima facie case exists for trial or Exception 8 to Section 499 clearly applies and consequently in such a case, calling upon the accused to face trial would be a travesty of justice.

The gravamen of the allegations in the complaint petition is that the accused persons made a complaint to the Treasury Officer, Amravati, containing false imputations to the effect that the complainant had come to the office in a drunken state and abused the Treasury Officer, Additional Treasury Officer and the Collector and circulated in the office using filthy language and such imputations had been made with the intention to cause damage to the reputation and services of the complainant. In order to decide the correctness of this averment, the Magistrate instead of issuing process had called upon the Treasury Officer to hold an enquiry and submit a report and the said Treasury Officer did submit a report to the Magistrate.

The question for consideration is whether the allegations in the complaint read with the report of the Magistrate make out the offence under Section 500 or not. Section 499 of the Penal Code, 1860 defines the offence of defamation and Section 500 provides the punishment for such offence. Exception 8 to Section 499 clearly indicates that it is not a defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with regard to the subjectmatter of accusation.

The report of the Treasury Officer clearly indicates that pursuant to the report made by the accused persons against the complainant, a departmental enquiry

had been initiated and the complainant was found to be guilty. Under such circumstances the fact that the accused persons had made a report to the superior officer of the complainant alleging that he had abused the Treasury Officer in a drunken state which is the gravamen of the present complaint and nothing more, would be covered by Exception 8 to Section 499 of the Penal Code, 1860. By perusing the allegations made in the complaint petition, we are also satisfied that no case of defamation has been made out.

In this view of the matter, requiring the accused persons to face trial or even to approach the Magistrate afresh for reconsideration of the question of issuance of process would not be in the interest of justice. On the other hand, in our considered opinion, this is a fit case for quashing the order of issuance of process and the proceedings itself. We, therefore, set aside the impugned order of the High Court and confirm the order of the learned Sessions Judge and quash the criminal proceeding itself. This appeal is allowed."

(underlining ours, for emphasis)

24. The aforesaid determination makes it clear that on perusal of the allegations levelled in the petition of complaint, the Court was satisfied that no case of defamation had been made out therein and this precisely seems to be the reason why the Court felt that it would not be in the interest of justice to require the accused persons to face trial or even to approach the Magistrate afresh for reconsideration of the question of issuance of process.

We do not read any law having been laid down by this Court in Rajendra Kumar Sitaram Pande (supra) that wherever a challenge to a summoning order passed on a complaint for defamation is laid before the High Courts in a petition under section 482, Cr. PC or such challenge travels to this Court, an endeavour must necessarily be made whether any of the exceptions is attracted so that the proceedings may be closed without subjecting the accused to long drawn proceedings. At best, we read the decision as one where, in the given facts and circumstances, the Court felt that requiring the appellants to undergo a trial would be a travesty of justice; hence, the decision must be held to be confined to the facts of the case.

25. Now, it is time to consider the other decision relied on by Ms. Viswanathan, i.e., Aroon Purie (supra). In such decision, the decision in Jawaharlal Darda v. Manoharrao Ganpatrao Kapsikar16 was considered. Before we look into Aroon Purie (supra), we propose to ascertain whether Jawaharlal Darda (supra) lays down a law having the force of a binding precedent.

26. The decision in Jawaharlal Darda (supra) reveals that the respondent 1 had filed a complaint on 2nd February, 1987 in the court of the relevant Magistrate alleging that by publishing a news item in its newspaper 'Daily Lokmat', on 4th February, 1984, the appellant being the then Chief Editor of that daily and 4 (four) others associated with the newspaper in one capacity or the other, had committed offences punishable under sections 499, 500, 501 and 502 read with section, 34 IPC. Process was issued against all the accused by the Magistrate.

Upon a challenge being laid to such order, the relevant Sessions Court quashed it being of the opinion that by publishing that news item, none of the accused had committed any offence. That order was challenged by the complainant by filing a petition in the High Court under section 482, Cr. PC. The High Court was of the opinion that the Sessions Court misinterpreted the publication. It was also of the view that when the Magistrate had found prima facie case against the accused and thought it fit to issue process, it was not proper for the Sessions Court to set aside that order by exercising revisional power. This Court restored the order of the Sessions Court holding as follows:

"4. As we have stated earlier, the news item was published on 4-2-1984. The complaint in that behalf was filed by the complainant on 2-2-1987. The news item merely disclosed what happened during the debate which took place in the Assembly on 13-12-1983. It stated that when a question regarding misappropriation of government funds meant for Majalgaon and Jaikwadi was put to the Minister concerned, he had replied that a preliminary enquiry was made by the Government and it disclosed that some misappropriation had taken place.

When questioned further about the names of persons involved, he had stated the names of five persons, including that of the complainant. The said proceedings came to be published by the accused in its Daily on 4-2-1984. Because the name of the complainant was mentioned as one of the persons involved and likely to be suspended he filed a complaint before the learned CJM alleging that as a result of publication of the said report he had been defamed.

5. It is quite apparent that what the accused had published in its newspaper was an accurate and true report of the proceedings of the Assembly. Involvement of the respondent was disclosed by the preliminary enquiry made by the Government. If the accused bona fide believing the version of the Minister to be true published the report in good faith it cannot be said that they intended to harm the reputation of the complainant. It was a report in respect of public conduct of public servants who were entrusted with public funds intended to be used for public good. Thus the facts and circumstances of the case disclose that

the news items were published for public good. All these aspects have been overlooked by the High Court."

(underlining ours, for emphasis)

It is clear from the above reasoning that this Court went on to reverse the order of the High Court and restore that of the Sessions Court on the grounds that the accused published the report in good faith and bona fide believing the version of the Minister to be true, that it cannot be said that they intended to harm the reputation of the complainant, and that the news item was published for public good. Therefore, relief was given to the accused having regard to the facts obtaining therein and without there being any discussion on the point that we are seized of. This decision too appears to have been rendered by this Court considering the special facts and circumstances.

27. Significantly, the precedents which we have referred to at an earlier part of this judgment do not appear to have been cited by the parties in Rajendra Kumar Sitaram Pande (supra) and Jawaharlal Darda (supra) and, thus, the Hon'ble Judges on the Bench did not have the benefit of considering the same.

28. What Aroon Purie (supra) reveals is that the operative part of the Trial Magistrate's order was extracted, wherein the decisions in Balraj Khanna (supra) and M.N. Damani (supra) were referred to; however, the case was decided without any express reference by the Court to such precedents.

29. We need not examine the facts in Aroon Purie (supra) in any great detail in view of the question of law that the Court formulated and the answer to it. The question, in paragraph 18, reads as follows:

"We now turn to the question: whether the benefit of any of the exceptions to Section 499 of the IPC can be availed of and on the strength of such exception, the proceedings can be quashed at the stage when an application moved under Section 482 of the Code is considered?"

After quoting paragraphs 5 and 7 from the decisions in Jawaharlal Darda (supra) and Rajendra Kumar Sitaram Pande (supra), respectively, and conscious of the legal position, the Court cautiously proceeded to hold as follows:

"21. It is thus clear that in a given case, if the facts so justify, the benefit of an exception to Section 499 of the IPC has been extended and it is not taken to be a rigid principle that the benefit of exception can only be afforded at the stage of trial."

(underlining ours, for emphasis)

30. Jawaharlal Darda (supra) and Rajendra Kumar Sitaram Pande (supra), we reiterate, are decisions where the disputes arising before the Court were resolved without laying down any law capable of being treated as precedents within the meaning of Article 141 of the Constitution. However, the approach adopted seems to have persuaded the Court in Aroon Purie (supra) to proceed to make the observation, highlighted above, which has opened up an arena of debate as to whether, the benefit of an Exception to section 499, IPC could be afforded at the stage of trial only or whether, if the facts of a given case so justify, such benefit can be extended and proceedings quashed at the stage a petition under section 482, Cr. PC is being dealt with.

31. At this stage, it would not be out of place to refer to and discuss a few other decisions of this Court which are considered relevant for the present adjudication. In all these decisions, the issue of legality of summoning orders was examined and resting on the discussion of the relevant laws vis-à-vis the facts of each case, the impugned order was either maintained/interdicted.

While the first two decisions are of ancient vintage, viz. Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar17 and Chandra Deo Singh v. Prokash Chandra Bose18, being decisions rendered by Benches of 3 (three) and 4 (four) Hon'ble Judges, respectively, the remaining three are decisions of not too distant an origin, viz. Jeffrey J. Diermeier v. State of West Bengal19, Manoj Kumar Tiwari v. Manish Sisodia20 and B.R.K. Aathithan v. Sun Group21 rendered by Benches of 2 (two) Hon'ble Judges of this Court.

32. Vadilal Panchal (supra) arose from the decision of the Bombay High Court reversing an order of the Presidency Magistrate under section 203, Cr. PC. In course of a public agitation, one Sitaram died because of a gunshot injury inflicted by the appellant. Upon a complaint being lodged before the Presidency Magistrate, he ordered an inquiry by the Superintendent of Police, CID. Materials collected in course of such inquiry suggested that the appellant, who was accused of murdering Sitaram, had exercised his right of self-defence. Considering the same and after extending due opportunity to the complainant, the Presidency Magistrate dismissed the complaint.

The Bombay High Court set aside the order of dismissal and directed the Presidency Magistrate to issue process against the appellant and deal with the case in accordance with law, on the ground that though Sitaram's death was indisputable, the accused would have to establish the necessary ingredients of the right of private defence as laid down in section 96 and onwards of the Indian Penal Code; that there was nothing in any of the sections in Chapter XVI to show that such an exception can be held to be established from the mere report of the police; that there is nothing in sections 202 or 203 of the Cr. PC

abrogating the rule as to the presumption laid down in section 105 of the Evidence Act and the mode of proof of exception laid down in imperative language in that section; and that it was not a proper case in which the Presidency Magistrate should have dismissed the complaint under section 203, there being no evidence before him as and by way of proof to establish the exception of the right of private defence pleaded by the accused.

32.1 The question that arose before this Court was, whether the High Court of Bombay was right in its view that when a Magistrate directs an enquiry under section 202 of the Cr. PC for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, is it not open to him to hold that the plea is correct on the basis of the report and the statements of witnesses recorded by the enquiring officer? Must the Magistrate, as a matter of law, issue process in such a case and leave the person complained against to establish his plea of self-defence at the trial?

32.2 While setting aside the impugned judgment and restoring the order of the Magistrate, this Court held that the Bombay High Court was in error in holding in such case that as a matter of law, it was not open to the Presidency Magistrate to conclude that no offence had been made out and there was no sufficient ground for proceeding further on the complaint on the materials before him.

32.3 After discussing the scheme of sections 200, 202 and 203, Cr. PC, this is what this Court held:

"10. Now, in the case before us it is not contended that the learned Presidency Magistrate failed to consider the materials which he had to consider, before passing his order under Section 203 CrPC. As a matter of fact the learned Magistrate fully, fairly and impartially considered these materials. What is contended on behalf of the respondent-complainant is that as a matter of law it was not open to the learned Magistrate to accept the plea of right of self-defence at a stage when all that he had to determine was whether a process should issue or not against the appellant. We are unable to accept this contention as correct.

It is manifestly clear from the provisions of Section 203 that the judgment which the Magistrate has to form must be based on the statements of the complainant and his witnesses and the result of the investigation or inquiry. The section itself makes that clear, and it is not necessary to refer to authorities in support thereof. But the judgment which the Magistrate has to form is whether or not there is sufficient ground for proceeding. This does not mean that the Magistrate is bound to accept the result of the inquiry or investigation or that he must accept any plea that is set up on behalf of the person complained against.

The Magistrate must apply his judicial mind to the materials on which he has to form his judgment. In arriving at his judgment he is not fettered in any way except by judicial considerations; he is not bound to accept what the Inquiring Officer says, nor is he precluded from accepting a plea based on an exception, provided always there are satisfactory and reliable materials on which he can base his judgment as to whether there is sufficient ground for proceeding on the complaint or not.

If the Magistrate has not misdirected himself as to the scope of an enquiry under Section 202 and has applied his mind judicially to the materials before him, we think that if (sic, it) would be erroneous in law to hold that a plea based on an exception can never be accepted by him in arriving at his judgment. What bearing such a plea has on the case of the complainant and his witnesses, to what extent they are falsified by the evidence of other witnesses - all these are questions which must be answered with reference to the facts of each case. No universal rule can be laid in respect of such questions."

(underlining ours, for emphasis)

33. Profitable reference can next be made to the decision in Chandra Deo Singh (supra), where a Bench of 4 (four) Hon'ble Judges had the occasion to consider a challenge to a judgment of the High Court at Calcutta. There, this Court was presented with a circumstance where two complaints alleging murder of a darwan were lodged before the Sub-Divisional Magistrate. The first complaint was lodged by a distant relative of the deceased accusing three persons of murder whereas the second complaint was lodged by the appellant accusing the respondent no.1 of murdering his uncle.

By separate orders, the Sub-Divisional Magistrate directed a Magistrate, First Class, to conduct judicial inquiry. Separate reports were submitted by the Magistrate, First Class. In his first report, he opined that a prima facie case to proceed against the three accused persons had been made out whereas, in his second report, he opined that no prima facie case to proceed against the first respondent had been made out. The Sub-Divisional Magistrate, perusing the second report, dismissed the complaint of the appellant against the respondent no.1 without assigning any reason.

The Sub-Divisional Magistrate, however, issued summons against the three other accused. Thereafter, the appellant approached the Sessions Judge with a revision who, after hearing the respondent no.1, directed the Sub-Divisional Magistrate to make a further inquiry against him. Thence, the respondent no.1 preferred a revision application before the High Court challenging the direction of the Sessions Judge.

The same was allowed by a Single Judge of the High Court and upon grant of certificate under Article 134(1)(c) of the Constitution, the matter was carried to this Court. It was held that upon a finding of a prima facie case, the Magistrate was bound to issue process despite the charged person having a defence. Further, it was held that the matter was to be decided by an appropriate forum at the appropriate stage, and issuance of process could not be refused.

33.1 We consider it appropriate to quote certain pertinent observations from such decision, hereinbelow:

"7. ***, it seems to us clear from the entire scheme of Chapter XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so.

It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go.

No doubt, one of the objects behind the provisions of Section 202 CrPC is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made.

Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under Section 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object

and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry."

(underlining ours, for emphasis)

33.2 Considering the decision in Vadilal Panchal (supra), what was said therein was explained in the following words:

"13. we may point out that since the object of an enquiry under Section 202 is to ascertain whether the allegations made in the complaint are intrinsically true, the Magistrate acting under Section 203 has to satisfy himself that there is sufficient ground for proceeding. In order to come to this conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry under Section 202, or statements made in an investigation under that section, as the case may be. He is not entitled to rely upon any material besides this."

(underlining ours, for emphasis)

In the same paragraph, after referring to the decision in Ramgopal Ganpatrai Ruia v. State of Bombay22, the Court proceeded to rule that:

"Thus, where there is a prima facie case, even though much can be said on both sides, a committing Magistrate is bound to commit an accused for trial. All the greater reason, therefore, that where there is prima facie evidence, even though an accused may have a defence like that in the present case that the offence is committed by some other person or persons, the matter has to be left to be decided by the appropriate forum at the appropriate stage and issue of process cannot be refused. Incidentally, we may point out that the offence with which Respondent 1 has been charged with is one triable by jury. The High Court, by dealing with the evidence in the way in which it has done, has in effect sanctioned the usurpation by the Magistrate of the functions of a jury which the Magistrate was wholly incompetent to do."

(underlining ours, for emphasis)

34. It is true that neither Vadilal Panchal (supra) nor Chandra Deo Singh (supra) arose out of proceedings for defamation but in both cases defence of the accused was considered in varying circumstances. As noted above, in Vadilal Panchal (supra) the order of the Presidency Magistrate dismissing the complaint on the ground that the accused had exercised his right of self-defence was restored upon setting aside of the order of the High Court of Bombay; whereas, in Chandra Deo Singh (supra), the order of the Sub-Divisional Magistrate directing further inquiry was restored upon setting aside the order of the High Court at Calcutta. The decision in Vadilal Panchal (supra) was not overruled by the larger

Bench in Chandra Deo Singh (supra). Such decisions, in our opinion, assume relevance because the guidance provided thereby carries great weight.

35. In Jeffrey J. Diermeier (supra), this Court was called upon to consider whether the High Court at Calcutta was right in refusing to quash a private complaint under section 500 read with section 34, IPC. It was held that it is for the accused to demonstrate, by leading evidence during trial, that the purportedly defamatory statement came under an exception enumerated in section 499, IPC.

The appellants therein had issued a public notice against the respondent no. 2, which the respondent no. 2 alleged to be defamatory in nature. The appellants pleaded that the aforesaid notice was published in public interest, and thus it was covered under the Tenth Exception to section 499, IPC. This Court held that it was trite law that the burden of proof for the accused could not be proof beyond reasonable doubt, yet the accused still had to show a preponderance of probability that his statement would be covered under an exception to section 499, IPC.

A mere averment by the accused stating that his statement was in public good was not sufficient to accept his defence and he must justify the same by leading evidence during trial. Considering the complaint as a whole as well as for the aforesaid reasons, this Court held that the impugned order did not warrant interference.

36. In Manoj Kumar Tiwari (supra), an order refusing to quash a summoning order was considered by this Court. Therein, the Additional Chief Metropolitan Magistrate had issued a summons to one of the accused under section 500, IPC without going into the contents of the alleged defamatory statement. The High Court of Delhi, on the other hand, while examining the statements, upheld the summons by simply relying on section 499 of the IPC.

This Court held that this was an erroneous approach because the Magistrate ought to have applied his mind to the complaint and determined whether the statement was prima facie defamatory, before issuing summons to the accused. This Court further held that a complaint could not be sustained on statements which were, on the face of it, non-defamatory. Also, it was held that it is a fundamental rule of criminal jurisprudence that if the allegations contained in a complaint do not constitute the offence complained of, then the accused should not be made to undergo the ordeal of a trial.

37. B.R.K. Aathithan (supra) is the decision of most recent origin. Therein, the factual conspectus was such that certain reportage concerning the appellant was telecast on a television channel of the respondents, and the same was contended

as defamatory. This Court emphasised the need for application of judicial mind by the Judicial Magistrate, while noting the consideration of the Fourth Exception to Section 499, IPC at the stage of issuance of process. This Court observed there as follows:

"16. This essentially involved application of judicial mind to reach a definite conclusion as to whether or not the accused be summoned. In the instant case, the learned Judicial Magistrate having found that the allegations made by the appellant were in the teeth of fourth exception to Section 499 IPC, he declined to issue process to the respondents. Such dismissal cannot be said to be without application of judicial mind. The application of judicial mind and arriving at an erroneous conclusion are two distinct things. The Court even after due application of mind may reach to an erroneous conclusion and such an order is always justiciable before a superior Court. Even if the said Order is set aside, it does not mean that the trial court did not apply its mind."

38. We note that in a different context, this Court in National Bank of Oman v. Barakara Abdul Aziz23 summed up the duty of a Magistrate as follows:

"8. The duty of a Magistrate receiving a complaint is set out in Section 202 CrPC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have."

(underlining ours, for emphasis)

39. Undoubtedly, the decisions of this Court proceed on two lines. While there are several decisions where this Court has consistently laid down the law in one particular line that it is for the Magistrate to consider the Exceptions to section 499, IPC for extension of benefit thereof at the trial when a defence is pleaded

by the party seeking to avail the same and upon the burden of proof being discharged by him and that such Magistrate while deciding the question purely from the point of view of the complainant may not advert to the possible defence of the accused at the time of exercising power under section 202, the other line of decisions seem to proceed on the premise that there is no bar in considering the Exceptions if the accused, even without appearing before the Magistrate in response to the summoning order, lays a challenge thereto under section 482, Cr. PC and satisfies the relevant High Court, by referring to the complaint itself and the statements of the complainant and his witness, that the facts alleged (even if deemed to be true) do not constitute an offence and hence, there was no sufficient ground for proceeding.

In fact, Aroon Purie (supra) has observed that there is no rigid principle that the Exceptions can only be considered at the pre-trial stage; in other words, at the stage of consideration of a petition for quashing, it can be so extended in a given case, and the Court would be empowered to quash the proceedings if extension of such benefit is justified on facts.

40. What applies to Judges of the High Courts faced with decisions of this Court where a cleavage of opinion is discernible, and particularly when the High Courts are technically bound by both decisions, equally applies to Hon'ble Judges of this Court. It would be inappropriate for a Bench, comprised of 2 (two) Judges of this Court, to hold which line of decisions lays down the correct law. In such a scenario, when there are decisions of this Court not expressing views in sync with each other, the first course to be adopted is to ascertain which is the decision that has been rendered by a larger Bench.

Obviously, inter se decisions of this Court, a decision of a Constitution Bench would be binding on Benches of lesser strength. None of the decisions that we have considered is rendered by a Constitution Bench. However, a sole judgment rendered by a Bench of 4 (four) Hon'ble Judges and 3 (three) decisions rendered by Benches comprised of 3 (three) Hon'ble Judges are there, which call for deference. Ordinarily, the decision of a larger Bench has to be preferred unless of course a Bench of lesser strength doubts an earlier view, formulates the point for answer and refers the matter for further consideration by a larger Bench in accordance with law.

If, however, the decisions taking divergent views are rendered by Benches of co-equal strength, the next course to be adopted is to attempt to reconcile the views that appear to be divergent and to explain those contrary decisions by assuming, to the extent possible, that they applied to different facts. The other course available is to look at whether the previous decision has been noticed, considered and explained in the subsequent decision; if not, the earlier decision

continues to remain binding whereas if the answer is in the affirmative, the subsequent decision becomes the binding decision.

We add a caveat that if the subsequent Bench, instead of deciding the matter before it finally upon consideration of the decision of the earlier Bench, formulates the point of difference and makes a reference for a decision by a larger Bench, it is the former decision that continues to govern the field so long the larger Bench does not decide the reference.

41. There is also authority for the proposition that while deciding cases on facts, more so in criminal cases, the courts should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of fact in another case. We may usefully refer to the decision in Kalyan Chandra Sarkar v. Rajesh Ranjan24 in this context.

42. Bearing the above principles in mind, we have perused the decisions, apparently striking discordant notes, with utmost care. It is observed that the conclusions reached in each of the decisions are based on the particular facts in each case and that the questions arising for decision on this appeal can be answered by harmonising the law as declared upon drawing guidance therefrom.

43. To the extent relevant, section 2(n) of the Cr. PC defines "offence" as any act or omission made punishable by any law for the time being in force. Section 200 ordains what a Magistrate, inter alia, is required to do on receipt of a complaint. In taking cognizance of an offence on a complaint, he is required to (i) examine upon oath the complainant and the witness present, if any; (ii) reduce in writing the substance of such examination; (iii) get the signature of the complainant and the witness, if any, on such writing; and (iv) sign the same too.

Section 202 is a provision that enables the Magistrate to postpone the issue of process against the accused and, if he thinks fit, either (a) inquire into the case himself or (b) direct an investigation to be made by (i) a police officer or (ii) by such other person he thinks fit. The statute permits the Magistrate to take such steps to facilitate a decision whether there is sufficient ground for proceeding against the accused by ascertaining the truth or falsity of the allegations made in the complaint.

Section 203 authorizes the Magistrate, after considering the statements on oath of the complainant and the witness, if any, under section 200 or the result of the inquiry or the investigation under section 202, to dismiss a complaint, with brief reasons, should in his judgment there be no 'sufficient ground for proceeding'. On the other hand, section 204 under Chapter XVI of the Cr. PC titled 'Commencement of Proceedings before Magistrates' envisages that the

Magistrate taking cognizance shall take steps for the issue of necessary process if in his opinion there is 'sufficient ground for proceeding'. It is therefore abundantly clear, from the aforesaid general scheme, that the accused does not enter the arena of adjudication made by the Magistrate prior to issuance of process.

44. Thus, when a Magistrate taking cognisance of an offence proceeds under section 200 based on a prima facie satisfaction that a criminal offence is made out, he is required to satisfy himself by looking into the allegations levelled in the complaint, the statements made by the complainant in support of the complaint, the documentary evidence in support of the allegations, if any, produced by him as well as statements of any witness the complainant may choose to produce to stand by the allegations in the complaint.

Although we are not concerned with section 202 here, if an inquiry or an investigation is conducted thereunder, it goes without saying that the reports should also be looked into by the Magistrate before issuing process under section 204. However, there can be no gainsaying that at the stage the Magistrate decides to pass an order summoning the accused, examination of the nature referred to above ought not to be intended for forming an opinion as to whether the materials are sufficient for a 'conviction'; instead, he is required to form an opinion whether the materials are sufficient for 'proceeding' as the title of the relevant chapter would indicate.

Since the accused does not enter the arena at that stage, question of the accused raising a defence to thwart issuance of process does not arise. Nonetheless, the fact that the accused is not before the Magistrate does not mean that the Magistrate need not apply his judicial mind. Nothing in the applicable law prevents the Magistrate from applying his judicial mind to other provisions of law and to ascertain whether, prima facie, an "offence", as defined in section 2(n) of the Cr. PC is made out. Without such opinion being formed, question of "proceeding" as in section 204 does not arise.

What the law imposes on the Magistrate as a requirement is that he is bound to consider only such of the materials that are brought before him in terms of sections 200 and 202 as well as any applicable provision of a statute, and what is imposed as a restriction by law on him is that he is precluded from considering any material not brought on the record in a manner permitted by the legal process. As a logical corollary to the above proposition, what follows is that the Magistrate while deciding whether to issue process is entitled to form a view looking into the materials before him.

If, however, such materials themselves disclose a complete defence under any of the Exceptions, nothing prevents the Magistrate upon application of judicial mind to accord the benefit of such Exception to prevent a frivolous complaint from triggering an unnecessary trial. Since initiation of prosecution is a serious matter, we are minded to say that it would be the duty of the Magistrate to prevent false and frivolous complaints eating up precious judicial time. If the complaint warrants dismissal, the Magistrate is statutorily mandated to record his brief reasons.

On the contrary, if from such materials a prima facie satisfaction is reached upon application of judicial mind of an "offence" having been committed and there being sufficient ground for proceeding, the Magistrate is under no other fetter from issuing process. Upon a prima facie case being made out and even though much can be said on both sides, the Magistrate would have no option but to commit an accused for trial, as held in Chandra Deo Singh (supra). The requirement of recording reasons at the stage of issuing process is not the statutory mandate; therefore, the Magistrate is not required to record reasons for issuing process.

This is also the law declared by this Court in Jagdish Ram v. State of Rajasthan25. Since it is not the statutory mandate that reasons should be recorded in support of formation of opinion that there is sufficient ground for proceeding whereas dismissal of a complaint has to be backed by brief reasons, the degree of satisfaction invariably must vary in both situations. While in the former it is a prima facie satisfaction based on probability of complicity, the latter would require a higher degree of satisfaction in that the Magistrate has to express his final and conclusive view of the complaint warranting dismissal because of absence of sufficient ground for proceeding.

45. In the context of a complaint of defamation, at the stage the Magistrate proceeds to issue process, he has to form his opinion based on the allegations in the complaint and other material (obtained through the process referred to in section 200/section 202) as to whether 'sufficient ground for proceeding' exists as distinguished from 'sufficient ground for conviction', which has to be left for determination at the trial and not at the stage when process is issued. Although there is nothing in the law which in express terms mandates the Magistrate to consider whether any of the Exceptions to section 499, IPC is attracted, there is no bar either.

After all, what is 'excepted' cannot amount to defamation on the very terms of the provision. We do realize that more often than not, it would be difficult to form an opinion that an Exception is attracted at that juncture because neither a complaint for defamation (which is not a regular phenomenon in the criminal

courts) is likely to be drafted with contents, nor are statements likely to be made on oath and evidence adduced, giving an escape route to the accused at the threshold.

However, we hasten to reiterate that it is not the law that the Magistrate is in any manner precluded from considering if at all any of the Exceptions is attracted in a given case; the Magistrate is under no fetter from so considering, more so because being someone who is legally trained, it is expected that while issuing process he would have a clear idea of what constitutes defamation.

If, in the unlikely event, the contents of the complaint and the supporting statements on oath as well as reports of investigation/inquiry reveal a complete defence under any of the Exceptions to section 499, IPC, the Magistrate, upon due application of judicial mind, would be justified to dismiss the complaint on such ground and it would not amount to an act in excess of jurisdiction if such dismissal has the support of reasons.

46. Adverting to the aspect of exercise of jurisdiction by the High Courts under section 482, Cr. PC, in a case where the offence of defamation is claimed by the accused to have not been committed based on any of the Exceptions and a prayer for quashing is made, law seems to be well settled that the High Courts can go no further and enlarge the scope of inquiry if the accused seeks to rely on materials which were not there before the Magistrate. This is based on the simple proposition that what the Magistrate could not do, the High Courts may not do. We may not be understood to undermine the High Courts' powers saved by section 482, Cr. PC; such powers are always available to be exercised ex debito justitiae, i.e., to do real and substantial justice for administration of which alone the High Courts exist.

However, the tests laid down for quashing an F.I.R. or criminal proceedings arising from a police report by the High Courts in exercise of jurisdiction under section 482, Cr. PC not being substantially different from the tests laid down for quashing of a process issued under section 204 read with section 200, the High Courts on recording due satisfaction are empowered to interfere if on a reading of the complaint, the substance of statements on oath of the complainant and the witness, if any, and documentary evidence as produced, no offence is made out and that proceedings, if allowed to continue, would amount to an abuse of the legal process. This too, would be impermissible, if the justice of a given case does not overwhelmingly so demand.

47. Based on our understanding of the law and the reasoning that we have adopted, issue of process under section 204 read with section 200, Cr. PC does not ipso facto stand vitiated for non-consideration of the Exceptions to section

499, IPC unless, of course, before the High Court it is convincingly demonstrated that even on the basis of the complaint and the materials that the Magistrate had before him and without there being anything more, the facts alleged do not prima facie make out the offence of defamation and that consequently, the proceedings need to be closed.

48. The above discussion answers the questions of law formulated by us.

49. Moving on to answer question (a), what we find in the present case is that the Trial Court did not take recourse to section 202, Cr. PC and hence obtaining reports of inquiry or investigation, as the case may be, did not arise. Though not under any statutory requirement, the Trial Court has given brief reasons in its order showing application of mind. At the stage, when the Trial Court made the summoning order, two aspects were required to be satisfied: (1) whether the uncontroverted allegations as made in the petition of complaint read with the examination of the complainant, prima facie, tend to suggest an offence having been committed, and (2) whether it is expedient and in the interest of justice to proceed.

Keeping in view the allegations made in the petition of complaint and the evidence placed before the Trial Court by the complainant and on a plain reading of its order dated 25th March, 2010 issuing summons to the accused, it does not appear to us that the finding of a prima facie case having been made out at that stage is so outrageously illogical or in defiance of legal principles and acceptable standards that it would merit interference by this Court. If at all the benefit of the Fourth Exception or any other pleaded exception is to be availed of, the appellant would be free to appear before the Trial Court and raise whatever defence is available to it in law, not necessarily confined to the Fourth Exception, for due consideration thereof by the Trial Court.

50. On facts of this case, we are satisfied that the Trial Court was not unjustified in issuing summons to the accused based on the materials before it.

51. We also hold that the omission of the learned Judge in dealing with the other points raised in the petition by the appellant does not afford any ground for us to interfere, having noticed that by a detailed judgment delivered on the same day on the petition of Aggarwal, the learned Judge had applied his mind and spurned a similar challenge. However, it is observed that the learned Judge would have been well advised to add a sentence in the order impugned that no separate reason was being assigned to dispose of the other points raised by the appellant in view of the reasons already assigned for disposal of Aggarwal's petition laying challenge to the summoning order.

52. Question (a), thus, stands answered against the appellant.

53. Having regard to what we have held above, questions (b) and (c) need not detain us for long. We could have left them unanswered but since some argument was advanced touching the same, we propose to briefly deal therewith.

54. Answer to question (b) must necessarily depend on the facts of each case, meaning thereby the quality of evidence that is led in course of the trial and the weight to be attached to it. At this stage it would not be inappropriate to consider the other line of argument advanced by Mr. Taneja that those documents/materials on which the appellant seeks to rely have not been admitted or accepted by the complainant and are yet to be proved; hence, the same cannot be looked into while considering a prayer for quashing.

The ratio of the decision in Supriya Jain (supra) finds support from an earlier decision of this Court in Chand Dhawan (Smt.) v. Jawaharlal26, where it was held that the High Court of Punjab and Haryana was not justified in quashing the complaint and the criminal proceedings on the ground of abuse of the process of court by relying on additional material produced by the accused, which was not admitted in evidence or accepted by the complainant.

55. The Power of Attorney is yet not proved by the appellant according to law and, therefore, could not have been considered by the learned Judge and cannot be considered by this Court as well. Even if proved, its effect and import necessarily have to be considered by the Trial Court in the light of the guiding factors for applicability of an Exception as indicated in the concurring judgment authored by Hon'ble O. Chinnappa Reddy, J. in Sewakram Sobhani (supra).

56. However, if from evidence led it is established that the authorised agent had issued defamatory statements with the consent of the principal or that the principal, without giving consent, had due knowledge of such defamatory statements, yet, did not caution/reprimand the agent for doing so or had not disowned the statements so made, there is no reason why a prosecution for defamation should be nipped in the bud on the specious ground that an authorised agent is supposed to act lawfully and not unlawfully.

57. Turning to question (c), it is for the appellant to demonstrate before the Trial Court that the Fourth Exception is attracted, or plead any other defence, and discharge its burden of proof in respect thereof during the course of the trial. This, in our opinion, is not the right stage to opine one way or the other and, therefore, we leave it open for being decided by the Trial Court in accordance with law.

CONCLUSION

58. Having answered all the questions, what is left for us is to dismiss the appeal which we hereby order. The appeal is dismissed, with the result that the interim order shall stand vacated forthwith. There shall, however, be no order for costs.

59. Except to the extent decided by this judgment, all other points are left open to be urged by the appellant before the Trial Court for a decision by it.

60. Since the proceedings have been unduly delayed, the Trial Court is encouraged to expedite the same.

.....J. (Bela M. Trivedi)

.....J. (Dipankar Datta)

New Delhi;

October 05, 2023

1 CRL. M.C. 2845/2010

2 (2011) 1 SCC 74

3 LPA-668/2010 dt. 17th September 2010

4 CC No.465/1/09

5 WP (C) No.6155/2008

6 (1999) 3 SCC 134

7 2022 (15) SCALE 541

8 CRL. M.C. 3350/2010

9 (2023) SCC OnLine SC 765

10 (1971) 3 SCC 399

11 (1981) 3 SCC 208

12 (1996) 6 SCC 263

13 (2001) 5 SCC 156

14 (2009) 1 SCC 101

15 (2016) 7 SCC 221

16 (1998) 4 SCC 112

17 (1961) 1 SCR 1

18 (1964) 1 SCR 639

19 (2010) 6 SCC 243

20 2022 SCC OnLine SC 1434

21 2022 SCC OnLine SC 1705

22 1958 SCR 618

23 (2013) 2 SCC 488

24 (2005) 2 SCC 42

25 (2004) 4 SCC 432

26 (1992) 3 SCC 317

IN THE SUPREME COURT OF INDIA

Balvir Singh
Vs.
State of Uttarakhand

Criminal Appeal No. 301 of 2015
With
Criminal Appeal No. 2430 of 2014

HEADNOTE – Section 106 of the Indian Evidence Act does not inherently impose a burden on the accused but comes into play when the accused fails to provide any explanation regarding facts that should be within their knowledge, facts that could support theories compatible with their innocence.

JUDGMENT

J. B. Pardiwala, J.:

1. Since both the captioned appeals arise from a common judgment and order passed by the High Court dismissing two criminal appeals of two accused persons tried in one sessions case those were heard analogously and are being disposed of by this common judgment and order.

2. These appeals are at the instance of two convicts and are directed against a common judgment and order dated 24.03.2014 passed by the High Court of Uttarakhand at Nainital in the Criminal Appeal No. 273 of 2013 and Criminal Appeal No. 274 of 2013 respectively by which the High Court dismissed both the appeals and thereby affirmed the judgment and order of conviction passed by the Additional District and Sessions Judge Kotdwar, Garhwal in the Sessions Trial No. 48 of 2008 holding Balvir Singh (husband) guilty of the offence of murder punishable under Section 302 of the Indian Penal Code, 1860, (for short, 'the IPC') alongwith the offence punishable under Section 498A of the IPC and Maheshwari Devi (mother-in-law) guilty of the offence punishable under Section 498A of the IPC read with Section 34 of the IPC.

CASE OF THE PROSECUTION

3. The deceased, namely, Sudha was married to Balvir Singh. The marriage of the deceased with Balvir Singh was solemnised on 12.12.1997. In the wedlock a son was born. On 02.06.2007, father of the deceased, namely, Virendra Singh (PW1) preferred an application in the court of the Judicial Magistrate First Class, Kotdwar, Garhwal under Section 156(3) Code of Criminal Procedure, 1973 (for short, 'the CrPC'), seeking a direction to the Police to register an FIR in

connection with the death of his daughter in suspicious circumstances. The Judicial Magistrate First Class, Kotdwar, Garhwal, passed the following order dated 04.06.2006:

"Order

04.06.2006

Applicant Virendra Singh had filed application under section 156(3) Cr.P.C. for passing order for registration of First Information Report against accused persons, wherein, applicant has mentioned as under that marriage of daughter of applicant Sudha had been solemnized on 12.12.1997 with Balvir Singh son of late Mahavir Singh, resident of village Ratanpur, Kumbhuchau, Halqa-Saneh, Kotdwar, Garhwal at Uttari Jhandichaur, Police Station Kotdwar and out of their wedlock, one son was born to them.

After sometime from solemnization of marriage Balvir Singh and Smt. Maheshwari Devi mother of Balvir Singh connived together and started harassing my daughter in different ways and started raising demand of Rs. One lakh cash in dowry. Applicant's daughter informed applicant about the same through letters. Balvir Singh has been working in a Private Nursing Home in Delhi and he is very well acquainted with medicines.

According to the Applicant, Balvir Singh before committing murder of his daughter managed to arrange fake prescription slips which he has kept with him. Despite reluctance of his daughter, on 09.05.07 Balvir left his son at Kotdwar and forcibly took my daughter Sudha who was in healthy condition to Mangolpuri, Delhi. Before leaving, Applicant's daughter expressed her wish to her uncle over telephone about her reluctance for going to Delhi.

On 13.05.07 at about 1.30 o'clock in the night Applicant's younger brother Harender Singh received information from Delhi over phone that his daughter Sudha has all of a sudden left for her heavenly abode in Mangolpuri. Balvir Singh did not give this information to any of the other family member rather some neighbour gave this information to the younger brother of Harender Singh; Shivcharan, who resides in Delhi. Shivcharan visited Mangolpuri in the night itself, where he came to know that she was in good health on that night and Balvir Singh after the death of the deceased, took her dead body to his home at Ratanpur, Kotdwar by private ambulance without giving information to anyone.

When the applicant came to know about this fact, he informed the police of Police Station Kotdwar. There were reddish injury marks apparent on the throat of the applicant's daughter, due to which the Police initiated inquest proceedings and arranged postmortem of the dead body.

On calling for the report from Police Station on the application filed by applicant, Police Station has submitted that no First Information Report is lying registered at Police Station on the basis of facts mentioned in the application moved by applicant under section 156(3) Cr.P.C Applicant has filed photocopies of letters written by his daughter and photocopies of applications lodged by him with Inspector Incharge of Police Station Kotdwar and Deputy District Magistrate, Kotdwar in court in support of his application filed under section 156(3) Cr.P.C.

On the basis of documents filed by applicant in support of his application, prima facie offence seems to be made out. Therefore, in such circumstances, registration of First Information Report seems to be essential. Therefore, S.H.O., Police Station Kotdwar is ordered that hiving registered First Information Report in the light of application filed by applicant under section 156(3) Cr.P.C and to conduct investigation.

Sd/-
Judicial Magistrate"

4. Pursuant to the aforesaid order passed by the learned Judicial Magistrate, the First Information Report came to be registered at the Kotdwar Police Station on 09.06.2007 for the offence punishable under Sections 302, 498A read with Section 34 of the IPC and Sections 3 and 4 respectively of the Dowry Prohibition Act, 1961 (for short, 'the Act 1961'). The First Information Report reads thus:

"Sir, Applicant Virendra Singh, son of late Mohan Singh, resident of Village Mawasa, Patti -Ajmer Pall, Tehsil Kotdwar Garhwal respectfully submits as under:-

1. That the marriage of my daughter Sudha had been solemnized on 12.12.1997 with Balvir Singh, son of late Mahavir Singh, resident of village Ratanpur, Kumbhuchaur, Halqa-Saneh, Kotdwar, Garhwal, from the house of my younger brother located at Uttari Jhandichaur, Police Station Kotdwar and out of the wedlock, one son was born to them.

2. That sometime after marriage, Balvir Singh and Smt. Maheshwari Devi who is the mother of Balvir Singh, in connivance with him, started harassing my daughter in different ways and raising demand of Rupees One lakh cash in dowry. Smt. Maheshwari Devi has been getting pension and also owns landed property. Balvir Singh is a greedy person and under the greed of pension of his mother, he has been harassing my daughter and subjecting her to beatings, not

providing food to her, and that the women of the village somehow provided her food by hiding themselves from these people.

My daughter wrote letters to us complaining about this fact. When Balvir Singh and his mother came to know about these letters, then they pressurized my daughter for asking back the said letters and we accordingly returned those letters, but letter dated 20.05.04 which has been lodged by us at Police Station, remained with us. In this letter also my daughter has put her grievances and harassment that she faced.

3. That on getting knowledge of this incident me, my few relatives, Panch, and Pradhan Ratanpur visited and tried to convince Balvir Singh and his mother not to indulge in such acts so that in future my daughter may stay there properly and I did not lodge any report. However, Maheshwari Devi and Balvir Singh kept on hatching conspiracy for eliminating my daughter Sudha. Once they had made my daughter consumed poison also but my daughter had not told this fact to anyone.

4. That Balvir Singh has been working in a Private Nursing Home in Delhi and he is very well acquainted with medicines. Before committing murder of my daughter, he managed to arrange fake and forged prescription slips, which has been shown to police also, and investigation about these slips & medicines is required. Despite reluctance of my daughter on 09.05.07 Balvir left his son at Kotdwar in healthy condition and took my daughter Sudha at Mangolpuri, Delhi forcibly. Before leaving, my daughter expressed her unwillingness to go to Delhi, to my younger brother Harender over telephone.

5. That on 13.05.07 at about 1.30 o'clock in the night my younger brother Harender Singh received information from Delhi over phone that my daughter Sudha has left for her heavenly abode all of a sudden in Mangolpuri. Balvir Singh did not give this information to any of our family member rather some neighbour gave this information to the younger brother of Harender Singh; Shivcharan, who resides in Delhi. Shivcharan visited Mangolpuri in the night, where he came to know that my daughter was in good health on that night and Balvir Singh after the death of my daughter, took her dead body to his home at Ratanpur, Kotdwar by private ambulance without giving information to anyone.

When we came to know about this fact, then we informed the police of Police Station Kotdwar but we could not provide all details at that time. As reddish injury marks were apparent on the neck of my daughter, Police initiated inquest proceedings and arranged postmortem of her dead body. Sir, I have reason to believe that the said Maheshwari Devi and her son Balvir Singh have killed my

daughter having hatched a conspiracy and have also induced her little child also in their favour.

6. That her mother-in law and her husband Balvir Singh caused inhuman harassment to my daughter which amounts to a heinous crime. Photocopies of her letters are being annexed herewith. I had lodged report at Police Station and Deputy District Magistrate also that she has been killed, but no first information report has not been registered till now. Therefore, it is prayed to please order police of Police Station Kotdwar to register First Information Report and get the offenders punished for the offence committed by them.

Dated : 02.06.07. Applicant - Sd/- Virendra Singh son of late Mohan Singh, resident of Village Mawasa, Patti -Ajmer Palla, Tehsil -Kotdwar, District -Pouri Garhwal.

Note: I, HC 14 Kabool Singh Prajapati do hereby certify that copy of formal report has been recorded word to word which is clearly legible.

Sd/-
HC 14 Kabool Singh

Police Station Kotdwar

Dated: 09.06.07"

5. Upon registration of the FIR, the investigation was carried out. The dead body of the deceased on being brought from Delhi to Kotdwar, was sent for post mortem. The inquest panchnama was drawn in presence of the independent panch witnesses. The statements of various witnesses were recorded by the investigating officer under Section 161 of the CrPC. The viscera collected during the course of the post mortem was sent to the forensic science laboratory. Both the appellants herein were arrested and remanded to judicial custody.

6. Upon conclusion of the investigation, chargesheet was filed for the offences enumerated above. To the charge framed by the trial court vide order dated 21.02.2009, the appellants pleaded not guilty and claimed to be tried.

7. The prosecution led the following oral evidence:

a. PW1 Virendra Singh (Father of the deceased)

b. PW2 Dr. Indra Singh Samant, Govt. Hospital (the Doctor who performed the post mortem)

c. PW3 Harender Singh (Uncle of the deceased)

d. PW4 Balbir Singh (Another uncle of the deceased)

e. PW5 M.M.S. Bisht (Senior Sub Inspector)

f. PW6 Baldev Singh (Panch witness to the inquest proceedings)

h. PW7 Kabool Singh (Head Constable)

8. Prosecution also led documentary evidence as under:

a. Post mortem report Exh.Ka-4

b. Inquest report Exh. Ka-5

c. Two letters written by the deceased to her father i.e., PW1 Exh.Ka-1 and Ka-2.

9. The appellants herein examined Shivam Rawat the son of the deceased as a defence witness (DW-1). The appellants also examined one Anoop Singh cousin brother of the deceased as a defence witness (DW-2).

10. Upon conclusion of the oral evidence, the further statement of both the appellants was recorded by the trial court. Two specific questions were put by the trial court to the convict Balvir Singh and the reply to the two questions were as under:

"Question No. 14:- Do you have anything else to say?

Answer:- I am innocent. Complainant has lodged a false case.

Question No. 15:- Poison has been found in the examination of viscera of the deceased. What do you have to say in this regard?

Answer:- I do not have knowledge as to how the poison has been found, but the deceased was a heart patient and used to consume medicines."

11. The mother-in-law of the deceased stated in her further statement recorded under Section 313 CrPC that she was innocent and had been falsely implicated.

12. The trial court upon appreciation of the oral as well as documentary evidence on the record held the husband guilty of the offence of murder punishable under Section 302 of the IPC and also for causing harassment punishable under Section 498A of the IPC. The trial court sentenced the husband to undergo

rigorous imprisonment with fine of Rs. 10,000/- The mother-in-law, namely, Maheshwari Devi came to be acquitted by the trial court of the offence of murder, however, she stood convicted by the trial court for the offence punishable under Section 498A of the IPC and was sentenced to undergo 2Ã‚½ years of imprisonment.

13. The trial court while holding the appellants guilty of the offence enumerated above, recorded the following findings:

"21. Deceased died of poison. Although prosecution could not bring clear evidence that victim was administered poison by accused, but regarding harassment PW-1 and PW-2 have produced evidence. This is established by Exhibit A1 and Exhibit A2 too. Moreover, after her death poison was found in viscera report. However, nothing has been said by the defence about how it entered the body of the deceased.

Accused statement was registered under section 313 of Criminal Procedure Code and he was clearly asked that poison was found in deceased's visceral examination report, what you have to say about it? Regarding this accused Balvir Singh said that "I do not have knowledge how it was found, but deceased was heart patient and was on medication". Regarding this, defence examined DW-1 who is deceased's son and who said in his examination-in-chief that "my mother was undergoing treatment at Delhi, where she died". He further said "my grandmother and father love me a lot and treated my mother nicely".

He is a child witness. This witness told that the death of the deceased took place during treatment but, nothing is said about where she was undergoing treatment, or how she died. Defence argued that deceased was a heart patient and because of which death occurred but this argument is negated by viscera report. DW-2 produced by defence said in his examination-inchief that "accused was getting the deceased continuously treated at Delhi. Deceased Sudha was distressed because of her illness. Accused use to take care of Sudha. Balvir Singh and his mother did not harass her, and that she may have done something to herself because of her illness".

This witness produced by defence has based his evidence on new facts. During cross-examination, examination of prosecution witness by defence, no question regarding such matter was asked as to whether the deceased was distressed either before her illness or because of her illness. DW-1 who is deceased's son and on whom defence stressed upon, has not stated anything regarding the deceased being distressed due to her illness. DW-1 has only stated that death occurred during treatment, while DW-2 has based his evidence on new facts

which are not concurring with the facts of defence because they have said that treatment was given at Escorts Hospital.

Regarding this defence has questioned PW-1 that in year 2006 accused paid a bill of rupees 3,82,500/-at Escorts Hospital which was refuted by him. Regarding this defence has produced documents. I have examined those documents. Although defence have not proved those documents but in file page number 48A/2 a document of rupees 3,82,500/-is present which was given by Dr. Nitish Chandra, but said document is not a bill of payment instead it is an estimate required for complete checkup and operation, because in the document it is written that -'Advance payment may please be made at the time of admission by case/demand draft in favour of Escorts Heart Institute and Research Centre Ltd. Payable at New Delhi'. By looking at the document it is clear that accused and others did not pay any money. Apart from this there is no document in the file for payment of rupees 3,82,500/-. regarding this there is no statement from defence.

22. Apart from this prosecution witness PW-4's crossexamination was conducted. In his cross-examination by defence the witness has said "it is true that in the inquest report deceased's husband stated that my wife after delivery of son, used to remain ill. Often, she had episodes of unconsciousness. On the night of 13 May 2007 at 10:00 pm, she had an attack and did not regain consciousness. I took her to Sanjay Gandhi Memorial Hospital, where she was declared dead by the Doctor".

This witness gave statement in his cross-examination that deceased died at Sanjay Gandhi Memorial Hospital regarding which no document was filed. Although this witness in his cross-examination also admitted that he was told this by Balvir Singh. This witness is supporting defence, but this witness statement is contrary to the oral and documentary evidence in the file. If the accused admitted deceased to Sanjay Gandhi Memorial Hospital after she had an attack on 13.5.2007, then there are no documents regarding this in the file and the defence has not given any statement as to this.

23. Defence has argued that deceased Sudha died on 13.5.2007. On 13.5.2007 her last rites were performed and complainant got the case registered underÃ‚Â· section 156(3) on 2.6.2007. Application was filed very late and this delay has not been. explained. I am not in agreement with this argument of defence. Victim died on 13.5.2007 and it is said that on 13.5.2007 her last rites were performed, but on receiving the news of death prosecution witness immediately put forward his doubt. In inquest report it is clearly written that deceased Sudha's death is suspicious, and postmortem should be done.

In above said inquest report PW-1 is one of the witnesses, he is deceased's father too. and was examined as PW1. During evidence witness has said that "Balvir lives in Mangolpuri at Delhi. Shivcharan was informed by neighbours that Sudha had died and they brought the dead body to Ratanpur. Next day I came to Kotdwar. I gave this information to Police station. Then Police and I came to Ratanpur. There police prepared inquest report. In inquest report I too was made a witness". As soon as witness received this information he raised a suspicion on the incident. Police station was informed.

This witness further said "I wrote a letter to Police station to investigate into her death. In this regard I made a written complaint to S.D.M., Kotdwar". This witness further said "then, with my lawyer's help I filed a petition under section156(3) of Criminal Procedure Code on which court ordered to register a case". This witness on receiving information about incident immediately raised suspicion and asked for a postmortem to be carried out.

On 14.5.2007 an application was written to Police station to investigate into the death of the Deceased. Police made inquest report and conducted postmortem. In this situation, defence cannot take benefit of the fact that complaint was registered under section 156(3) of Criminal Procedure Code, because this witness had informed Police station and S.D.M. Because of this information given by him to police, police came to spot and made inquest report.

24. In viscera report FSL has detected poison, in such situation the burden was on accused to prove whether deceased herself consumed poison and whether the deceased was under mental stress due to which she might have consumed poison, but defence did not make any statement of such kind during the whole trial. In the end DW-2 has presented this evidence that deceased was distressed because of her illness, but during the whole trial defence argued that deceased was a heart patient and was on treatment for it. Defence has argued that deceased was on medication and that because of chemical reaction medicine can naturally convert into poison, but no evidence was produced by defence regarding this, and no medical opinion was taken that deceased was taking medicine of such nature which due to chemical reaction could convert into poison in the body. As this was brought up by defence, in such situation burden was on them to prove it, but no statement was made about it. According to Indian Evidence Act section 114(g) - that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

25. In the presenting case this is argued by defence that because of chemical reaction medicine can turn into poison in deceased's body, therefore the burden of proof was on defence, but regarding this no evidence was produced by defence. In such situation under section 114(g) it is important to presume that if

any evidence was produced by accused then it would have been against him, because of which no evidence was produced by defence.

But deceased's death took place at Delhi. Accused Balvir Singh brought dead body from Delhi to Kotdwar. PW-1 in his examination-in-chief has said that "it is true that my daughter was living with accused at Delhi". On the basis of statement given by PW-1, deceased's death took place at Delhi, where she was living with accused Balvir Singh. On the basis of viscera report deceased died of poison. At the time of death only accused Balvir Singh was present. Accused Maheshwari Devi was not in Delhi. Since, deceased died at Delhi, in such situation charge under, section 302 of Indian Penal Code is not found against Maheshwari Devi.

26. As far as the question of dowry is concerned, PW-1 and PW-2 have adduced evidence in this matter against accused Balvir Singh and Shrimati Maheshwari Devi that they are demanding dowry. This fact is also proved by document letters exhibit A-1 and exhibit A-2 present in the file. Charge under section 498A of Indian Penal Code against accused Balvir Singh and Shrimati Maheshwari Devi is proved beyond doubt.

27. After above arguments I have reached the conclusion that prosecution has proved that accused Balvir Singh and Maheshwari Devi mistreated and harassed deceased for dowry and demanded rupees 1 lakh from deceased. Therefore accused Balvir Singh and Maheshwari Devi are fit to be convicted under section 498A/34 Indian Penal Code. Because in this incident deceased has died and it has come up in the evidence that deceased was living with accused Balvir Singh in Delhi, therefore charge under section 302 of Indian Penal Code against accused is proved and he is fit to be convicted for the said charge.

As prosecution could not prove that accused Shrimati Maheshwari Devi was at Delhi with Balvir Singh during the time of deceased's death and no role of Maheshawari Devi is proved in deceased's death, therefore no charge under section 302 of Indian Penal Code is proved against Shrimati Maheshwari Devi and therefore, she is fit to be discharged of the above said charge."

14. The appellants feeling dissatisfied with the judgment and order of conviction passed by the trial court went in appeal before the High Court. The High Court dismissed both the appeals and thereby affirmed the judgment and order of the conviction passed by the trial court. The High Court while affirming the judgment and order of conviction passed by the trial court held as under:

"3. In the chargesheet it was clearly held out that the death, in the instant case, was by poisoning. No sooner, the death was reported, PW1, looking at the dead

body, insisted for an inquest and the same was done. In course of inquest, he expressed doubt as to the cause of death and demanded post-mortem. Accordingly, post-mortem was done. The doctor, who conducted post-mortem, could not determine the reason for the death.

He, accordingly, preserved a part of the heart and the viscera of the deceased for the purpose of analysis. Viscera was sent for analysis and Forensic Science Laboratory, Agra, to whom the same was sent, reported that the same contained poison known as "Aluminium Phosphide". All these facts were in the chargesheet. The death, according to the chargesheet, had taken place at Delhi, when A1 alone was present with the victim. It is A1, who caused the dead body of the victim to be brought to Ratanpuri, Kotdwara.

It was not the contention of A1 that the victim, at any point of time, had any suicidal tendency or that he suspects that the victim committed suicide. It was the contention of A1, as is evident from the trend of cross-examination of the prosecution witnesses, and, in particular, suggestions given to the prosecution witnesses that the victim was suffering from heart disease, for that, matter required frequent treatment and administration of medicine. It was suggested that such medicine, so administered, turned into the aforementioned poison.

That being an assertion on behalf of A1, it was he, who was required to establish the same by tendering adequate evidence, which he miserably failed. A dead person, whose cause of death was by poisoning, was, accordingly, found on the lap of A1. A1 had special knowledge pertaining thereto. He failed to discloseÃ‚Â· anything in relation thereto. The Court below, in the circumstances, has taken adverse inference against A 1 under Section 114(g) of the Evidence Act. We think that the Court below was entitled to take such inference in the backdrop of the case as depicted above.

4. We, accordingly, find no reason for interference. The Appeal is dismissed. The judgment of the Court below is affirmed. The Application (CRMA No. 1744 of 2013) filed for examining applicant as witness for the defence is not pressed. The same is dismissed. A1 is in Jail. He will serve out the sentence as awarded by the Court below. A2 is on bail. Her bail bond is cancelled. She is directed to surrender forthwith to serve out the sentence awarded against her."

15. In such circumstances referred to above, the appeals are here before this Court with the captioned two appeals.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

16. Ms. Manisha Bhandari, the learned counsel appearing for the appellant vehemently submitted that the trial court as well as the High Court committed a

serious error in holding the appellants guilty of the offence as enumerated above. It was argued that the case is one of "No Evidence" so far as the charge of murder is concerned. According to the learned counsel, the husband was working in Delhi past sometime before the date of incident whereas the deceased along with her son was staying at their native home town in the State of Uttarakhand.

It was also sought to be argued that the deceased was not keeping well as she was suffering from a heart ailment. It was pointed out from the post mortem report as well as from the oral evidence of the doctor that the deceased had an enlarged heart and the ailment relating to heart could be the cause of sudden death. The learned counsel in the alternative put forward the theory of suicide. This theory of suicide was put forward by the defence on the basis of the fact that poison was detected in the viscera, in the form of "aluminium phosphide". An attempt was made to argue that the deceased might have consumed poison and committed suicide as she was tired of her ailment.

17. It was also argued that the evidence of the two defence witnesses would suggest that there was no harassment of any nature to the deceased either by the husband nor by the mother-in-law. It was also argued that no sooner the deceased passed away than the husband immediately informed the family members of the deceased about her sudden death. It is the husband who carried the dead body from Delhi to his village at Uttarakhand.

18. It was argued that the entire case hinges on circumstantial evidence. It is a primary principle that the accused must be and not merely may be guilty.

19. The learned counsel submitted that the facts which, the prosecution has so established should be consistent only with the hypothesis of the guilt of the accused that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances are not of a conclusive nature and tendency. The circumstances do not exclude every possible hypothesis except the one to be proved.

20. In the last, the learned counsel submitted that this Court may set aside the conviction for the offence of murder and substitute the same with the offence of abetting the commission of suicide punishable under Section 306 of the IPC. It was pointed out that the convict-husband is undergoing sentence past more than 9 years.

21. In such circumstances referred to above, the learned counsel prayed that there being merit in both her appeals, those may be allowed.

SUBMISSIONS ON BEHALF OF THE STATE

22. Mr. Jatinder Kumar Bhatia, the learned counsel appearing for the State vehemently submitted that no error not to speak of any error of law could be said to have been committed by the High Court as well as by the trial court in holding the appellants guilty of the respective offences.

23. It was sought to be vehemently argued that the deceased along with her son was residing at their village whereas the husband was doing some job in Delhi. The husband on the pretext of medical treatment of the deceased brought her from the village to Delhi and within three days of their arrival in Delhi, the incident occurred.

It was argued that if the case put forward by the husband is to be accepted then it is to be believed that while something went wrong with the deceased, the husband was very much present because according to the husband he had immediately taken the deceased to the Sanjay Gandhi Hospital. On being declared dead at the hospital, he thereafter brought the dead body to the village.

24. In such circumstances referred to above, the learned counsel appearing for the State submitted that in view of Section 106 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act' or 'the Act 1872'), it is for the convicthusband to explain as to what had actually transpired. It is the convict-husband who could be said to be in special knowledge of things that might have transpired at the relevant point of time.

25. It was argued that the presence of poison in the viscera would indicate that the same had been administered to the deceased in some manner and no one except the husband could have administered the poison. It was also argued that there was a strong motive for the husband to commit the crime. The husband has also been held guilty of causing lot of harassment to his wife and the same is evident from the two letters written by the deceased to her father and are exhibited in the evidence.

26. The learned counsel laid much stress on the fact that both the appellants have maintained complete silence especially of the facts which could be said to be within their personal knowledge. The failure to explain, the circumstances in which the death occurred is sufficient to hold the convict-husband guilty of the offence.

27. In such circumstances referred to above, the learned counsel prayed that there being no merit in the appeals those may be dismissed.

ANALYSIS

28. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order.

29. We take note of the following circumstances emerging from the facts on record:

a. The cause of death is due to poisoning. The poison detected in the viscera was aluminium phosphide. Aluminium phosphide is used as a fumigant to control the insects and rodents in the foodgrains and fields. It is too much for the convicts to say that the presence of aluminium phosphide in the viscera could be due to the medicines which the deceased used to take for her heart ailment. Such medicines even in high dosage would not lead to formation of aluminium phosphide in the body.

This theory which has been put forward could be termed as something very absurd. No particular question in this direction has been put to the expert witness (doctor) while he was in the witness box. In such circumstances, the only inference that can be drawn is that aluminium phosphide either in the liquid form or in the form of tablets was procured by the accused husband and the same was administered to the deceased.

b. We completely rule out the theory of suicide as sought to be put forward on behalf of the appellants

c. If it is the case of the convict-husband that he had taken the deceased to the Sanjay Gandhi Hospital at Delhi then he should have led some evidence to indicate how she was taken to the hospital, in what type of vehicle and who attended the deceased at the hospital? In the case of the present type, it is very difficult to believe that if the deceased had been taken to the hospital and declared dead on arrival, the hospital authorities would allow the convicthusband to carry the dead body of his wife back home. It would become a medico-legal case and the hospital would definitely inform the police.

d. The dubious conduct of the convict-husband of not informing the family members about the death of their daughter. Though in his further statement, the convict-husband has said that he had informed the family members of the deceased yet the evidence of PW3 Harender Singh (uncle of the deceased) is otherwise. In his oral evidence, he has deposed as under:

"My niece Sudha had died on 13.5.2007. Information thereof was given to me by my brother Shivcharan over the telephone. Shivcharan was living in Delhi. Then I told Shivcharan to inquire into the matter. Shivcharan went to the house of Balvir but he was not there. Then I gave this information in the Police Station, Kotdwar at 2 o'clock in the night over the telephone and also informed my brother Virendra. Thereafter, my brother came to the Police Station, Kotdwar in the morning. I also went to the police station. Then I had gone to the village of Balvir. There I saw the dead body of Sudha. I do not know as to whether Sudha died in Delhi or in the village."

30. In the aforesaid context, the oral evidence of the PW1 Virendra Singh (father of the deceased) is also relevant. In his oral evidence, PW1 has stated as under:

"Balvir Singh took my daughter to Delhi in the year 2007 and left his son here in the village itself. At the time of going, she telephoned my brother Harender, who lives in Jhandi Chaur, and had told him that she does not want to go to Delhi. She unwillingly went, but I cannot tell how she had gone.

Two days after going to Delhi, my brother received information that Sudha had died. My brother Shivcharan informed about it. Balvir was living in Mangolpuri in Delhi. The neighbours told Shivcharan that Sudha had died. Then, Balvir came to Ratanpur with the dead body of Sudha. Then, I came to Kotdwar the next day and gave this information in the police station. Then the police came with me to Ratanpur.

There the police prepared the inquest report and I was the panch in the inquest proceedings. There was a mark of injury on the neck of my daughter. I was suspicious of her death and so, I asked for a post-mortem. The witness was shown the inquest report Paper No. 9Ka, upon which he admitted his signature at the opinion of the Panches. Thereafter the dead body was sent for the post-mortem."

31. We shall now look into the two letters addressed by the deceased to her father (PW1). Both these letters have been proved through the oral evidence of the PW1 and have been exhibited. The letter dated 20.05.2004, Exh. Ka-1 reads thus:

"Dated: 20.05.04

Respected mother and father, please accept my pranam with folded hands. At the moment I am alive and pray before the Almighty for wellbeing of your whole family. Father Saheb, the reason behind writing this letter is that I am feeling quite harassed here. There is no faith of life as to when it may come to an end, any untoward incident may happen with me at any time. Father Saheb, since the

time my marriage was solemnized, I have been feeling extremely harassed from the acts of my mother-in-law and husband but I have not told you about this till date thinking that good sense will prevail with passage of time but, both of these intend to eliminate me.

They say that your father has not given anything in dowry. They told me that if you bring Rs.1 lakh cash from your father then only you can stay here, otherwise you go to your parents' home, or else we will eliminate you. I told them that my father is a labourer, and he cannot arrange Rs. 1 lakh. On account of this, my mother-inlaw and husband have been beating me. They did not provide me food for several weeks. I remained hungry & thirsty and the women of village somehow provided me food by hiding themselves from these people.

My mother-in-law even forbade me from giving milk to my 9-month-old son and forced me to bring firewood from jungle. Even after that, food was not provided to me. I have been staying at my matrimonial home throughout. You invited us several times for various functions and ceremonies but they neither allowed me to go nor they went themselves. They say that if you wish to go then bring Rs. One lakh otherwise you will not be allowed to return here.

They say that your parents and family members should not come here, if they do then it would not be good for me. My father, I do not have any support, I am surviving here at mercy of God. I have been staying here hungry & thirsty. On account of the beatings being given by them, I have not been keeping good health. Till date I have concealed all these facts. My father if you can arrange Rs. One lakh then my life can be saved, otherwise I do not know as to what will happen with me, any untoward incident may happen with me. Please do not tell anyone about this letter otherwise they will eliminate me.

Yours daughter

Village Mangolpuri"

32. The second letter, Exh. Ka-2 reads thus:

"Respected mother and father, accept Pranam from your daughter Sudha with folded hands. Love to Krishna, Manoj, Mukesh from their sister. I am well here and pray before Almighty for your well-being. I need my previous letter which I had written to you. I am not asking for the letter under pressure from anyone. I am happy at my home. I heard that uncle Anil is coming here and so I request you to send that letter through him. My father, if you wish to see me happy then please send the letter through Anil uncle. I have to stay here only.

I am not asking for it under pressure from anyone, I want that letter. If you do not send that letter through Anil uncle then treat that your daughter is no more. I am very well here. Don't think more, just send the letter only, I will wait for the same. Your son-in-law has been behaving properly with me. If he behaves with me properly, then everything is alright and you should not be concerned. You just send the letter through uncle, as I need that letter and there is no benefit in keeping that letter with you. I am alright here; you should feel happy about it. Sonu is fine.

Your daughter Sudha."

PRINCIPLES OF LAW GOVERNING THE APPLICABILITY OF SECTION 106 OF THE EVIDENCE ACT

33. Section 106 of the Evidence Act, states as under:

"106. Burden of proving fact especially within knowledge.-

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

34. Section 106 of the Evidence Act referred to above provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the Evidence Act. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act.

Section 101 with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are,

"especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience".

35. In Shambhu Nath Mehra v. The State of Ajmer reported in AIR 1956 SC 404, this Court while considering the word "especially" employed in Section 106 of the Evidence Act speaking through Vivian Bose, J., observed as under:

"11. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

It is evident that that cannot be the intention & the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. The King, 1936 PC 169 (AIR V 23) (A) and Seneviratne v. R, 1936-3 All ER 36 at p. 49 (B)."

36. The aforesaid decision of Shambhu Nath (supra) has been referred to and relied upon in Nagendra Sah v. State of Bihar reported in (2021) 10 SCC 725, wherein this Court observed as under:

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

(Emphasis supplied)

37. In Tulshiram Sahadu Suryawanshi and Another v. State of Maharashtra reported in (2012) 10 SCC 373, this Court observed as under:

"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872.

It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised.

We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516]: (SCC p. 393, para 38)

"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus: (AIR p. 406, para 11)

'11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.'""

(Emphasis supplied)

38. In Trimukh Maroti Kirkan v. State of Maharashtra reported in (2006) 10 SCC 681, this Court was considering a similar case of homicidal death in the

confines of the house. The following observations are considered relevant in the facts of the present case:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished.

A judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecutions [1944 AC 315 : (1944) 2 All ER 13 (HL)] - quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh [(2003) 11 SCC 271 : 2004 SCC (Cri) 135].) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led.

The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character.

In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the

dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

(Emphasis supplied)

39. The question of burden of proof, where some facts are within the personal knowledge of the accused, was examined by this Court in the case of State of W.B. v. Mir Mohammad Omar and Others reported in (2000) 8 SCC 382. In this case, the assailants forcibly dragged the deceased from the house where he was taking shelter on account of the fear of the accused, and took him away at about 2:30 in the night. The next day in the morning, his mangled body was found lying in the hospital.

The trial court convicted the accused under Section 364, read with Section 34 of the IPC, and sentenced them to ten years rigorous imprisonment. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for the charge of murder. The accused had not given any explanation as to what happened to the deceased after he was abducted by them.

The Sessions Judge, after referring to the law on circumstantial evidence, had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons, and the discovery of the dead body in the hospital, and concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act, and laid down the following principles in paras 31 to 34 of the report:

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts.

Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position.

The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody."

(Emphasis supplied)

40. Applying the aforesaid principles, this Court while maintaining the conviction under Section 364 read with Section 34 of the IPC, reversed the order of acquittal under Section 302 read with Section 34 of the IPC, and convicted the accused under the said provision and sentenced them to imprisonment for life.

41. Thus, from the aforesaid decisions of this Court, it is evident that the court should apply Section 106 of the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application to criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

42. Section 106 cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence.

It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden of the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a prima facie case is established by such evidence, the onus does not shift to the accused.

43. Section 106 obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge which would render the evidence of the prosecution nugatory. If in such a situation, the accused gives an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Prof. Glanville Williams:

"All that the shifting of the evidential burden does at the final stage of the case is to allow the jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence."

44. To recapitulate the foregoing : What lies at the bottom of the various rules shifting the evidential burden or burden of introducing evidence in proof of one's case as opposed to the persuasive burden or burden of proof, i.e., of proving all the issues remaining with the prosecution and which never shift is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand and it is therefore for the accused to give evidence on them if he wishes to escape.

Positive facts must always be proved by the prosecution. But the same rule cannot always apply to negative facts. It is not for the prosecution to anticipate and eliminate all possible defences or circumstances which may exonerate an accused. Again, when a person does not act with some intention other than that which the character and circumstances of the act suggest, it is not for the prosecution to eliminate all the other possible intentions.

If the accused had a different intention that is a fact especially within his knowledge and which he must prove (see Professor Glanville Williams-Proof of Guilt, Ch. 7, page 127 and following) and the interesting discussion-para 527

negative averments and para 528-"require affirmative counter-evidence" at page 438 and foil, of Kenny's outlines of Criminal Law, 17th Edn. 1958.

45. But Section 106 has no application to cases where the fact in question having regard to its nature is such as to be capable of being known not only by the accused but also by others if they happened to be present when it took place. From the illustrations appended to the section, it is clear that an intention not apparent from the character and circumstances of the act must be established as especially within the knowledge of the person whose act is in question and the fact that a person found travelling without a ticket was possessed of a ticket at a stage prior in point of time to his being found without one, must be especially within the knowledge of the traveller himself : see Section 106 of the Indian Evidence Act, illustrations (a) and (b).

46. A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, but the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. Thus, if the prosecution has offered evidence which if believed by the court would convince them of the accused's guilt beyond a reasonable doubt, the accused is in a position where he should go forward with counter-vailing evidence if he has such evidence.

When facts are peculiarly within the knowledge of the accused, the burden is on him to present evidence of such facts, whether the proposition is an affirmative or negative one. He is not required to do so even though a prima facie case has been established, for the court must still find that he is guilty beyond a reasonable doubt before it can convict. However, the accused's failure to present evidence on his behalf may be regarded by the court as confirming the conclusion indicated by the evidence presented by the prosecution or as confirming presumptions which might have been rebutted.

Although not legally required to produce evidence on his own behalf, the accused may therefore as a practical matter find it essential to go forward with proof. This does not alter the burden of proof resting upon the prosecution (Wharton's Criminal Evidence, 12th Edn. 1955, Vol. 1, Ch. 2 p. 37 and foil). Leland v. State reported in 343 U.S. 790=96 L.Ed. 1302, Raffel v. U.S. reported in 271 U.S. 294=70 L.Ed. 1054.

WHAT IS "PRIMA FACIE CASE" IN THE CONTEXT OF SECTION 106 OF THE EVIDENCE ACT?

47. The Latin expression prima facie means "at first sight", "at first view", or "based on first impression". According, to Webster's Third International Dictionary (1961 Edn.), "prima facie case" means a case established by "prima facie evidence" which in turn means "evi-Ideuce sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted".

In both civil and criminal law, the term is used to denote that, upon initial examination, a legal claim has sufficient evidence to proceed to trial or judgment. In most legal proceedings, one party (typically, the plaintiff or the prosecutor) has a burden of proof, which requires them to present prima facie evidence for each element of the charges against the defendant. If they cannot present prima facie evidence, or if an opposing party introduces contradictory evidence, the initial claim may be dismissed without any need for a response by other parties.

48. Section 106 of the Evidence Act would apply to cases where the prosecution could be said to have succeeded in proving facts from which a reasonable inference can be drawn regarding death.

49. The presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved.

50. To explain what constitutes a prima facie case to make Section 106 of the Evidence Act applicable, we should refer to the decision of this Court in Mir Mohammad (supra), wherein this Court has observed in paras 36 and 37 respectively as under:

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows:

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference."

(Emphasis supplied)

51. We should also look into the decision of this Court in the case of Ram Gulam Chaudhary and Others v. State of Bihar reported in (2001) 8 SCC 311, wherein this Court made the following observations in para 24 as under:

"24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura-blow was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the appellants. The appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive.

In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy.

Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr Mishra."

(Emphasis supplied)

52. In the case on hand it has been established or rather proved to the satisfaction of the court that the deceased was in company of her husband i.e., the appellant-convict at a point of time when something went wrong with her health and therefore, in such circumstances the appellant-convict alone knew what happened to her until she was with him.

FAILURE ON THE PART OF THE APPELLANT-CONVICT IN OFFERING ANY PLAUSIBLE EXPLANATION IN HIS FURTHER STATEMENT RECORDED UNDER SECTION 313 OF THE CRPC

53. We take notice of the fact that the appellant-convict (husband) has not explained in any manner as to what had actually happened to his wife more particularly when it is not in dispute that the appellant-convict was in company of his wife i.e., deceased. It is important to bear in mind that the deceased died on account of poisoning. The poison which was detected in the viscera was found to be "aluminium phosphide". Although, the appellant-convict tried to project a picture that no sooner the deceased fell sick than he immediately took her to the Sanjay Gandhi Hospital at Delhi, yet, there is no evidence worth the name in this regard.

The appellant-convict was expected to lead some evidence as to what had transpired at the Sanjay Gandhi Hospital. He has maintained a complete silence. It is only the appellant-convict who could have explained in what circumstances and in what manner he had taken his wife to the Sanjay Gandhi Hospital and who attended his wife at the hospital. If it is his case, that his wife was declared dead on being brought at the hospital then it is difficult to believe that the hospital authorities allowed the appellant to carry the dead body back home without completing the legal formalities.

54. In the aforesaid context, we must look into the decision of this Court in the case of Deonandan Mishra v. The State of Bihar reported in AIR 1955 SC 801. In the said decision, there is a very important passage in which, the learned Judges deal with the effect of failure of the accused to offer any explanation for circumstances appearing in evidence against him in a prosecution based upon circumstantial evidence. At the cost of repetition, the law is very clear that the accused is not bound to offer any explanation, that there is no burden cast upon him to do so and that the onus of proof does not shift in respect of the vital matter of guilt at any stage of a criminal trial. But as stated by this Court:

"It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which, if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain."

(Emphasis supplied)

55. In our view, the aforesaid passage applies with great force to the facts and circumstances of the present case.

56. Even where there are facts especially within the knowledge of the accused, which could throw a light upon his guilt or innocence, as the case may be, the accused is not bound to allege them or to prove them. But it is not as if the section is automatically inapplicable to the criminal trials, for, if that had been the case, the Legislature would certainly have so enacted.

We consider the true rule to be that Section 106 does not cast any burden upon an accused in a criminal trial, but that, where the accused throws no light at all upon the facts which ought to be especially within his knowledge, and which could support any theory of hypothesis compatible with his innocence, the Court can also consider his failure to adduce any explanation, in consonance with the principle of the passage in Deonandan Mishra (supra), which we have already set forth.

The matter has been put in this form, with reference to Section 106 of the Evidence Act, in Smith v. R. reported in 1918 A.I.R. Mad. 111, namely, that if the accused is in a position to explain the only alternative theory to his guilt, the absence of explanation could be taken into account. In the present case, taking the proved facts together, we are unable even to speculate about any alternative theory which is compatible with the innocence of the accused.

57. In the aforesaid context, we may also refer to and rely on a decision of this Court in Kalu alias Laxminarayan v. State of Madhya Pradesh reported in (2019) 10 SCC 211, wherein this Court after referring to its various other decisions on the applicability of Section 106 of the Evidence Act observed as under:

"16. In view of our conclusion that the prosecution has clearly established a prima facie case, the precedents cited on behalf of the appellant are not considered relevant in the facts of the present case. Once the prosecution established a prima facie case, the appellant was obliged to furnish some explanation under Section 313 CrPC with regard to the circumstances under which the deceased met an unnatural death inside the house. His failure to offer any explanation whatsoever therefore leaves no doubt for the conclusion of his being the assailant of the deceased."

(Emphasis supplied)

58. We should also look into the decision of this Court in the case of Sawal Das v. State of Bihar reported in (1974) 4 SCC 193. In the said case the trial court had come to the conclusion that, upon the established circumstances listed above, no other inference was left open to the Court except that the appellant and

his father and stepmother had conjointly committed the murder of the deceased Smt. Chanda Devi on the morning of 28.05.1965 and that the appellant and his father had then hastily and stealthily disposed off the body in order to conceal the commission of the offence.

It had also taken into account, in coming to this conclusion, the fact that the appellant had unsuccessfully set up a plea, in his written statement, that, Smt. Chanda Devi, who was alleged by him to be wearing a nylon Saree said to have caught fire accidentally while she was using a kerosene stove in her room, died of extensive burns on her body and collapsed. The appellant had alleged that Smt. Chanda Devi was debilitated and kept bad health due to frequent pregnancies and was also suffering from asthma, a weak heart, and abdominal complaints. She had given birth to six children.

59. In view of the aforesaid facts, this Court held as under:

"8. We think that the burden of proving the plea that Smt. Chanda Devi died in the manner alleged by the appellant lay upon the appellant. This is clear from the provisions of Sections 103 and 106 of the Indian Evidence Act. Both the trial Court and the High Court had rightly pointed out that the appellant had miserably failed to give credible or substantial evidence of any facts or circumstances which could support the pleas that Smt. Chanda Devi met her death because her Nylon Saree had accidentally caught fire from a kerosene stove.

The trial Court had rightly observed that the mere fact that some witnesses had seen some smoke emerging from the room, with a kitchen nearby at a time when food was likely to be cooked, could not indicate that Smt. Chanda Devi's saree had caught fire. Neither the murdered woman nor the appellant nor any member of his family was shown to have run about or called for help against a fire.

9. Learned Counsel for the appellant contended that Section 106 of the Evidence Act could not be called in aid by the prosecution because that section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which or the intention with which an accused did a particular act alleged to constitute an offence. The language of Section 106 of the Evidence Act does not, in our opinion, warrant putting such a narrow construction upon it.

This Court held in Gurcharan Singh v. State of Punjab [AIR 1956 SC 460 : (1956) Cri LJ 827] that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in

discharging his burden of creating a reasonable belief, that circumstance, absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt.

10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is : Has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?"

(Emphasis supplied)

60. We also pose the very same question like the one posed in Sawal Das (supra) referred to above, "has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellants beyond reasonable doubt?"

61. We are of the view that the circumstances narrated by us in para 28 of this judgment constitute more than a prima facie case to enable the prosecution to invoke Section 106 of the Evidence Act and shift the burden on the accused husband to explain what had actually happened on the date his wife died.

62. These appeals remind us of what this Court observed in the case of Dharam Das Wadhwani v. State of Uttar Pradesh:

"The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct."

The role of courts in such circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner and not allow the criminals to escape on account of procedural technicalities, perfunctory investigation or insignificant lacunas in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the crime going unpunished. The courts are expected to be sensitive in cases involving crime against women.

63. In the result, both the appeals fail and are hereby dismissed.

64. However, as Maheshwari Devi (mother-in-law) appellant of Criminal Appeal No. 2430 of 2014 has been convicted only for the offence punishable under Section 498A of the IPC, we reduce her sentence to the period already undergone. Even otherwise, she is on bail. Maheshwari Devi need not now surrender. Her bail bonds stand discharged.

65. Pending applications if any shall stand disposed of.

.....J. (J.B. Pardiwala)

.....J. (Prashant Kumar Mishra)

New Delhi;

October 06, 2023.

IN THE SUPREME COURT OF INDIA

Dhani Ram (D) through LRS. & Ors.
Vs.
Shiv Singh

Civil Appeal No. 8172 of 2009

HEADNOTE – Will can't be presumed to be valid merely because it is registered. Mere registration would not sanctify a document by attaching to it an irrebuttable presumption of genuineness.

JUDGMENT

Sanjay Kumar, J.

1. I.A. No. 151091 of 2023 was filed for deletion of the name of deceased appellant No. 2, the widow of Dhani Ram, from the array of parties. This application is ordered as the sons of Dhani Ram and deceased appellant No. 2 have already been brought on record. Registry shall make necessary changes in the cause title before placing this final judgment in the public domain and/or issuing copies thereof.

2. Leela Devi, also referred to as Leela Wati, died on 10.12.1987. Her husband, Sohan Lal, had predeceased her. Dhani Ram, the son of Leela Devi's brother, claimed that she executed a registered Will bequeathing to him the properties left by late Sohan Lal. Shiv Singh, the son of Sohan Lal's brother, instituted Civil Suit No. 200/1 of 1990 on the file of the learned Senior Sub Judge, Solan, Himachal Pradesh, challenging the Will executed by Leela Devi, under which Dhani Ram claimed entitlement to the properties that originally belonged to Sohan Lal.

3. By judgment dated 30.08.1997, the Trial Court decreed the suit, disbelieving the Will put forth by Dhani Ram. In consequence, the mutation effected by the authorities on the strength of the said Will was also set aside. Shiv Singh was held entitled to a decree of possession, as he was the rightful owner of the suit properties, and Dhani Ram was permanently injuncted from causing interference therewith.

Aggrieved thereby, Dhani Ram and the other defendants filed Civil Appeal No. 63-S/13 of 1997 before the learned District Judge, Solan, Himachal Pradesh. By judgment dated 12.05.1998, the Appellate Court reversed the judgment and decree of the Trial Court. It held that the Will stood proved and that there were

no suspicious circumstances surrounding it. The suit filed by Shiv Singh was accordingly dismissed with costs.

4. Thereupon, Shiv Singh filed Regular Second Appeal No. 398 of 1998 before the Himachal Pradesh High Court. The second appeal was allowed by the High Court, vide judgment dated 18.03.2009, restoring the judgment and decree of the Trial Court. Aggrieved by this turn of events, Dhani Ram filed this appeal by special leave.

5. By order dated 30.07.2009, this Court stayed the operation and implementation of the judgment under appeal.

6. Admitted facts, to the extent relevant, may now be taken note of. Sohan Lal and his brother, Devi Ram, succeeded to the ancestral properties left by their father, Giridhari Lal. Sohan Lal had no issues, though it is stated that he had two wives, Leela Devi and Draupadi. The existence and status of Draupadi is disputed but it is of no consequence presently. Devi Ram had two sons, Balbir Singh and Shiv Singh, viz., the respondent herein, who had filed the suit. Balbir Singh died on 26.04.1985. Sohan Lal died intestate and before his death, so did Draupadi, supposedly one of his wives.

Therefore, Leela Devi alone inherited Sohan Lal's share in the ancestral properties by intestate succession. In the ordinary course, if Leela Devi had also died intestate, Shiv Singh, being the sole legal heir of her husband, would have succeeded to the properties under Section 15(1)(b) and Section 15(2)(b) of the Hindu Succession Act, 1956 (for brevity, 'the Act of 1956').

However, Dhani Ram, the son of Leela Devi's brother, claimed the said properties under the Will allegedly executed by Leela Devi on 27.10.1987, which was registered thereafter on 03.11.1987. On the strength thereof, Dhani Ram also got his name mutated in the records in relation to these properties. Having come to know of the same, Shiv Singh initiated the subject litigation and ultimately succeeded before the Himachal Pradesh High Court.

7. The case, therefore, turns upon the Will said to have been executed by Leela Devi. If the said Will is found to be legal and valid, Dhani Ram would succeed to Sohal Lal's properties. If not, Shiv Singh would be the successor to these properties under Section 15 of the Act of 1956.

8. Before the Trial Court, Shiv Singh examined himself as PW1, apart from examining three other supporting witnesses. Dhani Ram examined himself as DW1 in addition to examining Lok Nath Attri, an attesting witness to the Will, as DW-2. Documentary evidence was also led. The contentious Will was marked

as Ex. DW-2/A. According to Dhani Ram, it was executed by Leela Devi on 27.10.1987 at Kasauli.

It was scribed by Ghanshyam Dutt Sharma, a document writer, in the presence of witnesses, Lok Nath Attri (DW2) and Chaman Lal (PW4). The Will was registered subsequently on 03.11.1987 by the Sub-Registrar, Kasauli. Dhani Ram claimed that Leela Devi was looked after by him and his wife during the last stages of her life. This fact was also confirmed by PW2 and PW3. According to Dhani Ram, being happy with their services, Leela Devi executed the Will in his favour.

9. The Trial Court rightly opined that mere registration of the Will would not be sufficient to prove its validity, as its lawful execution necessarily had to be proved in accordance with Section 68 of the Indian Evidence Act, 1872 (for brevity, 'the Evidence Act'), and Section 63 of the Indian Succession Act, 1925 (for brevity, 'the Succession Act'). Thereupon, the Trial Court found that the evidence of the attesting witnesses to the Will, viz., Lok Nath Attri (DW-2) and Chaman Lal (PW-4), was contradictory as they did not speak to the same effect. In these circumstances, the Trial Court held that valid execution of the Will was not proved.

10. On the contrary, in appeal, the Appellate Court held to the effect that Leela Devi was of sound mind despite her advanced age of 70 years and that it was natural for her to execute a Will in favour of her brother's son, Dhani Ram, as he and his family had cared for her well-being during her twilight years. Further, the Appellate Court was inclined to overlook the discrepancies in the evidence of the two attesting witnesses to the Will, viz., Lok Nath Attri (DW-2) and Chaman Lal (PW-4). It is on this basis that the Appellate Court reversed the findings of the Trial Court.

11. However, the High Court, in exercise of second appellate jurisdiction, took a different view. The High Court was of the opinion that as Dhani Ram had taken a keen interest in the execution and registration of the Will, as noted by both the Courts below, that would constitute a reason in itself to entertain some suspicion and the mere registration of the Will would not suffice to dispel the suspicious circumstances surrounding it.

The High Court further held that discrepancies in the evidence of the attesting witnesses to the Will were of significance and the sum effect thereof was that the very execution of the Will was not proved in terms of Section 68 of the Evidence Act and Section 63 of the Succession Act. In consequence, the High Court refused to act upon the said Will and disallowed Dhani Ram's claim based thereon.

12. Perusal of the disputed Will reflects the following features - It was made on 27.10.1987, as recorded in the first paragraph and also certified on the last page by Ghanshyam Dutt Sharma, the document writer, who affixed his signature with the date 27.10.1987 thereunder. The Will is only two pages in length. It was scribed in English and Leela Devi affixed her signature as 'Leela' in Hindi on each page. She affixed her signature on the first page above an 'x' mark. The attesting witnesses' signatures are not found on the first page.

On the second page, the signatures of Leela Devi and the attesting witnesses appear at the end of the document but the placement of the attesting witnesses' signatures is not consistent, as one signed above his name (Lok Nath Attri) while the other (Chaman Lal) signed under his name. The attesting witnesses' signatures also appear on the back of the first page at the bottom. Lok Nath Attri's signature is on the left side corner while Chaman Lal's is on the right side corner and Leela Devi's signature is in between.

The Sub-Registrar, Kasauli, noted in Hindi, above these signatures, that the contents of the document had been read over and explained to the testatrix, which were heard, understood and admitted by her; that the presenter of the document was identified by Lok Nath Attri, Pradhan of the Gram Panchayat, Rouri; and that he, the Sub-Registrar, personally knew Witness No. 2 and, therefore, the Will was registered. The Sub-Registrar also noted that the document was presented for registration by Leela Devi between 12 and 1 pm on 03.11.1987.

13. These being the contents of the disputed Will, it would be apposite to examine the depositions of the two attesting witnesses at this stage. Lok Nath Attri deposed as DW-2 on 19.06.1993. He said that he was the Pradhan of Rouri Panchayat. He stated that he knew Leela Devi, the widow of Sohan Lal, and that, in his presence, she executed the Will (Ex. DW-2/A). He again stated that she signed it in his presence and in the presence of Chaman Lal. He stated that he recognized the signature of Leela Devi and identified her signature and his own signature in the document.

He stated that he did not remember the date on which this Will was registered in Tehsil Kasauli and who had presented it. He went on to state that Leela Devi went inside and he, along with Chaman Lal, together went with her. According to him, the Tehsildar explained the Will to Leela Devi and asked her as to why she had made it. Thereupon, Leela Devi stated that she did not have any children and as Dhani Ram and his wife had looked after her, she had executed the Will in their favour.

14. In his cross-examination, Lok Nath Attri stated that he worked in Mohan Meakin at Kasauli. He said that Leela Devi often used to meet him and asked him to prepare a Will but he had told her that it would be better if she got the Will registered. He reiterated that Leela Devi often used to meet him for some work or the other, but he did not know whether she was seriously ill and had stayed in the hospital. He denied the suggestion that by taking advantage of her weak mental condition, the Will was got prepared.

He then stated that his impression was that Leela Devi might have been alive for 2 - 3 years after executing the Will. He also stated that his meetings with Leela Devi went on in the same way as before even after execution of the Will. He stated that he received a telephone call at his office that Leela Devi had come to Kasauli and she wanted a Will to be made. This telephone call was received by him at 10.30 pm and he immediately started from there. When he reached Kasauli, Leela Devi told him that she had to get the Will made and Chaman Lal was already there.

For getting the Will made and registered, Lok Nath Attri said that it took 2 hours. He went on to state that he did not know how much time it took to get it registered. He also could not say whether the Will was made before lunch or after. According to him, he did not need to take leave from his office for doing panchayat work and this facility was given to him by his Company. He stated that he orally informed his manager whenever he had to go for panchayat work.

He admitted that under the Panchayat Act and the Government's instructions, he was not under any duty to attest Wills but whenever any person from the panchayat wanted to execute a Will, then he would participate in his official capacity. He denied the suggestion that Chaman Lal had signed the document earlier and he used his influence to benefit Dhani Ram in getting the Will made and getting it registered.

15. After completion of Lok Nath Attri's deposition, Dhani Ram gave up examination of Chaman Lal on the ground that it was unnecessary. This was recorded by the Trial Court on 19.06.1993. Thereupon, Shiv Singh examined Chaman Lal as PW-4 on 21.11.1994. Chaman Lal stated thus: About 7 years previously, he had gone to the Government Hospital at Kasauli to get medicine and Dhani Ram met him while he was taking it. Dhani Ram told him that his signatures were required on some papers and he affixed his signatures.

He identified his signatures in Ex. DW-2/A. He further stated that when he put his signatures, no other proceedings took place. He said that when he signed the papers, he did not know any other person there except Dhani Ram. He asserted that Leela Devi, Lok Nath Attri and Ghanshyam Das did not sign in his

presence. He also asserted that what was written in Ex. DW-2/A was neither explained to him nor was it explained to anybody else in his presence. He claimed that he affixed his signatures in the document and left the place.

16. In his cross-examination, Chaman Lal stated that his signatures in Ex. DW-2/A were made on the same day and at the same time. He stated that his signatures on the document were made on 03.11.1987 in the Tehsil. He, however, said that he did not go to the office of the Tehsildar but signed the document and came back from outside the Tehsil. He stated that he did not go inside the Tehsil. He denied that, after making Ex. DW-2/A Will, Leela Devi appeared before the Tehsildar (Sub-Registrar) with him and Lok Nath Attri. He further said that he did not know that Leela Devi signed Ex. DW-2/A in Lok Nath Attri's and his presence after admitting it as correct.

17. Bare perusal of the statements made by these two attesting witnesses demonstrates that they are not on same page. Lok Nath Attri (DW-2) claimed that Leela Devi signed the Will in his presence and in the presence of Chaman Lal. However, and most significantly, he did not state that Chaman Lal and he affixed their signatures in the document in the presence of Leela Devi. On the other hand, Chaman Lal claimed that he put his signatures at the bottom of the pages at the request of Dhani Ram and that he never saw Leela Devi affix her signatures in the document.

18. In this regard, it would be apt to note the essential requirements in law to prove a Will. Section 68 of the Evidence Act reads as under:

"68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

19. Section 63 of the Succession Act prescribes the mode and method of proving a Will and, to the extent relevant, it reads as under: -

"63. Execution of unprivileged Wills.-

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:-

(a). .....

(b). .....

(c). The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

20. It would also be necessary to take note of Section 71 of the Evidence Act. This provision states as follows:

"71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

21. It is well settled that mere registration would not sanctify a document by attaching to it an irrebuttable presumption of genuineness. The observations of this Court in Rani Purnima Debi and another vs. Kumar Khagendra Narayan Deb and another1, which were referred to by the Himachal Pradesh High Court, are of guidance in this regard and are worthy of extraction. These observations read as under:

"There is no doubt that if a Will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination.

If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the Will.

But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value.

It is not unknown that registration may take place without the executant really knowing what he was registering. Law reports are full of cases in which registered Wills have not been acted upon. Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a Will; though the fact that there has been registration would be an important circumstance in favour of the Will being genuine if the evidence as to registration establishes that the testator admitted the execution of the Will after knowing that it was a Will the execution of which he was admitting."

22. We may also refer to Janki Narayan Bhoir vs. Narayan Namdeo Kadam2, wherein this Court held that, to prove that a Will has been executed, the requirements in clauses (a), (b) and (c) of Section 63 of the Succession Act have to be complied with.

It was pointed out that the most important point is that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will or must have seen some other person sign the Will in the presence of and by the direction of the testator or must have received from the testator a personal acknowledgment of his signature or mark or of the signature or mark of such other person and each of the witnesses has to sign the Will in the presence of the testator.

It was further held that, a person propounding a Will has got to prove that the Will was duly and validly executed and that cannot be done by simply proving that the signature on the Will was that of the testator, as the propounder must also prove that the attestations were made properly, as required by Section 63(c) of the Succession Act. These observations were affirmed and quoted with approval by this Court in its later judgment in Lalitaben Jayantilal Popat vs. Pragnaben Jamnadas Kataria and others3.

23. Viewed in the context of the legal requirements and the law laid down by this Court, we find that neither of the attesting witnesses in this case fulfilled the mandate of Section 63(c) of the Act of 1925 to prove the Will. Though Lok Nath Attri claimed that Leela Devi affixed her signatures in the Will in their presence,

which was vehemently denied by the other attesting witness, Chaman Lal, the fact remains that Lok Nath Attri also did not state that he affixed his signatures in the Will in the presence of Leela Devi. This is one of the compulsory requisites of Section 63(c) of the Succession Act.

24. We may also note that Lok Nath Attri claimed that he had good relations with Leela Devi and that she would meet him regularly for some work or the other. Having stated so, he surprisingly said that Leela Devi may have lived for 2 - 3 years after the execution of the Will. However, Leela Devi allegedly executed the Will on 27.10.1987, got it registered on 03.11.1987 and expired on 10.12.1987. Therefore, she lived for barely a month and a half after the execution of the Will. The fact that Lok Nath Attri did not recall this crucial detail casts any amount of doubt on his credibility.

25. It is difficult to believe that Chaman Lal would have blindly affixed his signatures in a document upon the mere asking of Dhani Ram without knowing its consequences. However, even if it is accepted that Chaman Lal is not being honest about his role in the execution of the Will (Ex. DW-2/A), the fact still remains that neither attesting witness spoke of the execution of the said Will in terms of the prescriptions in Section 63(c) of the Succession Act.

Further, when the Will itself demonstrates that it was made on 27.10.1987 but was registered on 03.11.1987, Lok Nath Attri's statement that for getting the Will made and registered it took 2 hours is equally astonishing. This statement leads to the inference that the making of the Will and its registration took place on the same day. Notably, he could not even recall whether it was done before lunch or after.

No doubt, in Shyamal Ghosh vs. State of West Bengal4, this Court held that where evidence is given after a lapse of several years in the context of attestation of a Will, contradictions of minor nature should not be taken to be suspicious circumstances, as memory would fade after the lapse of a long period of time. However, the evidence of Lok Nath Attri does not inspire confidence on grounds more than one.

Therefore, this ratio does not suffice to cure all the defects in his deposition, which render him totally uncreditworthy. Further, as already noted, he did not state that he signed the Will in the presence of Leela Devi, which is fatal to proving the execution of the Will in terms of Section 63(c) of the Succession Act.

26. Section 68 of the Evidence Act requires at least one attesting witness to the Will to prove its execution in terms of Section 63 of the Succession Act, but it is

clear that neither Lok Nath Attri nor Chaman Lal passed muster in satisfying this requirement.

In consequence, Section 71 of the Evidence Act had a role to play in the matter, as one attesting witness, Chaman Lal, denied the very execution of the document in his presence while the other attesting witness, Lok Nath Attri, did not establish its execution in terms of the legal mandate.

It was, therefore, incumbent upon Dhani Ram to lead other evidence to prove the execution of the Will by Leela Devi. However, neither Ghanshyam Dutt Sharma, the document writer who scribed the Will, nor anyone from the Registrar's Office at Kasauli were examined to prove its execution.

27. On the above analysis, it is manifest that compliance with the essential legal requirements, in terms of Sections 68 and 71 of the Evidence Act and Section 63 of the Succession Act, was not established in order to prove the execution of Ex. DW-2/A Will.

As Dhani Ram failed to prove the execution of the Will in terms of the mandatory legal requirements, Shiv Singh would be entitled to succeed to the properties by way of intestate succession under Section 15 of the Act of 1956, as rightly held by the Himachal Pradesh High Court.

28. The appeal is, therefore, bereft of merit and is accordingly dismissed. Interim Order dated 30.07.2009 shall stand vacated. Parties shall bear their own costs.

.....J (C.T. Ravikumar)

.....J (Sanjay Kumar)

New Delhi.

October 06, 2023;

1 AIR 1962 SC 567 = [1962] 3 SCR 195

2 (2003) 2 SCC 91

3 (2008) 15 SCC 365

4 (2012) 7 SCC 646

IN THE SUPREME COURT OF INDIA

Chandra Pratap Singh
Vs.
State of Madhya Pradesh

Criminal Appeal No. 1209 of 2011

HEADNOTE – Distinction between "common intention" and "common object",

JUDGMENT

Abhay S. Oka, J.

Factual Aspects

1. This is an appeal by accused no. 2 who has been convicted by the High Court for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short, 'IPC'). The appellant was also convicted for the offence punishable under Section 201 of IPC. For the first offence, he was sentenced to undergo life imprisonment. For the second offence under Section 201 of IPC, he was sentenced to undergo rigorous imprisonment for five years.

2. There were 17 accused prosecuted for the offence of triple murder. Out of 17 accused, the Trial Court acquitted accused nos. 3 to 8, 10, 13, 15 and 17. The Trial Court convicted accused nos. 2, 9, 11, 12, and 16 for the offence punishable under Section 302, read with sections 148 and 149 and Section 201 of IPC. Accused nos.1 and 14 were convicted for the offence punishable under Section 302 read with Section 148 of IPC. The Trial Court did not frame a charge against any accused for the offence punishable under Section 302 read with Section 34 of IPC. The High Court acquitted accused nos. 9, 11 and 12.

3. The allegation was of the triple murder of Uma Prasad, Vinod Kumar and Munau @ Anant Kishore Khare. According to the prosecution case, on 2nd June 1987, Vinod Kumar had taken his brother Munau to village Naugaon by scooter for medical treatment. As they did not return till 5 pm, Uma Prasad Khare (deceased), who was the father of Vinod Kumar Khare and Munau, deputed Naval Kishore (PW1) and Manua Chammer (PW2) to search his sons. PW1 Naval Kishore was the nephew of Uma Prasad.

Even Uma Prasad proceeded to search Vinod Kumar and Munau Khare. When they reached Hanuman temple, they saw the accused gathered near the temple with firearms and other arms like farsa, axe and ballam. The appellant - accused

no.2 and accused no.16 were armed with a spear. The role ascribed to accused nos.2 and 16 is that they stopped Uma Prasad.

As a result, he fell off his bicycle. According to the prosecution case, accused nos. 3, 5 and 7 (acquitted) exhorted the other accused to chop Uma Prasad into pieces. Accused nos. 7, 9 and 11 (acquitted) pointed their guns at PW1 Naval Kishore and PW2 Manua and told them not to interfere. The act of assaulting and killing Uma Prasad was allegedly done by accused no.1 and accused no.14.

4. Another allegation against the appellant is that as per suggestion of acquitted accused no.6, he, along with accused no.1, dragged the body of deceased Uma Prasad and threw the same into a well.

5. Further allegation of the prosecution is that after committing the murder of Uma Prasad, all the accused went towards the bus stand with the intention of killing Vinod Kumar Khare and Munau Khare. It is alleged that after about 15 minutes, the sound of two gun fires was heard, and it is alleged that Vinod Kumar Khare and Munau Khare were killed. As far as the allegation of killing these two persons is concerned, the Trial Court acquitted all the accused, and that part of the judgment of the Trial Court has become final.

6. A joint appeal was preferred by accused no.1, the present appellantaccused no.2 and accused no.16. Separate appeals were preferred by the other accused. While partly allowing the appeals, by the impugned Judgment, the High Court acquitted accused nos. 9,11 and 12. The High Court partly allowed the appeal of the present appellant and accused nos. 1,14 and 16 by substituting their conviction under Section 302 read with Sections 148 and/or 149 of IPC with Section 302 read with Section 34 of IPC. The appellant's conviction for the offence punishable under Section 201 of IPC was maintained.

7. We may note here that Special Leave Petition (criminal) no. 876 of 2012 filed by accused no.1 was dismissed as the said accused did not file proof of surrender. The application for restoration of the Special Leave Petition was also dismissed. It appears that accused nos.14 and 16 did not prefer any appeal to this Court. They may have undergone the entire sentence.

Submissions

8. The first submission of the learned senior counsel appearing for the appellant is that the appellant was not represented by his advocate when the appeal was called out for hearing before the High Court. In the cause title of the impugned judgment, the absence of the appellant's advocate has been mentioned. Moreover, the judgment does not refer to any submission made on behalf of any accused. He would, therefore, submit that the High Court has committed a gross

illegality by proceeding with the hearing of the appeal in the absence of his advocate.

9. He submitted that in view of the decision of this Court in the case of Mala Singh v. State of Haryana1, the appellant could not have been convicted with the aid of Section 34 of IPC as there was no evidence of common intention, which was necessary for attracting Section 34 of IPC. Moreover, the appellant and other accused ought to have been put to notice by the High Court that it intended to modify the charge for invoking Section 34. He submitted that prejudice has been caused to the appellant by alteration of the charge apart from the fact that ingredients of Section 34 of IPC were not proved. Hence, the appellant is entitled to acquittal.

10. The learned counsel appearing for the respondent urged that from the impugned judgment, it appears that the High Court has carefully perused the evidence of the prosecution witnesses. He submitted that in an appeal against conviction, under Section 386 of the Code of Criminal Procedure, 1973 (for short 'Cr.PC') read with Section 216 of Cr.PC, the Appellate Court, has the power to alter or add the charge when no prejudice is shown to the accused. He submitted that there was enough evidence on record to prove the ingredients of Section 34 of IPC. He invited our attention to the gravity of the offence and submitted that no interference is called for.

Consideration of Submissions

11. The first issue is whether any prejudice was caused to the appellant, as his appeal was heard in the absence of his advocate. The cause title of the judgment clearly mentions that the advocate representing the appellant was absent. The order sheet of the appeal preferred by the appellant and two others (Annexure P3) records that on 26th October 2004, when the appeal preferred by the appellant and two others was called out, the appellant's advocate was present. The appeal was heard on 23rd November 2004.

The order sheet of that date records that the advocate for the appellant was absent. It also notes that the arguments were heard, and judgment was reserved. The impugned judgment does not refer to any submission canvassed on behalf of the appellant. The High Court has, thus, committed illegality by deciding the appeal against the conviction preferred by the appellant without hearing the appellant or his advocate. After finding that the advocate appointed by the appellant was absent, the High Court ought to have appointed a lawyer to espouse his cause.

12. In view of the wide powers conferred by Section 386 of Cr.PC, even an Appellate Court can exercise the power under Section 216 of altering or adding the charge. However, if the Appellate Court intends to do so, elementary principles of natural justice require the Appellate Court to put the accused to the notice of the charge proposed to be altered or added when prejudice is likely to be caused to the accused by alteration or addition of charges.

Unless the accused was put to notice that the Appellate Court intends to alter or add a charge in a particular manner, his advocate cannot effectively argue the case. Only if the accused is put to notice by the Appellate Court that the charge is intended to be altered in a particular manner, his advocate can effectively argue that even the altered charge was also not proved. For example, in the present case, it was necessary for the Appellate Court to put the appellant to notice that it intended to convict him with the aid of Section 34 of IPC, for which a charge was not framed.

We may add here that the Court can give the notice of the proposed alteration or addition of the charge even by orally informing the accused or his advocate when the appeal is being heard. In a given case, the Court can grant a short time to the advocates for both sides to prepare themselves for addressing the Court on the altered or added charge.

13. In the facts of the case, the appellant's advocate was absent on the date of the hearing. Therefore, there was no occasion for the High Court to put the advocate for the appellant to the notice that the charge under Section 302 read with Sections 148 and/or 149 of IPC was proposed to be altered to a charge under Section 302 read with Section 34 of IPC.

Therefore, grave prejudice has been caused to the appellant by altering the charge without giving any notice to the appellant or his advocate about the charge. The reason is that there was no opportunity available to the accused to argue that there was no evidence on record to prove the existence of common intention, which is the necessary ingredient of Section 34 of IPC. There is one more crucial aspect of the case.

A perusal of the impugned judgment shows that the High Court has extensively referred to the evidence of PW1 Nand Kishore and PW2 Manua. However, the entire judgment does not mention that the Court was altering the charge for the reasons recorded. No finding is recorded in terms of subsection (4) of Section 216 of Cr.PC that the proposed alteration of the charge will not prejudice the accused in his defence.

14. There is no reason recorded in the impugned judgment to show that Section 34 of IPC was applicable. There is no discussion on this aspect in the judgment. Only in the operative part (paragraph 15), without assigning any reasons, the High Court held that the appellant was liable to be convicted for the offence punishable under Section 302, read with Section 34 of IPC.

As stated earlier, there is a complete absence of any reason for concluding that Section 34 of IPC was attracted. The High Court has not recorded a finding that there was sufficient evidence to prove that the four accused who were ultimately convicted had done the criminal act in furtherance of a common intention.

15. Obviously, the Trial Court's conviction of the appellant under Section 302 with the aid of Section 149 of IPC could not be sustained. As per Section 141 of IPC, unlawful assembly must be of five or more persons. As the High Court confirmed the conviction of only four and acquitted all others, the offence of unlawful assembly was not made out, and therefore, the offences under Sections 148 and 149 were not made out.

16. In the ordinary course, we would have remanded the appeal to the High Court for a fresh hearing on the ground that the appellant was not heard before confirming conviction on a modified charge. However, we cannot ignore that the incident is of 1987, and the present appeal is of 2011. Therefore, it will be unjust to pass an order of remand. Hence, we have examined the evidence on record.

17. In the case of Chittarmal v. State of Rajasthan2, this Court dealt with the conversion of charge from Section 302 read with Section 149 of IPC, to Section 302, read with Section 34 of IPC. Paragraph 14 of the said decision reads thus:

"14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap.

But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34.

Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case.

The nonapplicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See Barendra Kumar Ghosh v. King Emperor [AIR 1925 PC 1 : 26 Cri LJ 431], Mannam Venkatadari v. State of A.P. [(1971) 3 SCC 254: 1971 SCC (Cri) 479 : AIR 1971 SC 1467] , Nethala Pothuraju v. State of A.P. [(1992) 1 SCC 49: 1992 SCC (Cri) 20: AIR 1991 SC 2214] and Ram Tahal v. State of U.P. [(1972) 1 SCC 136: 1972 SCC (Cri) 80: AIR 1972 SC 254])"

(Emphasis added)

18. We have carefully perused the evidence of PW1 and PW2. There is no evidence of the presence of common intention. Only the act of stopping the deceased Uma Prasad will not, by itself, bring the case within the purview of Section 34 of IPC. There is no overt act attributed to the appellant by any prosecution witness in the assault on deceased Uma Prasad.

It is difficult to infer a prior meeting of minds in this case. There is no material to prove the existence of common intention which is the necessary ingredient of Section 34 of IPC. In this case, there is no overlap between a common object and a common intention. Therefore, the conviction of the appellant under Section 302, read with Section 34 will have to be set aside.

19. However, the evidence of two eyewitnesses (PW1 and PW2) is very consistent on the role played by the appellant in dragging the dead body of the deceased and throwing the same into a well. There is hardly any cross-examination on this aspect of both PW1 and PW2. Therefore, there is every justification for convicting the appellant for the offence punishable under Section 201 of IPC of causing the disappearance of the evidence of the crime.

Hence, the conviction and sentence of the appellant for the offence under Section 201 of IPC will have to be maintained. The order dated 20th April 2012 passed in this appeal records that the appellant was enlarged on bail as he remained incarcerated for about nine years. The appellant was sentenced to

undergo rigorous imprisonment for five years for the offence under Section 201 of IPC, which he has already undergone.

20. Hence, the appeal partly succeeds. We set aside the appellant's conviction for the offence punishable under Section 302, read with Section 34 of IPC. However, the appellant's conviction for the offence punishable under Section 201 of IPC is confirmed. The appellant has already undergone the sentence for the said offence. Therefore, the bail bonds of the appellant stand cancelled.

21. The appeal is allowed on the above terms.

.....J. (Abhay S. Oka)

.....J. (Pankaj Mithal)

New Delhi;

October 09, 2023.

1 (2019) 5 SCC 127

2 (2003) 2 SCC 266

IN THE SUPREME COURT OF INDIA

State of Gujarat
Vs.
Dilipsingh Kishorsinh Rao

Criminal Appeal No. 2504 of 2023

HEADNOTE – At the stage of framing of charges, the accused does not have the right to produce any material or documents to contest the case.

JUDGMENT

Aravind Kumar, J.

1. The proceedings initiated under the Prevention of Corruption Act, 1988 (hereinafter referred to as 'Act') against the respondent herein came to be questioned by him by filing an application for discharge on the ground of investigating officer (hereinafter referred to as 'IO') having failed to consider the written explanation offered by him with supporting documents and the conclusion reached by the sanctioning authority was also without considering the same reflecting non-application of mind and thereby the conclusion reached by the sanctioning authority that respondent accused possessed assets disproportionate to his known source of income is erroneous and the charge-sheet material do not reveal any circumstances or evidence to arrive at a conclusion that accused had disproportionate source of income.

The said application having been rejected by the trial court by order dated 13.04.2016, respondent moved the High Court under Section 397 read with Section 401 of Cr.P.C. by filing Criminal Revision Application No.387 of 2016 and same having been allowed by the impugned order dated 11.01.2018, the State has approached this Court.

2. The sole question that arises for our consideration is whether the order of the sanctioning authority dated 05.03.2015 is liable to be set aside and consequently, the charge-sheet filed by Anti-Corruption Bureau, Anand Police Station on 17.06.2015 is liable to be quashed?

3. The case of the prosecution as laid in the chargesheet filed against the respondent is to the effect that during the period 2005 to 2011 the respondent by misuse of his power while discharging his duties as Sub-Inspector of Borsad Town Police Station and based on corrupt practices had acquired assets in his and his wife's name to the tune of Rs.1,15,35,319/- which was beyond his known

source of income and it was disproportionate to the tune of Rs.32,68,258/- which is more than 40% of his known source of income.

4. An application for discharge (Annexure P-29) came to be filed under Section 227 read with Section 228 of Cr.P.C. contending inter alia that during investigation, the IO had failed to consider the written statement dated 13.08.2014 and the permission obtained by him to visit Australia and also the details of the purchase of movable and immovable properties furnished to the department on every occasion of his investment, and yet, the IO had failed to consider the same in proper perspective.

It was also contended that sanction granted by the department for purchase of the property has also not been taken into account by the I.O. It was further contended, that error in calculation of disproportionate asset though brought to the notice of the investigating agency, same had not been considered as also the statement of the witnesses who had loaned amounts to the respondent.

It was further urged that the sanctioning authority had failed to consider the documentary proof furnished for purchase of properties from various sources of income and investigating agency had failed to take into consideration the amount which was obtained under loans from friends and family members which was duly supported by documentary evidences. Hence, contending that charge-sheet material does not disclose the commission of offence alleged, respondent pleaded in the application for being discharged.

5. Trial Court taking into consideration the principles enunciated by this Court in catena of judgments and applying the ratio laid down to the facts on hand observed as under:

"(4) xxxxx

Thus, from the afore-stated settled principles and record of the case, the following aspects emerges from the record.

(a) Whether the accused has taken loan from his brother, mother and father is a question of fact which is to be decided during the trial;

(b) The fact of Rs.10 lacs as loan from the friends is also a question of fact which is to be decided during the trial;

(c) Other two friends namely, Iliyashbhai and Niteshbahai who have given amount to the accused as loan is also a question of fact which is to be decided during the trial;

(d) The fact of accused informing with regard to purchase of property to the department under the Gujarat Civil Services rules does not gave him a clean chit with regards to his income. This can merely be said to be complying with the rules and regulations of service, however, this does not give him a seal of authenticity with regards to the value of consideration which is disproportionate to the known source of income.

(e) The explanation given by the accused with regard to disproportionate income is also taken into consideration while filing the charge-sheet against the accused and also while granting sanction.

(f) Necessary sanction has been obtained and hence, the question where sanction is given without application of mind is also a question of fact to be decided at the time of trial.

(g) The bulk of records placed on record by way of charge-sheet papers prima facie shows that if they are taken at their face value if discloses all the ingredients of disproportionate income with the known source of income;

(h) Even considering the broad principles whatever defence the accused is taking, even if the same are considered, it cannot be said that the ingredients constituting the alleged offence are not attracted.

(i) There does not seems to be any basis infirmities prima facie on record which nullifies the case of prosecution. Even if two views are possible, present case papers clearly creates grave a suspicion against the accused with regards to the loan amount taken from his brother, father, mother and other friends and also with regards to the income of his son, who was residing at Australia and his agricultural income and there are sufficient grounds for proceeding against the accused.

(5) Considering the facts recorded hereinabove emerging from the documents on record, it cannot be said that the accused is liable to be discharged since this Court is not required to make roving inquiry into pros and cons of the matter and weighing the evidence as if the trial is conducted.

Even otherwise the allegations with regards to the disproportionate assets against the known source of income is a subject matter which cannot be decided at the outset without conducting full fledge trial, more particularly, when it is the accused who has the knowledge with regard to the source of income from while purchase of the properties both movable and immovable are made by him and the Court at this juncture is able to see prima facie case against the accused. Under the circumstances, the application is substance less and hence the following order is passed."

and for the aforesaid reasons dismissed the application by order dated 13.04.2016 (Annexure P-30).

6. Being aggrieved by the above said order respondent herein carried the same in revision before the High Court. As already noticed hereinabove the High Court by impugned order allowed the Revision Application by perusing the material on record placed by the respondent -accused and arrived at a conclusion that trial court had committed an error in dismissing the application and accepting the plea of the respondent which was virtually by way of defence and discharged the respondent.

Discussion and Findings

7. It is trite law that application of judicial mind being necessary to determine whether a case has been made out by the prosecution for proceeding with trial and it would not be necessary to dwell into the pros and cons of the matter by examining the defence of the accused when an application for discharge is filed. At that stage, the trial judge has to merely examine the evidence placed by the prosecution in order to determine whether or not the grounds are sufficient to proceed against the accused on basis of charge sheet material.

The nature of the evidence recorded or collected by the investigating agency or the documents produced in which prima facie it reveals that there are suspicious circumstances against the accused, so as to frame a charge would suffice and such material would be taken into account for the purposes of framing the charge. If there is no sufficient ground for proceeding against the accused necessarily, the accused would be discharged, but if the court is of the opinion, after such consideration of the material there are grounds for presuming that accused has committed the offence which is triable, then necessarily charge has to be framed.

8. At the time of framing of the charge and taking cognizance the accused has no right to produce any material and call upon the court to examine the same. No provision in the Code grants any right to the accused to file any material or document at the stage of framing of charge. The trial court has to apply its judicial mind to the facts of the case as may be necessary to determine whether a case has been made out by the prosecution for trial on the basis of charge-sheet material only.

9. If the accused is able to demonstrate from the chargesheet material at the stage of framing the charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the court at that stage. The main intention of granting a chance to the

accused of making submissions as envisaged under Section 227 of the Cr.P.C. is to assist the court to determine whether it is required to proceed to conduct the trial. Nothing in the Code limits the ambit of such hearing, to oral hearing and oral arguments only and therefore, the trial court can consider the material produced by the accused before the I.O.

10. It is settled principle of law that at the stage of considering an application for discharge the court must proceed on an assumption that the material which has been brought on record by the prosecution is true and evaluate said material in order to determine whether the facts emerging from the material taken on its face value, disclose the existence of the ingredients necessary of the offence alleged. This Court in State of Tamil Nadu Vs. N. Suresh Rajan And Others (2014) 11 SCC 709 adverting to the earlier propositions of law laid down on this subject has held:

"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge.

It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction.

In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

11. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged. The expression "the record of the case" used in Section 227 Cr.P.C. is to be understood as the documents and articles, if any, produced by the prosecution. The Code does not give any right to the accused to

produce any document at the stage of framing of the charge. The submission of the accused is to be confined to the material produced by the investigating agency.

12. The primary consideration at the stage of framing of charge is the test of existence of a prima-facie case, and at this stage, the probative value of materials on record need not be gone into. This Court by referring to its earlier decisions in the State of Maharashtra Vs. Som Nath Thapa (1996) 4 SCC 659 and the State of MP Vs. Mohan Lal Soni (2000) 6 SCC 338 has held the nature of evaluation to be made by the court at the stage of framing of the charge is to test the existence of prima-facie case.

It is also held at the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.

13. The power and jurisdiction of Higher Court under Section 397 Cr.P.C. which vests the court with the power to call for and examine records of an inferior court is for the purposes of satisfying itself as to the legality and regularities of any proceeding or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in such proceedings. It would be apposite to refer to the judgment of this court in Amit Kapoor Vs. Ramesh Chandra (2012) 9 SCC 460 where scope of Section 397 has been considered and succinctly explained as under:

"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law.

If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie.

Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

14. This Court in the aforesaid judgement has also laid down principles to be considered for exercise of jurisdiction under Section 397 particularly in the context of prayer for quashing of charge framed under Section 228 Cr.P.C. is sought for as under:

"27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles.

At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie."

15. The revisional court cannot sit as an appellate court and start appreciating the evidence by finding out inconsistency in the statement of witnesses and it is not legally permissible. The High Courts ought to be cognizant of the fact that trial court was dealing with an application for discharge.

16. In the teeth of the above analysis of law when the impugned order of the High Court is perused, it would not detain us for too long to brush aside the contentions raised by the respondent-accused for reasons more than one.

Firstly, the charge-sheet has been filed after taking into consideration the written submissions filed by the accused before the Investigating Authority which included the documentary evidences tendered by the respondent accused.

Secondly, the statement of friends and acquaintances from whom loans of large amounts had been borrowed by the accused which had been relied upon by the accused to stave off the prosecution in his written submissions filed before the Investigating Authority and which material had persuaded the High Court to accept the same on its evaluation to be true, is nothing but short of accepting the same as defence evidence and examining the truthfulness of its contents even before trial could be commenced or held.

Thirdly, the High Court has proceeded to examine the pros and cons of defense by weighing the defence-evidence and probabilities of the conclusion that may ultimately be arrived at, as the basis for exercising the revisional jurisdiction which was impermissible.

Fourthly, the purported loans said to have been obtained by the respondent accused from his mother, brother and father are all question of facts which requires adjudication and this could be done only during trial and the explanation relating to borrowing of large sums raises a reasonable suspicion, which has been termed by the Investigating Agency as strong material to file the charge sheet and based on such material the sanctioning authority also recorded its satisfaction under sanction order dated: 05.03.2015 to prosecute the respondent-accused. Hence, raising reasonable suspicion cannot be held or construed at the primary stage for discharging the accused.

17. The plea or the defence when requiring to be proved during course of trial is itself sufficient for framing the charge. In the instant case, the learned Trial Judge has noticed that explanation provided by the respondent accused pertaining to purchase of shop No.7 of Suman City Complex of plot No.19, Sector-11 from the loan borrowed and paid by the respondent was outside the check period and hence the explanation provided by respondent is a mere eye wash.

This is an issue which has to be thrashed out during the course of the trial and at the stage of framing the charge mini trial cannot be held. That apart the explanation offered by the respondent accused with regard to buying of Maruti Wagon-R car, Activa scooter, purchase of house etc., according to the prosecution are all the subject matter of trial or it is in the nature of defence which will have to be evaluated after trial.

18. In the afore-stated circumstances we are of the considered view that High Court had committed a serious error in interfering with the well-reasoned order passed by the trial court. Hence, the impugned judgment dated 11.01.2018 passed in Criminal Revision Application No.387 of 2016 setting aside the trial court order dated 13.04.2016 requires to be set aside and accordingly it is set aside and appeal is allowed.

The trial court shall proceed with the trial having regard to the fact that charge-sheet has been filed in the year 2015 and shall conclude the trial expeditiously and preferably within a period of one year.

.....J. [S. Ravindra Bhat]

.....J. [Aravind Kumar]

New Delhi;

October 09, 2023

IN THE SUPREME COURT OF INDIA

Naresh @ Nehru
Vs.
State of Haryana

[Criminal Appeal No.1786 of 2023]

Irshad and Anr.

Vs.

State of Haryana

[Criminal Appeal Nos.1787-1788of 2023]

HEADNOTE – Prosecution must prove accused was aware of offences likely to be committed to achieve common object under Sec. 149 of Indian Penal Code

JUDGMENT

Aravind Kumar, J.

1. Judgment dated 09-01-2020 rendered in Criminal Appeal Nos.1063 of 2017, 997 & 1043 of 2017 by the High Court of Punjab and Haryana, Judicature at Chandigarh is under challenge in these appeals, whereunder the accused Nos.4, 5 and 6 (appellants herein) who were convicted for the offences punishable under Section 302 read with Section 149 of the Indian Penal Code (for short 'IPC') by the Sessions Court came to be affirmed.

GIST OF PROSECUTION CASE:

2. On 22-04-2016, ASI Ram Kishan while on patrolling duty at 75 feet road, had received a telephonic information that in the village Maheshwari certain persons had fired a gun-shot at a boy and upon reaching there, statement of Mohit @ Kala came to be recorded which was to the effect that at about 6.40 pm his cousins Ajay and Suraj were talking in front of the house of Ex. Sarpanch Karan Singh and they were near the house of Dharmender and he (Mohit) saw Ajay and Suraj running towards the house of Dharmender as they were being chased by three youngsters on a bullet motorcycle.

It was also stated by Mohit @ Kala that bullet motorcycle was being driven by Ravi, Shoaib Khan was the pillion rider and one unknown person was sitting behind them. It was further stated that two more motorcycles having two riders each, with batons in their hands were following the Bullet motorcycle.

It was also alleged that unknown person sitting on the Bullet motorcycle got down and fired at Ajay with country-made revolver, which hit his head and Ajay fell in front of the house of Dharmender. Suraj hid in Dharmender's house and on raising the alarm the assailants sped away on their motorcycles towards Bhiwadi; it is also stated by Mohit @ Kala that injured Ajay was shifted to the hospital; it is further stated that Ravi was studying in his school and was his junior and he used to bully and threaten all. Mohit also stated that Ajay and Suraj had a fight with Ravi on the day of 'Dulhandi' and he had threatened to kill them and Ravi along with his companions had fired at Ajay with intend to kill him.

Based on the said statement FIR under Sections 148, 149, 307 of IPC and Section 25 of the Arms Act came to be registered and on the death of Ajay (on 23-04-2016) Section 302 of IPC was substituted in place of Section 307 IPC and accused persons were apprehended; on the disclosure statement of first accused (Pawan) country made pistol was recovered and as per the statement of accused No.2 (Dharmender) wooden stick was recovered apart from four motorcycles.

One of the accused-Shoaib was produced before the Juvenile Justice Board and Ravi was tried by the Children's Court under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. The charge was framed against six accused persons and in all 18 witnesses were examined on behalf of the prosecution. The statements of the accused under Section 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') came to be recorded and the accused having denied the incriminating material appearing in evidence against them, had pleaded not guilty.

After hearing the learned advocates appearing for the accused persons and the public prosecutor and on appreciation of the evidence laid before the court, the learned Sessions Judge by judgment dated 06- 10-2017 convicted the accused persons for the offences already noticed hereinabove and said order of conviction and sentence imposed came to be affirmed by the High Court under the impugned order vide judgment dated 09-01-2020. Hence, these appeals have been preferred by accused Nos.4 to 6.

3. We have heard Mr. Siddharth Mittal and Mr. Soumik Ghosal, learned Advocates appearing for the accused-appellants in Criminal Appeal Nos.1786 of 2023 and 1787-1788 of 2023 respectively, and Ms. Manisha Aggarwal Narain, learned Additional Advocate General appearing for the State of Haryana, Respondent.

SUBMISSIONS ON BEHALF OF THE APPELLANTS:

4. Mr. Siddharth Mittal, learned counsel for the appellant appearing for Naresh @ Nehru Accused No.4, contends that the trial court and High Court had committed an error in convicting him without considering the statement of Mohit @ Kala (PW-9) in proper perspective whereunder he had not named the appellant and the CCTV footage did not conform to Section 65 B of the Indian Evidence Act which even otherwise did not reflect A-4's of presence.

He also contends that no Test Identification Parade (TIP 'for short') was conducted, and PW-9 had only identified this accused (A-4) in the court. Mr. Mittal learned counsel would also contend that said witness (PW- 9) was shocked or perplexed when his statement came to be recorded as admitted by him and reliance could not have been placed on said evidence for convicting the appellant. He would further contend that A- 4 had no common object to share with the main accused, Pawan (PW- 1), who is said to have fired at Ajay (deceased).

Mr. Mittal, learned counsel would also contend that PW-9 was an interested witness as he was a close relative of the deceased, and various discrepancies, including the improvement in his statement made before court, ought to have been the ground to summarily brush aside his testimony. Mr. Mittal, learned advocate would point out that discrepancies in PW-9's statement had clearly surfaced which was evident from his admission of not informing the police about the Splendor vehicle being driven by the appellant and this fact was conveniently ignored by the courts below.

Mr. Mittal, learned counsel would also contend that CCTV footage relied upon by prosecution was recorded on a mobile phone by PW-8 and converted into a CD, which was not in conformity with Section 65B of the Evidence Act and it was allegedly recorded on 26.04.2016 but handed over to the police on 01.06.2016 and during this interregnum period the possibility of said recording being tampered could not have been ruled out. Even otherwise the face of the assailants was not identifiable in the CCTV footage as found by the trial court itself and, therefore, no inference could have been drawn to implicate the appellant(A-4).

5. He would contend that the alleged motive attributed to the accused persons is due to a quarrel that had ensued between the deceased, Suraj, Ravi, and Nabbu on the day of Dulhandi and there was no evidence placed on record by prosecution to suggest any common object had been shared by the appellants with other accused persons. He would contend that appellant has not been alleged to have been armed with any weapon, so no inference could have been drawn about the common object to commit the offence.

He would submit that the reasoning adopted by the courts below to convict the accused by overlooking the fact that TIP had not been conducted and only on the ground of PW-9 having known the remaining accused by face before the incident was erroneous, though the testimony of PW-9 would suggest that accused persons were not previously known to him and his admission in evidence that came to know about them only when they were arrested and their names were published in the newspaper.

The non-disclosure of the names of the accused persons at the first instance creates reasonable doubts as to the appellant's identity. The learned counsel for the appellant (A-4) would also contend that there was unexplained delay in recording PW-9's statement, namely it was recorded at 11:30 p.m., despite the incident having taken place at 6:30 p.m. and PW-9 was present during this period.

The alleged confessional statement of the appellant is of no value in the light of Section 25 of the Evidence Act and said statement does not indicate any common object having been shared by the appellant with other assailants. Hence, he prays for his appeal being allowed and the appellant (A-4) being acquitted.

6. Mr. Soumik Ghosal, learned counsel appearing for the appellants, namely, Irshad and Sonu Kumar (accused numbers 5 and 6 respectively) in Criminal Appeal Nos.1787-1788 of 2023, contends that courts below had erred in not considering the fact that a person liable for being punished for the offence of being a member of an unlawful assembly under Section 149 IPC would be necessary to prove that such persons had acted in pursuance of a common object.

He would further contend that prosecution had failed to prove that appellants were aware of Pawan's (Accused No.1) possessing the pistol and he had the intention/object to kill Ajay and such intention could not be inferred. He would contend that appellants' involvement in the unlawful assembly and sharing a common object to kill Ajay could not be inferred in the circumstances of the case, particularly when there was no evidence to support the stand of the prosecution that appellants were aware of pistol being in possession of Pawan (A-1).

7. He would further contend that the prosecution failed to prove that the members of the unlawful assembly had assembled to accomplish the common object of killing Ajay, as attributed to them. There was no evidence suggesting a sharing of common object between the accused.

The CCTV footage, which was relied upon by the prosecution, does not inspire confidence to accept the story of the prosecution, since, faces appearing in the video was not clear and this itself would be a good ground to allow appeals and set aside the conviction of the appellants. He would also contend that appellants were not residents of the village where the incident took place and there is no whisper in the statement of PW-9 recorded under Section 161 of Cr.P.C. on this aspect. Hence, he prays for appeal preferred by A-5, and A-6 be allowed by setting aside the impugned judgment.

ANALYSIS AND CONCLUSION:

8. Having heard the learned counsels appearing for the parties and on perusal of the judgments of the courts below, it would emerge therefrom, that conviction of all the accused is based on the testimony of PW-9 and recovery of the motor-cycles and the motive for the crime attributed by PW-9 in his statement recorded on the date of incident. In this background, we have perused the judgments of the courts below by bestowing our anxious consideration to the rival contentions raised at the Bar.

9. At the outset, it requires to be noticed that motive that has been attributed against the accused persons for the killing of Ajay was, he (Ajay) and Suraj had a fight with Ravi on the day of Dulhandi, where Ravi had threatened to kill them and in furtherance of said threat, he is said to have come along with other co-accused, and a person sitting on the bullet motor-cycle had fired at Ajay from the pistol, while Ravi was driving the Bullet motorcycle.

PW-9 had also deposed that Ajay was in the company of Suraj, who ran alongside the deceased and hid himself in Dharmender's house. However, the police did not record the statement of Suraj, and he was not even cited as a witness on behalf of the prosecution. This would be the first gap in the prosecution story or a defective investigation.

9.1 The prosecution relied on Statement of Mohit @ Kala (PW- 9) and courts below accepted him as a star witness to convict the accused. PW-9's testimony was shrouded with inconsistencies and he had not named the appellants in the FIR and had failed to identify Naresh @ Nehru as the driver of the Splendor motorcycle.

He had identified Irshad and Sonu Kumar in court but had not named them in his statement Ex.PM made before police. In his cross-examination, PW-9 admitted of not informing the police about the Pulsar motorcycle and two other Splendor motorcycles. He stated in his statement Ex.PM that victim Ajay and his friend

Suraj were being chased by three motorcycles, namely Bullet, Splendor and Pulsar motorcycles respectively.

However, in the statement made before the court, he improvised his version by deposing that the victim was being chased by four motorcycles. In the cross-examination, PW-9 admitted to have informed the police about deceased having been chased by four motorcycles and reiterated the contents of his statement in Ex.PM as true. These inconsistencies give rise to suspicion and raises doubt in the prosecution story.

9.2 PW-9 had named only Ravi and Shoaib in his statement Ex.PM. and for the first time before court he had identified Naresh (A-4), Irshad and Sonu (A-9 and A-6). He admitted in his cross-examination that he only knew Ravi and Shoaib before the incident, and had known about the names of the other accused persons when they were arrested. This raises doubts about PW-9's presence at the scene of the incident itself. Undisputedly no recovery was made from Irshad and Sonu. Contradictions in PW-9's statement is glaring.

In his deposition he admits his statement was written by the police at 10:45 PM on 22.04.2016, whereas PW-12 (ASI Ram Kishan) deposed that written statement EX.PM was handed over to the police by the complainant's party at 11:30 PM on 22.04.2016. PW-9 and also deposes that police arrived at the scene of crime between 10:30-11:00 PM, creating serious doubt about the recording of PW-9's statement at the place of crime as claimed by the prosecution.

9.3 As noticed hereinabove, the evidence of the eye-witness should be of very sterling quality and calibre and it should not only instil confidence in the court to accept the same but it should also be a version of such nature that can be accepted at its face value. This Court in the case of Rai Sandeep @ Deepu alias Deepu Vs. State (NCT of Delhi) (2012) 8 SCC 21 has held:

"22. In our considered opinion, the "sterling witness" should be of very high quality and caliber whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness.

What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness.

The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness.

It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished.

To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

PW-9, the cousin of the deceased, was examined as an eyewitness to the crime. However, the presence of PW-9 at the scene raises doubt due to contradictions. Although Suraj, who was also the deceased's cousin, was accompanying the deceased, PW-9 never tried to contact him to ascertain the names of the accused persons. This raises a serious doubt about his presence that has been ignored by the courts below. The presence of PW-9 at the scene raises doubts and raises questions about the veracity of his evidence. This is the second lacunae in the prosecution case.

9.4 The courts below have relied on CCTV footage to convict the appellants and co-accused persons. However, we are of the considered view that said evidence could not have been relied upon, as it was infested with serious doubts and the very manner in which it came into existence itself would raise a serious doubt not only about its source but also raises a serious doubt about the presence of the appellants at the scene of crime.

PW-8, who made a video from his mobile phone of the CCTV footage on 22.04.2016 and has claimed to have handed over the recorded CD (Ex.P.3) to the police on 01.06.2016. However, the video (CD) has not been forwarded by the

police to the Forensic Science Laboratory. He (PW-8) claims to have downloaded the video from his mobile phone and transferred to his laptop and then prepared CD (Ex.P.3). Neither laptop nor mobile phone was produced by prosecution or had been seized by the police during the course of investigation.

The trial court's conclusion is based on inconsistent evidence and there is lack of clarity in the evidence of PW.8. He has identified his signature on the certificate Ex. P-L (furnished as required under Section 65-B of the Evidence Act) which certificate was prepared by police official Mr. Aman and he has not been examined. The CD(Ex.P.3) was played in the trial court and observation recorded by Sessions Judge which is to the following effect would acquire great significance.

"COURT OBSERVATION:- from the video clips the faces of assailants and complainants are not decipherable." (Emphasis supplied by us)

9.5 He (PW-8) admits in his cross-examination that certificate Ex. PL was prepared by a police official, and he (PW-8) had affixed his signature to Ex.PL. He also admits that faces of the assailants are not visible and identifiable and the registration numbers of the motorcycles are also not visible. It is pertinent to note at this juncture itself that Investigating Officer (PW-15) also admits in his cross-examination that faces of the accused are not identifiable from the video.

The said video according to PW-8 was taken from the CCTV camera located in the house of Dharmendra and he (Dharmendra) was never cited as a witness by the prosecution. This is the third stage of the deficient investigation and blame has to be necessarily laid at their door and the benefit of the doubt has to be extended to the accused persons.

9.6 The confessional statement of the accused and co-accused came to be recorded when they were in police custody. This court in Mehboob Ali & Another Vs. State of Rajasthan (2016) 14 SCC 640 has held:

"12. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 provides that no confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27 is in the form of a proviso, it lays down how much of an information received from accused may be proved.

13. For application of Section 27 of the Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest.

In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the police before disclosure statement of the accused is recorded, is admissible in the evidence.

14. Section 27 of the Evidence Act refers when any "fact" is deposed. Fact has been defined in Section 3 of the Act. Same is quoted below:

"'Fact'.- 'Fact' means and includes-

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact. 'Relevant'.-One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."

In the instant case, the confessional statement of the accused relied upon by the prosecution was admittedly recorded after the arrest of those accused persons when accused 4, 5, and 6 were in police custody. Hence, said statement would become inadmissible having regard to the provisions of Sections 25 and 26 of the Evidence Act, of 1872.

Section 25 of the Act in no uncertain terms makes it clear that no confession made to a police officer shall be proved as against a person accused of any offence. Likewise, Section 26 states that any such statement is inadmissible if given while in police custody. For this proposition, the judgment of this Court in Indra Dalal vs. State of Haryana (2015) 11 SCC 31 can be looked up.

10. As already noticed hereinabove prosecution has attempted to drive home the guilt of the accused based on accused persons having shared a common object, by pressing into service Section 149 of IPC. This provision does not create a separate offence but only declares vicarious liability of all members of unlawful assembly for acts done in common object. Thus, in order to attract Section 149 of the Code it must be shown by the prosecution that the incriminating act was done to accomplish the common object by such unlawful assembly.

It must be within the knowledge of the other members as one likely to be committed in furtherance of the common object. Even if no overt act is imputed to the accused, the presence of the accused as part of the unlawful assembly is sufficient for conviction. The inference of a common object has to be drawn from various factors such as the weapons with which the members were armed, their movements, the acts of violence committed by them, and the end result. This court in Roy Fernandes vs. State of Goa and Others (2012) 3 SCC 221 has held:

"18. That leaves us with the question whether the commission of murder by a member of an unlawful assembly that does not have murder as its common object would attract the provisions of Section 149 IPC?

19. Section 149 IPC reads:

"**149.Every member of unlawful assembly guilty of offence committed in prosecution of common object.-**

If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

A plain reading of the above would show that the provision is in two parts. The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly. The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but members of such assembly "knew that the same is likely to be committed in prosecution of the common object of the assembly".

20. As noticed above, the commission of the offence of murder of Felix Felicio Monteiro was itself not the common object of the unlawful assembly in the case at hand. And yet the assembly was unlawful because from the evidence adduced at the trial it is proved that the common object of the persons comprising the

assembly certainly was to either commit a mischief or criminal trespass or any other offence within the contemplation of clause (3) of Section 141 IPC, which may to the extent the same is relevant for the present be extracted at this stage:

"141. Unlawful assembly.- An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is-

First.-***

Second.-***

Third.-To commit any mischief or criminal trespass, or other offence;"

21. From the evidence on record, we are inclined to hold that even when commission of murder was not the common object of the accused persons, they certainly had come to the spot with a view to overawe and prevent the deceased by use of criminal force from putting up the fence in question. That they actually slapped and boxed the witnesses, one of whom lost his two teeth and another sustained a fracture only proves that point.

22. What then remains to be considered is: whether the appellant as a member of the unlawful assembly knew that the murder of the deceased was also a likely event in prosecution of the object of preventing him from putting up the fence? The answer to that question will depend upon the circumstances in which the incident had taken place and the conduct of the members of the unlawful assembly including the weapons they carried or used on the spot. It was so stated by this Court in Lalji v. State of U.P. [(1989) 1 SCC 437 : 1989 SCC (Cri) 211] in the following words: (SCC p. 441, para 8)

"8. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

23. The Court elaborated the above proposition in Dharam Pal v. State of U.P. [(1975) 2 SCC 596 : 1975 SCC (Cri) 704] as: (SCC p. 603, para 11)

"11. Even if the number of assailants could have been less than five in the instant case (which, we think, on the facts stated above, was really not possible), we think that the fact that the attacking party was clearly shown to have waited for the buggi to reach near the field of Daryao in the early hours of 7-6- 1967, shows pre-planning. Some of the assailants had sharpedged weapons. They were obviously lying in wait for the buggi to arrive. They surrounded and attacked the

occupants shouting that the occupants will be killed. We do not think that more convincing evidence of a preconcert was necessary.

Therefore, if we had thought it necessary, we would not have hesitated to apply Section 34 IPC also to this case. The principle of vicarious liability does not depend upon the necessity to convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. (See Yeshwant v. State of Maharashtra [(1972) 3 SCC 639 : 1972 SCC (Cri) 684] and Sukh Ram v. State of U.P. [(1974) 3 SCC 656 : 1974 SCC (Cri) 186])

The most general and basic rule, on a question such as the one we are considering, is that there is no uniform, inflexible, or invariable rule applicable for arriving at what is really an inference from the totality of facts and circumstances which varies from case to case. We have to examine the effect of findings given in each case on this totality. It is rarely exactly identical with that in another case. Other rules are really subsidiary to this basic verity and depend for their correct application on the peculiar facts and circumstances in the context of which they are enunciated."

In the instant case by the impugned order, the High Court has held that every member had inhibited the common intention to accomplish the unlawful object. The facts on hand would disclose that the motive alleged was a quarrel that ensued between Ravi and Nabbu with Ajay and Suraj on the day of Dulhandi and Ravi is said to have threatened to kill Ajay. This factor would clearly disclose that the appellants herein were not involved in the fight that occurred on the day of Dulhandi and as such no motive could be attributed to the appellants.

The prosecution had failed to prove that the appellants herein had shared a common object with other members of the alleged unlawful assembly. To convict a person under Section 149 IPC prosecution has to establish with the help of evidence that firstly, appellants shared a common object and were part of unlawful assembly and secondly, it had to prove that they were aware of the offences likely to be committed is to achieve the said common object.

Both these ingredients are conspicuously absent and there is no evidence to connect the petitioners with the deceased or the co-accused. Undisputedly, no overt act has been attributed to the appellants, and in unequivocal terms PW-9 admits in his cross-examination that none of the accused except Pawan had caused injury to the deceased and there was only a single shot fired from the pistol.

Hence, we are of the considered view that the prosecution had failed to prove the guilt of the appellants herein beyond reasonable doubt, and non-consideration of the lacuna in the prosecution case in proper perspective by the Trial Court and the High Court as analysed hereinabove has resulted in miscarriage in the administration of justice namely conviction of the appellants which cannot be sustained.

11. Resultantly, the appeals are allowed and the judgment passed by the Sessions Court in SC No.21 of 2016 dated 09.05.2017 as affirmed by the High Court of Punjab and Haryana at Chandigarh in CRA-D Nos.1063 of 2017, 997 of 2017 and 1043 of 2017 are hereby set aside and consequently appellants are acquitted of the offences alleged and are ordered to be released forthwith if not required in any other case.

.....J. (S. Ravindra Bhat)

.....J. (Aravind Kumar)

New Delhi,

October 09, 2023

IN THE SUPREME COURT OF INDIA

Dr. Nirmal Singh Panesar
Vs.
Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar

Civil Appeal No. 2045 of 2011

HEADNOTE – Marriage is considered 'pious' in Indian society. Divorce on ground of 'irretrievable breakdown of marriage' is not always desirable.

JUDGMENT

Bela M. Trivedi, J.

1. "Should the irretrievable breakdown of marriage necessarily result in the dissolution of marriage in exercise of powers under Article 142 of the Constitution of India, when such is not a ground for divorce under the Hindu Marriage Act 1955?" - is the question posed before us.

2. The appellant is a qualified doctor, and was Commissioned Air Force Officer. He retired on 30.04.1990 as Wing Commander. The respondent is also a qualified teacher, who was working in a Central School, and has retired now. The appellant had filed the Divorce proceedings on 12.03.1996 before the District Court, Chandigarh on two grounds, namely 'cruelty' and 'desertion' as contemplated in Section 13(1)(ia) and 13(1)(ib) respectively of the Hindu Marriage Act 1955 (hereinafter referred to as the said Act).

3. The instant appeal is directed against the judgment and order dated 18.02.2009 passed by the High Court of Punjab and Haryana at Chandigarh in LPA No. 195/2001 in FAO No. 44-M/2000 preferred by the appellant-husband, whereby the Division Bench of the High Court while dismissing the said LPA, had confirmed the judgment and decree dated 21.12.2000 passed by the Single Bench in the FAO No.44-M of 2000.

The said FAO No. 44-M/2000 was preferred by the respondent-wife, against the judgment and decree dated 05.02.2000 passed by the District Judge, Chandigarh (hereinafter referred to as the District Court) in HMA No.63 of 1996, which had vide the said decree dated 05.02.2000 allowed the HMA filed by the appellant-husband, and dissolved the marriage between the parties under Section 13 of the said Act.

4. It is not disputed that the parties had married as per the Sikh rites on 10.03.1963 at Amritsar. The marriage was consummated and they were blessed

with three children- two daughters - Harpreet Kaur and Rupdaman Kaur (both married now), and one son- Kunwarjit Singh Panesar. As per the case of the appellant, he was serving in the Indian army and the respondent was serving as a teacher in Central School in Amritsar. Till January 1984, the relations between the parties were normal.

The acrimony in their relationship appears to have developed when the appellant was posted at Madras in January 1984 and the respondent did not join him, and preferred to stay initially with the parents of the appellant and thereafter with her son. Despite sincere efforts having been made by the parties, the differences and disputes could not be resolved, which ultimately led the appellant to file Divorce proceedings in the District Court.

5. As stated hereinabove, the District Court granted the decree of divorce, as prayed for by the appellant however the Single Bench of the High Court reversed the same and the Division Bench of the High Court confirmed the judgment and order passed by the Single Bench vide the impugned order.

6. At the outset, it may be stated that both the parties are in the late evening of their lives, in as much as the appellant is aged about 87 years and the respondent is aged about 82 years. The Court considering the age of the parties, had expected them to sit together and explore the possibility of an amicable settlement, however the same having failed, the Court had no option but to hear the respective learned counsels for the parties on merits. 5

7. Mr. Vipin Gogia, the learned advocate appearing for the appellant submitted that the High Court had committed gross error in reversing the well-reasoned decree of divorce granted by the District Court, which had concluded that the respondent had treated the appellant with cruelty and had deserted the appellant without any reasonable cause as alleged in the divorce petition.

According to him, the acts of the respondent in not joining the appellant when he was transferred to Madras, and thereafter not taking care of the appellant though he had a heart problem, and subsequently making complaints to the Air Force Authorities against the appellant to malign his image, were the acts of "Cruelty," entitling the appellant to a decree of divorce, in view of the decision in case of Naveen Kohli vs. Neelu Kohli1.

He alternatively submitted that the parties are staying separate since the time the appellant had filed the Divorce petition in the District Court, and that the marriage having been irretrievably broken down, the Court should exercise the powers under Article 142 of the Constitution of India and grant a decree of

divorce. In this regard, he has heavily relied upon the recent decision of the Constitution Bench in the case of Shilpa Sailesh vs. Varun Sreenivasan2.

8. Per contra, the learned advocate Ms. Madhurima Tatia for the respondent submitted that the respondent being an aged lady does not want to die with the stigma of a "Divorcee." According to her, the respondent had made all efforts to respect the sacred relationship between the parties all through out and is still ready to look after the appellant with the assistance of her son.

Mere long period of separation could not tantamount to irretrievable break down of the marriage. She lastly submitted that the appellant having failed to make out any ground either of cruelty or desertion, the Court may not interfere with the concurrent findings recorded by the Single Bench and the Division Bench of the High Court in this regard.

9. We have given anxious thought and consideration to the submissions made by the learned advocates for the parties in the light of the evidence on record. There could not be any disagreement with the proposition of law canvassed by the learned counsel for the appellant that the allegations of 'cruelty' and 'desertion' are legitimate grounds for seeking a decree of divorce under Section 13(1) of the said Act.

It is well accepted proposition that "cruelty" is a course or conduct of one party which adversely affects the other. The "cruelty" may be mental or physical, intentional, or unintentional. This court in Naveen Kohli (supra) has summarised the principles of law on "cruelty" as under: -

"46. The principles of law which have been crystallised by a series of judgments of this Court are recapitulated as under:
In Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan [(1981) 4 SCC 250 : 1981 SCC (Cri) 829] this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living.

With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

47. In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] this Court had an occasion to examine the concept of cruelty. The word "cruelty" has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i-a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional.

If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal.

Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

48. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

49. .....

50. .....

51. .....

52. This Court in Savitri Pandey v. Prem Chandra Pandey [(2002) 2 SCC 73] stated that mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.

Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

10. The crux of the various decisions of this Court on the interpretation of the word "cruelty" is that it has to be construed and interpreted considering the type of life the parties are accustomed to; or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

11. Similarly, the law is also well settled as to what could be said to be "Desertion" in the divorce proceedings filed under Section 13 of the said Act. The expression "Desertion" had come up under the judicial scrutiny of this Court in BipinChandra JaiSinghBai Shah vs. Prabhavati 3, which was again considered in case of Lachman UtamChand Kirpalani vs. Meena alias Mota4. This Court collating the observations made in the earlier decisions, stated its view as under: -

"Collating the aforesaid observations, the view of this Court may be stated thus: Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely, (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home."

12. Recently, in Debananda Tamuli vs. Kakumoni Kataky5, the Court referring the decision in case of Lachman UtamChand Kirpalani (supra) observed as under: -

"7. We have given careful consideration to her submissions. Firstly, we deal with the issue of desertion. The learned counsel appearing for the appellant relied upon the decision of this Court in Lachman Utamchand Kirpalani [Lachman Utamchand Kirpalani v. Meena, (1964) 4 SCR 331 : AIR 1964 SC 40] which has been consistently followed in several decisions of this Court.

The law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be animus deserendi on the part of the deserting spouse.

There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home. The view taken by this Court has been incorporated in the Explanation added to subsection (1) of Section 13 by Act 68 of 1976. The said Explanation reads thus:

"13. Divorce.- (1) * * *

Explanation. - In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.""

"8. The reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence."

13. Coming back to the facts of the present case, the Single Bench of the High Court holding that the appellant-petitioner had failed to prove the grounds of "cruelty" and "desertion" as contemplated in Section 13(1) of the said Act, had reversed the decree of divorce passed by the Trial Court. The Division Bench vide the impugned order confirmed the order passed by the Single Bench and observed by holding as under: -

"16. Coming now to the facts of the present case, it is undisputed that the wife continued to live with the husband without any grievance for 21 years and gave birth to three children. She looked after the children. One daughter was married in the year 1984 before separation. The grievance put-forward by the husband for the first time was that the wife did not join him when he was transferred to Madras.

The parties were settled at Amritsar and lived there for 21 years where children and parents of the appellant were also living. Case of the wife is that the husband got himself transferred of his own volition. At this stage of life when there were three grown up children and the wife had been living with the husband for 21 years, if unilateral decision was taken by the husband and the wife expressed her opposition, could it be held that the wife deserted the husband or treated him with cruelty.

We have already referred to the settled principles on the subject. If the wife did not agree to have herself transferred to Madras, in the given situation, it could

not be held that the wife wanted to bring cohabitation permanently to an end without reasonable cause. This did not show any animus deserendi nor it could be held that the wife was cruel to the husband. Taking an overall view of the matter, it cannot be held that the view taken by the learned Single Judge is not a possible view so as to call for interference in an appeal under Letters Patent.

The fact remains that the wife continued to look after the children and arrange their marriages. There is nothing to show that the husband made any effort to join the wife, who was living in the matrimonial home or to look after any of the children. The burden of proof is on the appellant to prove desertion and cruelty."

"17. Learned counsel for the appellant refers to Exh.A-8, which is a letter addressed to the wife, in response to her representation for maintenance. The contents of the letter are as under: -

"2. lt is informed that we have tried our best to help you both to reconcile in the long-term interest of the welfare of the family and children. Accordingly, it is learnt that Wg Cdr. N.S. Panesar, in good faith and on our counsel signed for reconciliation. But it seems that you are not ready to reconcile even in the interest of children. Under the circumstances, there is no other alternative for this HQ except to advice you to redress your grievance, if any, in the Court of law. However, on moral and humanitarian grounds we have counselled your husband to continue remitting Rs.800/- p.m. till the matter is settled to mutual satisfaction."

He also refers to Exh.A-17, which is letter written by the son of the appellant, asking the appellant to send money to the Court."

"18. Next contention raised is that the jewellery should not be given to the wife. Learned counsel for the appellant suggested that a grand-daughter of the appellant should visit the appellant, in which case, the appellant will have no objection to the jewellery being given to the grand daughter. Learned counsel for the wife states that the grand-daughters will visit the appellant as often as possible and also depending on desire and attitude of the appellant but not as a condition for finding of learned Single Judge to be upheld. Finding of learned Single Judge in this regard is as under:-

"This is a fit case to hand over the jewellery which was given to appellant (wife) at the time of marriage and thus, l -direct the Manager, Bank of Baroda, Sector 22, Chandigarh to hand over all the jewellery to the appellant lying in the locker.""

14. Having regard to the observations made by the Single Bench and Division Bench of the High Court, we do not propose to take any different view. Suffice it

to say that the appellant had failed to prove that the respondent had treated the appellant with "Cruelty" or that the respondent had "Deserted" the petitioner as contemplated in Section 13(1)(ia) and 13(1)(ib) respectively of the said Act.

15. This brings us to advert to the submission made by the appellant for granting the decree of divorce on the ground that the marriage has irretrievably broken down. There is no dispute that the parties are staying separate since last many years and all the efforts to bring them together have failed. Under the circumstances one may presume that the marriage is emotionally dead and beyond salvation and that there is an irretrievable break down of marriage between the parties. However, the question is, should the irretrievable break down of marriage necessarily result into a decree of divorce to be granted under Article 142 of the Constitution of India?

16. Recently, the Constitution Bench of this Court in the case of Shilpa Shailesh vs. Varun Sreenivasan (supra) while adumbrating the issue with regard to irretrievable break down of marriage and passing of decree of divorce under Article 142 of the Constitution, observed as under: -

"41. Having said so, we wish to clearly state that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that this Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward.

That the marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc.

The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children.

Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and economic rights of the children and other pending matters, if any, are relevant considerations. We would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration.

42-49. .....

50. In view of the aforesaid discussion, we decide this reference by answering the questions framed in the following manner:

(i) The scope and ambit of power and jurisdiction of this Court under Article 142(1) of the Constitution of India. This question as to the power and jurisdiction of this Court under Article 142(1) of the Constitution of India is answered in terms of paragraphs 8 to 13, inter alia, holding that this Court can depart from the procedure as well as the substantive laws, as long as the decision is exercised based on considerations of fundamental general and specific public policy. While deciding whether to exercise discretion, this Court must consider the substantive provisions as enacted and not ignore the same, albeit this Court acts as a problem solver by balancing out equities between the conflicting claims. This power is to be exercised in a 'cause or matter'.

(ii) In view of, and depending upon the findings of this bench on the first question, whether this Court, while hearing a transfer petition, or in any other proceedings, can exercise power under Article 142(1) of the Constitution, in view of the settlement between the parties, and grant a decree of divorce by mutual consent dispensing with the period and the procedure prescribed under Section 13-B of the Hindu Marriage Act, and also quash and dispose of other/connected proceedings under the Domestic Violence Act, Section 125 of the Cr. P.C., or criminal prosecution primarily under Section 498-A and other provisions of the I.P.C.

If the answer to this question is in the affirmative, in which cases and under what circumstances should this Court exercise jurisdiction under Article 142 of the Constitution of India is an ancillary issue to be decided. In view of our findings on the first question, this question has to be answered in the affirmative, inter alia, holding that this Court, in view of settlement between the parties, has the discretion to dissolve the marriage by passing a decree of divorce by mutual consent, without being bound by the procedural requirement to move the second motion. This power should be exercised with care and caution, keeping in mind the factors stated in Amardeep Singh (supra) and Amit Kumar (supra). This Court can also, in exercise of power under Article 142(1) of the Constitution of

India, quash and set aside other proceedings and orders, including criminal proceedings.

iii) Whether this Court can grant divorce in exercise of power under Article 142(1) of the Constitution of India when there is complete and irretrievable breakdown of marriage in spite of the other spouses opposing the prayer? This question is also answered in the affirmative, inter alia, holding that this Court, in exercise of power under Article 142(1) of the Constitution of India, has the discretion to dissolve the marriage on the ground of its irretrievable breakdown.

This discretionary power is to be exercised to do 'complete justice' to the parties, wherein this Court is satisfied that the facts established show that the marriage has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified. The Court, as a court of equity, is required to also balance the circumstances and the background in which the party opposing the dissolution is placed."

17. In view of the afore-stated decision of the Constitution Bench, there remains no shadow of doubt that this Court can depart from the procedure as well as the substantive laws, and exercise its discretion under Article 142 for dissolving the marriage between the parties by balancing out the equities between the conflicting claims of the parties, however, such discretion should be exercised with great care and caution. It has also laid down that this discretionary power could be exercised for dissolving the marriage on the ground of its irretrievable break down to do "complete justice," though one of the spouses opposes the prayer for dissolution of marriage.

18. However, in our opinion, one should not be oblivious to the fact that the institution of marriage occupies an important place and plays an important role in the society. Despite the increasing trend of filing the Divorce proceedings in the courts of law, the institution of marriage is still considered to be a pious, spiritual, and invaluable emotional life-net between the husband and the wife in the Indian society.

It is governed not only by the letters of law but by the social norms as well. So many other relationships stem from and thrive on the matrimonial relationships in the society. Therefore, it would not be desirable to accept the formula of "irretrievable break down of marriage" as a strait-jacket formula for the grant of relief of divorce under Article 142 of the Constitution of India.

19. So far as the facts of the present case are concerned, as stated earlier, the appellant-husband is aged about 89 years and respondent-wife is aged about 82 years. The respondent all throughout her life has maintained the sacred

relationship since 1963 and has taken care of her three children all these years, despite the fact that the appellant-husband had exhibited total hostility towards them.

The respondent is still ready and willing to take care of her husband and does not wish to leave him alone at this stage of life. She has also expressed her sentiments that she does not want to die with the stigma of being a "divorcee" woman. In contemporary society, it may not constitute to be stigma but here we are concerned with the respondent's own sentiment.

Under the circumstances, considering and respecting the sentiments of the respondent wife, the Court is of the opinion that exercising the discretion in favour of the appellant under Article 142 by dissolving the marriage between parties on the ground that the marriage has irretrievably broken down, would not be doing "complete justice" to the parties, would rather be doing injustice to the respondent.

In that view of the matter, we are not inclined to accept the submission of the appellant to dissolve the marriage on the ground of irretrievable break down of marriage.

20. The appeal therefore is dismissed.

.....J. [Aniruddha Bose]

.....J. [Bela M. Trivedi]

New Delhi;

October 10, 2023

1 (2006) 4 SCC 558

2 2023 SCC Online SC 544

3 AIR 1957 SC 176

4 AIR 1964 SC 40

5 (2022) 5 SCC 459

IN THE SUPREME COURT OF INDIA

Kamal Prasad and Ors.
Vs.
State of Madhya Pradesh (Now State of Chhattisgarh)

[Criminal Appeal No. 1578 of 2012]

HEADNOTE – Explains the principles relating to plea of alibi and delaying in registering FIR

JUDGMENT

Sanjay Karol J.,

1. This appeal calls into question the correctness of a judgment and order passed by the High Court of Chhattisgarh in Criminal Appeal No.596 of 1992 by which the guilt of the accused and the sentence of imprisonment imposed in Sessions Trial No.198 of 1988 vide a judgment dated 11.05.1992 stands confirmed.

2. Challenging their conviction, before us are three convict(s) - appellants, namely, Kamal Prasad (A-3); Shersingh (A-6); and Bhavdas (A-9).

3. The convict-appellants stand convicted of having committed an offence punishable under Sections 148, 302 read with 149, 307 read with 149, Indian Penal Code, 18601 and Sections 4/5 of the Explosive Substance Act, 1908 under which the sentence awarded varies from rigorous imprisonment for 3 years to life imprisonment, all to run concurrently.

Background

4. Facts, as they emerge from the judgments of the Court below are:

4.1 On 17.04.1988 one Chetram was taking his son Kapildeo @ Guddu to the hospital for treatment with one Choubisram (PW-3) as a pillion rider. Upon reaching the house of accused Darasram, 11 persons attacked them with country made bombs as also Laathis and tabbal. Chetram received multiple injuries and eventually succumbed while receiving the treatment.

PW-3 escaped this attack and took shelter in the house of Baisakhu Kewat. Kapildeo, son of Chetram, who was being taken to the hospital by his father and Chaubisram, was found close to a tree near the place of occurrence alive and was

taken to a Government Hospital, Palari and was shifted to D.K. Hospital, Raipur. However, in the course of treatment, he also died, same day at about 4.55 p.m.

4.2 Post-mortem examination of the body of the deceased Chetram was conducted by Dr. R.P. Pandey (PW-11) and the post-mortem examination of Kapildeo was conducted by Dr. K.L. Gopawar (PW-10). The police reached the spot of the crime at 11.15 a.m. after reading the dehatinalishi recorded at 11.00 a.m at the instance of PW-3.

4.3 The investigation having been conducted by SI Sahid Ali (PW- 19) revealing the complicity of all 11 accused persons, challan was presented before the Court concerned for trial.

5. The Trial Court, based on the evidence led by the prosecution and the accused endeavoring to establish their plea of alibi, finding the evidence led by the prosecution to be reliable; the witnesses to have established the prosecution case beyond reasonable doubt; the witnesses' testimonies being of sterling quality and their credit, unimpeachable, convicted 9 of the 11 accused persons.

6. In an appeal preferred by the convicts, the findings of fact, reasoning adopted, and the judgment of conviction and consequent sentence imposed, stands affirmed. The High Court in the impugned judgment records as follows:

"(21.) After due appreciation of these witnesses, it comes that firstly two accused persons namely Anandram and Kamal threw bombs on the deceased and thereafter the other accused persons started assaulting the deceased by lathis and tabbal while he fell down on the ground.

If we examine the conduct of each accused it would appear that they had an intention to commit murder of the deceased and for that they had made preparation by forming an unlawful assembly which is evident from the series of events which took place in a sequence when firstly two accused threw bombs on the deceased and when the. Deceased fell down, all of them attack over him with deadly weapons like lathis and tabbal and caused multiple injuries to him."

7. Counsel for the appellants contended before the High Court that since most of the witnesses were close relatives or interested witness, hence their testimonies could not be relied upon, which contention was not accepted, not only in view of the unimpeachable creditworthiness of the witnesses, fully inspiring in confidence, but also in the light of principles of law enunciated by this Court. On facts, the Court also observed that PW-3, is not a relative at all, and Khorbahrin Bai (PW-16) although is a relative of the deceased but is not a close relative. Also, even though PW-17 is the wife of the deceased, nothing elicited prompting her testimony to be unbelievable.

The Present Appeal

8. Before us, the aforesaid convict-appellants have assailed the impugned judgment on four fronts-

(a) Inordinate delay in filing of the First Information Report (F.I.R.) (Ex.15) introduces to the case, the possibility of improvements thereby casting doubt on the version of the prosecution;

(b) the testimonies of the witnesses of the prosecution being contradictory, hence unreliable;

(c) the deceased being a history-sheeter, having numerous cases pending against him, hence equal probability that someone other than the convict(s)-appellant(s) favouring and wanting, his elimination; and

(d) that the accused persons were, in fact, not at the scene of the crime and their plea of alibi is probable.

9. The case of the prosecution rests primarily on the testimonies of three witnesses, namely, Choubisram PW-3; Khorbahrin Bai PW-16 and Jugbai PW-17.

10. Here only we may record that the Courts below have concurrently found the witnesses to have deposed truthfully, their testimonies to be entirely inspiring in confidence.

11. Further that the death of the deceased Chetram and Kapildeo is undisputed, with medical and scientific evidence including the post-mortem reports conducted by two doctors referred to supra (PW-10 and PW-11), confirm such fact. Deceased Chetram having sustained multiple injuries upon vital parts of the body as a result of the bombs being thrown at him also stands proved.

12. It is also a matter of record that PW-3 had sustained lacerated wounds the causation of which could well have been the country made bombs used in the commission of offence. Such fact is evident from the medical opinion of Dr. Ghanshyam (PW-20) who conducted his medical examination.

13. Before proceeding to the four contentions advanced, firstly it would be necessary for us to appreciate the principles of law in respect of delay in registration of FIR as evolved over time.

13.1 This Court in Apren Joseph v. State of Kerala2, has observed that "Undue unreasonable delay in lodging the FIR", "inevitably gives rise to suspicion which

puts the Court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version." The Bench of three learned Judges further observed that no time duration, in the abstract could be fixed as the 'reasonable time' to give information to the police and therefore, the same is a question to be determined as per facts and circumstances of each case.

13.2 Further, referring to Ram Jag v. State of U.P.3, this Court in State of M.P. v. Ratan Singh4 observed that Courts when faced with the question of delay in registration of FIR are duty-bound to determine whether the explanation afforded is plausible enough based on the given facts and circumstances of each case.

13.3 This Court recently in Bhagwan Singh v. Dilip Singh alias Depak & Anr5 has observed that if the prosecution attempts to 'improvise its case stage by stage and step by step' during the intervening period, it would be open for the accused to contend that the delay was fatal to the proceedings and the same was done to 'stave off proceedings against the accused'.

14. In respect of the first contention put forth by the convictappellants it is seen from the record that the FIR was registered about two hours after the incident having taken place on 17.04.1988 at about 08.00 a.m. The document itself records the time of incident as being 8.15 a.m. and the time of report as being 11.00 a.m. The testimony of PW-3 at whose instance the FIR was recorded, shows that out of fear and having sustained numerous injuries, he ran from the place of occurrence and hid in the house of Baisakhu Kewat and only emerged therefrom two hours later.

In such a situation, delay in filing of the FIR cannot be said to be fatal to the case of the prosecution more so in view of the injuries sustained by him; the place of occurrence being a remote village area and that the version of events was dictated to the police by this witness only upon their reaching his place of shelter. To us it does not appear to be a case of prior consultation; discussion; deliberation or improvements.

15. Relevant portion of the testimony of PW-3 reads as under:-

"After 2 hours someone opened the door and I came out from the place where I was hiding. Public had assembled there. But I cannot tell the names of those persons who had assembled. Because I was badly injured and I was feeling immense pain. My left eye which was perfectly alright before this incident, was completely damaged in this incident. Thereafter I dictated report of this incident to the station House Officer at the house of Baisakhu. First information report

was read over to witness and he stated that this is the same report which I had dictated. First information report marked Ex. P15."

16. Significantly, this part of his testimony goes unrefuted. Even a suggestion of such statement being false was not given by any one of the accused in cross-examination. Having perused the same and also the cross-examination forming part of the record, we do not find anything emanating therefrom which would credibly suggest that the time gap between the occurrence of incidence and registration of the FIR is unjustified.

17. Resultantly, the first contention of the convict appellants must necessarily be answered in the negative.

18. Another defence taken by the convict-appellants is that of the plea of alibi. This Court in Binay Kumar Singh v. State of Bihar6 has noted the principle as:

"23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime."

19. The principles regarding the plea of alibi, as can be appreciated from the various decisions7 of this Court, are:

19.1 It is not part of the General Exceptions under the IPC and is instead a rule of evidence under Section 11 of the Indian Evidence Act, 1872.

19.2 This plea being taken does not lessen the burden of the prosecution to prove that the accused was present at the scene of the crime and had participated therein.

19.3 Such plea is only to be considered subsequent to the prosecution having discharged, satisfactorily, its burden.

19.4 The burden to establish the plea is on the person taking such a plea. The same must be achieved by leading cogent and satisfactory evidence. 19.5 It is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the spot of the crime. In other words, a standard of 'strict scrutiny' is required when such a plea is taken.

20. We notice that the defendants have laid certain evidence attempting to indicate their presence being at a place other than the spot of commission of the offence. The statements of four witnesses, namely, Sonchand DW-1; Jageshwar Prasad DW-2; Ramadheen DW-3; and Parsu Das DW-4 form part of record.

However, DW-3 testifies to the whereabouts of accused Sandas and DW-4 does so for accused Anand Ram, both of whom the present case does not concern as the appellants before us are Kamal Prasad (A-3), Shersingh (A-6) and Bhavdas (A-9). The two relevant defence witnesses for the convict-appellants before us, are as under:-

20.1 DW-1 states that A-9 is his uncle and had come to his house to go to Sandi Bazar. When the police came to arrest him he mentioned to them that he had just been returning from Bhalesur and did not have any relation with the offence. He was arrested by the police.

20.2 DW-2 submitted that on the day of the offence, A-9 went to the shop run by him at Bhalesur to purchase some tea and jaggery. The distance between Bhalesur and Sundri is 16 Kilometres.

21. In our considered view, both these defence witnesses do not conclusively establish the plea of alibi, based on the principle of preponderance of probability as their statements stand unsupported by any other corroborative evidence. Not only that, no reason stands explained in such testimony for A-9 having travelled from Bhalesur to Sundri in order to go to Sandi Bazar. It is a matter of record that A-9 is a resident of Bhalesur where he resided with his family. He owned farms in Sundri.

The family of A-9 was not examined to substantiate the claim of such travel. For those reasons, we cannot believe the version testified to by DW-1 and DW-2. We also cannot ignore that all 3 primary witnesses of the prosecution i.e., PW-3, PW-16, and PW-17 have categorically deposed the presence of the convict-appellants at the spot of the crime and such a statement could not be shaken in cross-examination.

22. We find that for the plea of alibi to be established, something other than a mere ocular statement ought to have been present. After all, the prosecution has relied on the statement of eyewitnesses to establish its case against the convict-appellants leading to the unrefuted conclusion that convict-appellants were present on the spot of the crime and had indeed caused injuries unto the deceased as also PW-3 with Lathis and Tabbal on various and vital parts of their bodies.

23. As we have hitherto observed, the prosecution case relies primarily on 3 witnesses whom, the Courts below have believed without exception. It is next urged that there are contradictions in the testimonies of three witnesses, hence, it would neither be appropriate nor safe to place reliance thereon. Having perused the same, we find them to be coherent on material facts such as the presence of

the accused on the spot of the crime; the death of Chetram; a blast having taken place; and the accused being the assailants.

A perusal thereof reveals PW3 to have categorically deposed that Kamal (A3) threw a bomb on him and deceased Chetram. He also stated the other two accused Shersingh (A6) and Bhavdas (A9) were also present at that time. PW16 has named all three accused persons, attributing upon them the act of hitting the deceased with shovels and lathis and further stated that accused Kamal hurled abuses at the said witness and the others present alongside, prompting them to run away from that place.

She, however, does not ascribe particular roles to any of the accused as to who had hit the deceased with a lathi or who did so with a showel. Jugbai PW-17 deposed that the three accused before us, as well as others had lathis and shovels with them and they had challenged her presence there forcing her to run away. She stated that she along with others had witnessed the incident from near the house of one Samaru and that she had seen the accused beating the deceased. Therefore, we find no force in the contention that the testimonies relied on by the prosecution are inherently contradictory.

24. It may be true that the deceased Chetram was a historysheeter and had scores of criminal cases pending against him or cases in which he was involved. However, such fact is unsubstantiated on record for no detail whatsoever stands provided in respect of such cases involving the deceased.

Be that as it may, simply because the deceased had a chequered past which constituted several run-ins with the law, Courts cannot give benefit thereof, particularly when such claims are bald assertions, to those accused of committing such a person's murder. And in any event, such a plea is merely presumptuous.

25. In conclusion, we find that the charges levied against the accused, i.e., under Sections 148, 302 read with 149, 307 read with 149, IPC, and Sections 4/5 of the Explosive Substance Act, 1908, and the sentence corresponding thereto as awarded by the Trial Court and confirmed by the High Court, do not warrant interference of this Court. It may also be observed that the sentences awarded are in no manner excessive or disproportionate to the crimes for which the convict-appellants stand convicted.

26. The appeal, therefore, fails and is accordingly dismissed.

27. The bail granted by this Court vide order dated 1st October 2012, stands cancelled. The appellants are directed to surrender forthwith. The concerned trial court to take consequential steps.

28. Pending Interlocutory application(s), if any, shall stand disposed of.

.....J. (Abhay S. Oka)

.....J. (Sanjay Karol)

New Delhi.

October 10, 2023;

1 For Brevity, "IPC"

2 (1973) 3 SCC 114

3 (1974) 4 SCC 201

4 (2020) 12 SCC 630

5 2023 SCC OnLine 1059

6 (1997) 1 SCC 283

7 Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220; Binay Kumar Singh (supra) Jitender Kumar v. State of Haryana (2012) 6 SCC 204; Vijay Pal v. State (Govt. of NCT of Delhi) (2015) 4 SCC 749; Darshan Singh v. State of Punjab (2016) 3 SCC 37; Mukesh v. State (NCT of Delhi) (2016) 6 SCC 1; Pappu Tiwari v. State of Jharkhand 2022 SCC OnLine SC 109.

IN THE SUPREME COURT OF INDIA

Supriyo @ Supriya Chakraborty & Anr.
Vs.
Union of India

[Writ Petition (Civil) No. 1011 of 2022]
[Writ Petition (Civil) No. 93 of 2023]
[Transferred Case (Civil) No. 5 of 2023]
[Transferred Case (Civil) No. 8 of 2023]
[Transferred Case (Civil) No. 9 of 2023]
[Transferred Case (Civil) No. 11 of 2023]
[Transferred Case (Civil) No. 12 of 2023]
[Writ Petition (Civil) No. 1020 of 2022]
[Writ Petition (Civil) No. 1105 of 2022]
[Writ Petition (Civil) No. 1141 of 2022]
[Writ Petition (Civil) No. 1142 of 2022]
[Writ Petition (Civil) No. 1150 of 2022]
[Writ Petition (Civil) No. 159 of 2023]
[Writ Petition (Civil) No. 129 of 2023]
[Writ Petition (Civil) No. 260 of 2023]
[Transferred Case (Civil) No. 6 of 2023]
[Writ Petition (Civil) No. 319 of 2023]
[Transferred Case (Civil) No. 7 of 2023]
[Transferred Case (Civil) No. 10 of 2023]
[Transferred Case (Civil) No. 13 of 2023]
[Writ Petition (Civil) No. 478 of 2023]

HEADNOTE – Refuses to recognize same-sex marriages by 3:2 majority. Asks Union Govt. to form committee to determine rights of queer unions.

DIRECTIONS

Chief Justice Dr. D.Y. Chandrachud

In terms of the reportable judgment, the Chief Justice of India issued following directions and conclusions:

a. The Union Government, State Governments, and Governments of Union Territories are directed to:

i. Ensure that the queer community is not discriminated against because of their gender identity or sexual orientation;

ii. Ensure that there is no discrimination in access to goods and services to the queer community, which are available to the public;

iii. Take steps to sensitise the public about queer identity, including that it is natural and not a mental disorder;

iv. Establish hotline numbers that the queer community can contact when they face harassment and violence in any form;

v. Establish and publicise the availability of 'safe houses' or Garima Grehs in all districts to provide shelter to members of the queer community who are facing violence or discrimination;

vi. Ensure that "treatments" offered by doctors or other persons, which aim to change gender identity or sexual orientation are ceased with immediate effect;

vii. Ensure that inter-sex children are not forced to undergo operations with regard only to their sex, especially at an age at which they are unable to fully comprehend and consent to such operations;

viii. Recognize the self-identified gender of all persons including transgender persons, hijras, and others with sociocultural identities in India, as male, female, or third gender. No person shall be forced to undergo hormonal therapy or sterilisation or any other medical procedure either as a condition or prerequisite to grant legal recognition to their gender identity or otherwise;

b. The appropriate Government under the Mental Healthcare Act must formulate modules covering the mental health of queer persons in their programmes under Section 29(1). Programmes to reduce suicides and attempted suicides (envisaged by Section 29(2)) must include provisions which tackle queer identity;

c. The following directions are issued to the police machinery:

i. There shall be no harassment of queer couples by summoning them to the police station or visiting their places of residence solely to interrogate them about their gender identity or sexual orientation;

ii. They shall not force queer persons to return to their natal families if they do not wish to return to them;

iii. When a police complaint is filed by queer persons alleging that their family is restraining their freedom of movement, they shall on verifying the genuineness of the complaint ensure that their freedom is not curtailed;

iv. When a police complaint is filed apprehending violence from the family for the reason that the complainant is queer or is in a queer relationship, they shall on verifying the genuineness of the complaint ensure due protection; and

v. Before registering an FIR against a queer couple or one of the parties in a queer relationship (where the FIR is sought to be registered in relation to

their relationship), they shall conduct a preliminary investigation in terms of Lalita Kumari v. Government of U.P1, to ensure that the complaint discloses a cognizable offence. The police must first determine if the person is an adult. If the person is an adult and is in a consensual relationship with another person of the same or different gender or has left their natal home of their own volition, the police shall close the complaint after recording a statement to that effect.

Conclusions

a. This Court is vested with the authority to hear this case. Under Article 32, this Court has the power to issue directions, orders, or writs for the enforcement of the rights in Part III;

b. Queerness is a natural phenomenon known to India since ancient times. It is not urban or elite;

c. There is no universal conception of the institution of marriage, nor is it static. Under Articles 245 and 246 of the Constitution read with Entry 5 of List III to the Seventh Schedule, it lies within the domain of Parliament and the state legislatures to enact laws recognizing and regulating queer marriage;

d. Marriage has attained significance as a legal institution largely because of regulation by the state. By recognizing a relationship in the form of marriage, the state grants material benefits exclusive to marriage;

e. The State has an interest in regulating the 'intimate zone' to democratize personal relationships;

f. The issue of whether the Constitution recognizes the right to marry did not arise before this Court in Justice KS Puttaswamy (9J), Shafin Jahan , and Shakti Vahini;

g. The Constitution does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law. However, several facets of the marital relationship are reflections of constitutional values including the right to human dignity and the right to life and personal liberty;

h. This Court cannot either strike down the constitutional validity of Special Marriage Act(SMA) or read words into the SMA because of its institutional limitations. This Court cannot read words into the provisions of the SMA and provisions of other allied laws such as the Indian Succession Act and the Hindu Succession Act because that would amount to judicial legislation. The Court in the exercise of the power of judicial review must steer clear of matters, particularly those. impinging on policy, which fall in the legislative domain;

i. The freedom of all persons including queer couples to enter into a union is protected by Part III of the Constitution. The failure of the state to recognise the

bouquet of entitlements which flow from a union would result in a disparate impact on queer couples who cannot marry under the current legal regime. The state has an obligation torecognize such unions and grant them benefit under law;

j. In Article 15(1), the word 'sex' must be read to include 'sexual orientation' not only because of the causal relationship between homophobia and sexism but also because the word 'sex' is used as a marker of identity which cannot be read independent of the social and historical context;

k. The right to enter into a union cannot be restricted based on sexual orientation. Such a restriction will be violative of Article 15. Thus, this freedom is available to all persons regardless of gender identity or sexual orientation;

l.The decisions in Navtej (supra) and Justice KS Puttaswamy (9J) (supra) recognize the right of queer couples to exercise the choice to enter into a union. This relationship is protected from external threat. Discrimination on the basis of sexual orientation will violate Article 15;

m. Transgender persons in heterosexual relationships have the right to marry under existing law including personal laws which regulate marriage;

n. Intersex persons who identify as either male or female have the right to marry under existing law including personal laws which regulate marriage;

o. The state must enable the LGBTQ community to exercise its rights under the Constitution. Queer persons have the right to freedom from coercion from their natal families, agencies of the state including the police, and other persons;

p. Unmarried couples (including queer couples) can jointly adopt a child. Regulation 5(3) of the Adoption Regulations is ultra vires the JJ Act, Articles 14, and 15. Regulation 5(3) is read down to exclude the word "marital". The reference to a 'couple' in Regulation 5 includes both married and unmarried couples as well as queer couples. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried couples who seek to jointly adopt a child. However, while framing regulations, the state may impose conditions which will subserve the best interest and welfare of the child in terms of the exposition in the judgment;

q. The CARA Circular disproportionately impacts the queer community and is violative of Article 15;

r. The Union Government, State Governments, and Governments of Union Territories shall not discriminate against the freedom of queer persons to enter into union with benefits under law; and

s. We record the assurance of the Solicitor General that the Union Government will constitute a Committee chaired by the Cabinet Secretary for the purpose of

defining and elucidating the scope of the entitlements of queer couples who are in unions. The Committee shall include experts with domain knowledge and experience in dealing with the social, psychological, and emotional needs of persons belonging to the queer community as well as members of the queer community. The Committee shall before finalizing its decisions conduct wide stakeholder consultation amongst persons belonging to the queer community, including persons belonging to marginalized groups and with the governments of the States and Union Territories.

The Committee shall in terms of the exposition in this judgment consider the following:

i. Enabling partners in a queer relationship

(i) to be treated as a part of the same family for the purposes of a ration card; and

(ii) to have the facility of a joint bank account with the option to name the partner as a nominee, in case of death;

ii. In terms of the decision in *Common Cause v. Union of India*, as modified by *Common Cause v. Union of India* , medical practitioners have a duty to consult family or next of kin or next friend, in the event patients who are terminally ill have not executed an Advance Directive. Parties in a union may be considered 'family' for this purpose;

iii. Jail visitation rights and the right to access the body of the deceased partner and arrange the last rites; and

iv. Legal consequences such as succession rights, maintenance, financial benefits such as under the Income Tax Act 1961, rights flowing from employment such as gratuity and family pension and insurance. The report of the Committee chaired by the Cabinet Secretary shall be implemented at the administrative level by the Union Government and the governments of the States and Union Territories."

Justice SK Kaul

Mr Justice Sanjay Kishan Kaul, while concurring with the judgment of the Chief Justice of India, concluded as follows:

"33. Is this the end where we have arrived? The answer must be an emphatic 'no'. Legal recognition of nonheterosexual unions represents a step forward towards marriage equality. At the same time, marriage is not an end in itself. Our Constitution contemplates a holistic understanding of equality, which applies to all spheres of life. The practice of equality necessitates acceptance and protection of individual choices. The capacity of nonheterosexual couples for love, commitment and responsibility is no less worthy of regard than

heterosexual couples. Let us preserve this autonomy, so long as it does not infringe on the rights of others. After all, "it's my life."

Justice S Ravindra Bhat

Justice S Ravindra Bhat pronounced the judgment on behalf of himself and Justice Hima Kohli.

In terms of the reportable judgment, the conclusions and directions are as follows:

i. There is no unqualified right to marriage except that recognised by statute including space left by custom.

ii. An entitlement to legal recognition of the right to union – akin to marriage or civil union, or conferring legal status upon the parties to the relationship can be only through enacted law. A sequitur of this is that the court cannot enjoin or direct the creation of such regulatory framework resulting in legal status.

iii. The finding in (i) and (ii) should not be read as to preclude queer persons from celebrating their commitment to each other, or relationship, in whichever way they wish, within the social realm.

iv. Previous judgments of this court have established that queer and LGBTQ+ couples too have the right to union or relationship (under Article 21) – "be it mental, emotional or sexual" flowing from the right to privacy, right to choice, and autonomy. This, however, does not extend to a right to claim entitlement to any legal status for the said union or relationship.

v. The challenge to the SMA on the ground of under classification is not made out. Further, the petitioner's prayer to read various provisions in a 'gender neutral' manner so as to enable same-sex marriage, is unsustainable.

vi. Equality and non-discrimination are basic foundational rights. The indirect discriminatory impacts in relation to earned or compensatory benefits, or social welfare entitlements for which marital status is a relevant eligibility factor, for queer couples who in their exercise of choice form relationships, have to be suitably redressed and removed by the State. These measures need to be taken with expedition because inaction will result in injustice and unfairness with regard to the enjoyment of such benefits, available to all citizens who are entitled and covered by such laws, regulations or schemes (for instance, those relating to employment benefits: provident fund, gratuity, family pension, employee state insurance; medical insurance; material entitlements unconnected with matrimonial matters, but resulting in adverse impact upon queer couples). As held earlier, this court cannot within the judicial framework engage in this complex task; the State has to study the impact of these policies, and entitlements.

vii. Consistent with the statement made before this Court during the course of proceedings on 03.05.2023, the Union shall set up a high-powered committee chaired by the Union Cabinet Secretary, to undertake a comprehensive examination of all relevant factors, especially including those outlined above. In the conduct of such exercise, the concerned representatives of all stakeholders, and views of all States and Union Territories shall be taken into account.

viii. The discussion on discriminatory impacts is in the context of the effects of the existing regimes on queer couples. While a heterosexual couple's right to live together is not contested, the logic of the discriminatory impact [mentioned in conclusion (vi) above] faced by queer couples cohabiting together, would definitionally, however, not apply to them.

ix. Transgender persons in heterosexual relationships have the freedom and entitlement to marry under the existing statutory provisions.

x. Regulation 5(3) of the CARA Regulations cannot be held void on the grounds urged. At the same time, this court is of the considered opinion that CARA and the Central Government should appropriately consider the realities of de facto families, where single individuals are permitted to adopt and thereafter start living in a non-matrimonial relationship. In an unforeseen eventuality, the adopted child in question, could face exclusion from the benefits otherwise available to adopted children of married couples. This aspect needs further consideration, for which the court is not the appropriate forum.

xi. Furthermore, the State shall ensure - consistent with the previous judgment of this Court in K.S. Puttaswamy (supra), Navtej Johar (supra), Shakti Vahini (supra) and Shafin Jahan (supra)- that the choice exercised by queer and LGBTQ couples to cohabit is not interfered with and they do no face any threat of violence or coercion. All necessary steps and measures in this regard shall be taken. The respondents shall take suitable steps to ensure that queer couples and transgender persons are not subjected to any involuntary medical or surgical treatment.

xii. The above directions in relation to transgender persons are to be read as part of and not in any manner whittling down the directions in NALSA (supra) so far as they apply to transgender persons.

xiii. This court is alive to the feelings of being left out, experienced by the queer community; however, addressing their concerns would require a comprehensive study of its implications involving a multidisciplinary approach and polycentric resolution, for which the court is not an appropriate forum to provide suitable remedies."

Justice Pamidighantam Sri Narasimha

Justice Pamidighantam Sri Narasimha, while concurring with the judgment of Justice S Ravindra Bhat, concluded as follows:

a. The question of marriage equality of same sex/LGBTQ+ couples did not arise for consideration in any of the previous decisions of this Court, including the decision in Navtej Singh Johar & Ors. v. Union of India and NALSA v. Union of India . Consequently, there cannot be a binding precedent on this count. The reasons for arriving at this conclusion are articulated in the opinion of Justice Bhat.

b. The rights of LGBTQ+ persons, that have been hitherto recognized by this Court, are the right to gender identity, sexual orientation, the right to choose a partner, cohabit and enjoy physical & mental intimacy. In the exercise of these rights, they have full freedom from physical threat and from coercive action, and the State is bound to afford them full protection of the law in case these rights are in peril.

c. There is no unqualified right to marriage guaranteed by the Constitution, that qualifies it as a fundamental freedom. With respect to this, I agree with the opinion of Justice Bhat, but will supplement it with some additional reasons.

d. The right to marriage is a statutory right, and to the extent it is demonstrable, a right flowing from a legally enforceable customary practice. In the exercise of such a right, statutory or customary, the State is bound to extend the protection of law to individuals, so that they can exercise their choices without fear and coercion. This, in my opinion, is the real import of the decisions in Shafin Jahan v. Asokan K.M. and Shakti Vahini v. Union of India .

e. The constitutional challenge to the Special Marriage Act, 1954 and the Foreign Marriage Act,1969 must fail, for the reasons indicated in the opinion of Justice Bhat.

f. Similarly, Justice Bhat also rightly finds the semantic impossibilities of gender-neutral constructions of the Special Marriage Act, 1954 and the Foreign Marriage Act,1969. On both (e) and (f), the opinion of Justice Bhat is exhaustive as to the reasons, and they need not be supplemented.

g. I find that a right to a civil union or an abiding cohabitational relationship conferring a legally enforceable status cannot be situated within Part III of the Constitution of India. On this count too, I agree with the conclusions of Justice Bhat, and supplement them with my own reasons.

h. I agree with the reasoning and the conclusion of Justice Bhat with respect to the constitutionality of Regulation 5(3) of the CARA Regulations, 2020.

JUDGMENT

Dr. Dhananjaya Y. Chandrachud, CJI

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I. Regulation 5(3) of the Adoption Regulations exceeds the scope of the JJ Act .....
II. Regulation 5(3) of the Adoption Regulations violates Article 14 of the Constitution .....
III. Regulation 5(3) of the Adoption Regulations violates Article 15 of the Constitution .....
b. Challenge to the CARA Circular .....
E Response to the opinion of Justice Ravindra Bhat .....
F Directions to obviate discrimination .....
G Conclusions and orders of enforcement .....

1. The Transfer Petitions in these proceedings are allowed.

2. The terms 'LBGTQ' and 'queer' are used interchangeably and as umbrella expressions to capture the various sexual orientations and gender identities that exist.

3. The term 'union between queer persons' or similar terms have been used to mean relationship between parties where one or both of them have an atypical gender identity or sexual orientation.

A. Background

i. The decision of this Court in Navtej Singh Johar

4. Section 377 of the Indian Penal Code 18601 criminalizes "carnal intercourse against the order of nature." History is replete with instances of the State having used the provision to rip-off the dignity and autonomy of individuals who engaged in sexual activity with persons of the same sex.2 A colonial provision which reflected Victorian morality continued in the statute after Independence.

Section 377 was also weaponized against gender non-conforming persons.3 Intimate relationships and activities were subject to public ridicule and judicial scrutiny. By criminalizing sexual behavior of homosexual and gender non-conforming persons, the State stripped them of their identity and personhood. Those who defied the mandate of the law and dodged prosecution were socially ostracized.

5. In Naz Foundation v. Government of NCTD4, a Division Bench of the High Court of Delhi read down Section 377 of the IPC to exclude consensual homosexual sexual activity between adults. On appeal, a two-Judge Bench of this Court in Suresh Kumar Koushal v. Naz Foundation5 reversed the judgment of the High Court of Delhi. A writ petition seeking to declare the right to sexuality, the right to sexual autonomy, and the right to choice of a sexual partner as a part of the rights guaranteed under Article 21 of the Constitution and to declare Section 377 of the IPC to be unconstitutional was listed before a three-Judge Bench of this Court.

The petitioners argued that the matter must be referred to a five-Judge Bench in view of the decisions of this Court in National Legal Services Authority v. Union of India6 and Justice KS Puttaswamy (9J) v. Union of India.7 In NALSA (supra), this Court held that the state must recognize persons who fall outside the male-female binary as 'third gender persons' and that they are entitled to all constitutionally guaranteed rights. It also directed the Union and State Governments to grant legal recognition to the self-identified gender of transgender persons, including when they identify as male and female.

In Justice KS Puttaswamy (9J) (supra), this Court held that the Constitution protects the right of a person to exercise their sexual orientation. The three-Judge Bench referred the judgment of this Court in Suresh Kumar Koushal (supra) to a larger Bench. The three-Judge Bench also observed that the "order of nature" referred to in Section 377 of the IPC is not a constant but is guided by social morality as opposed to constitutional values, and that a section of the population should not remain in a constant state of fear while exercising their choices.

6. This Court answered the reference in Navtej Singh Johar v. Union of India8, holding that Section 377 is unconstitutional to the extent that it criminalizes consensual sexual activities by the LGBTQ community. It held that:

(i) Section 377 violated Article 14 because it discriminated between heterosexual persons and non-heterosexual persons, although both groups engage in consensual sexual activities 9;

(ii) While Article 14 permits reasonable classification based on intelligible differentia, a classification based on an 'intrinsic and core trait' is not reasonable; Section 377 classified individuals on the basis of the core trait of 'sexual orientation'10;

(ii) Article 15 prohibits discrimination based on 'sex' which includes within its meaning sexual orientation as well11 and Section 377 indirectly discriminated

between heterosexual persons and the LGBTQ community based on their sexual orientation; and

(iii) Section 377 violated Article 19(1)(a) because Section 377 inhibited sexual privacy.12

7. One of us (DY Chandrachud, J.) observed that the right to sexual privacy also captures the right of the LGBTQIA+ community to navigate public places free from State interference. The community does not face discrimination merely based on their private 'sexual' activities. It extends to their identity, expression, and existence.

The Court declared that the members of the LGBTQIA+ community are entitled to the full range of constitutional rights including the right to choose whom to partner with, the ability to find fulfilment in sexual intimacies, the benefit of equal citizenship, and the right not to be subject to discriminatory behaviour. This Court in Navtej (supra) went beyond decriminalizing the sexual offence. It recognized that persons find love and companionship in persons of the same gender; protected the class against discriminatory behavior; and recognized the duty of the State to end the discrimination faced by the queer community.

ii. Societal violence against the queer community

8. Despite the de-criminalization of queer relationships and the broad sweep of the decision in Navtej, members of the queer community still face violence and oppression, contempt, and ridicule in various forms, subtle and not so subtle, every single day. The State (which has the responsibility to identify and end the various forms of discrimination faced by the queer community) has done little to emancipate the community from the shackles of oppression. The ghost of Section 377 lives on in spite of the decriminalization of the sexual offence and the recognition of the rights of queer persons in Navtej (supra).

9. The law, in the form of Section 377, imposed social morality on homosexual relationships. The legal regime was the chariot which propels social norms on love and unions. The impact of Section 377 on society must be viewed in terms of its effect on the social conceptions of love and companionship. Section 377 enforced morality through law by shaping beliefs about queer identity.

This far-reaching impact of the legal regime is one of the primary reasons for the continuing, widespread revulsion against the LGBTQIA+ community even after homosexual sexual acts have been decriminalized. The lack of sensitization and the ensuing discrimination has pushed the members of the community into the proverbial closet. For many members of the LGBTQIA+ community, expressing their sexual orientation and gender identity is an act of defiance which requires

strength and courage. The ostracism extends across the full range of social values, from parenting to public office.

10. The discrimination faced by the LGBTQIA+ community in various forms is, in so many ways, a product of social morality as much as it is a product of the lack of effort from the State to sensitize the general public about issues concerning queer rights. Social norms and beliefs which were internalised over centuries were not overhauled at the stroke of midnight when the nation became the source of its destiny and when the Constitution was adopted in 1950. Similarly, the stigma against the members of the LGBTQIA+ community did not end with a stroke of the pen when this Court decriminalized consensual homosexual sexual activity.

11. Despite this Court recognizing that sexual orientation is a core and innate trait of an individual, the members of the queer community continue to face economic, social and political oppression in both visible and invisible ways. At a primary level, they face oppression because of their inability to express their gender identity due to the fear of public disapproval.

Researchers have recorded incidents where the public has subjected members of the queer community to violence for publicly displaying affection towards one another. A woman who eloped with another woman was beaten, stripped and paraded around the village within a blackened face and a garland of shoes around her neck.13 Queer individuals who are from socio-economically marginalised backgrounds are at an even greater risk of being subject to harassment.

12. The LGBTQIA+ community also faces discrimination in the public space because of the lack of accommodation in the public sphere for persons who do not conform to the gender binary. All the services provided by the State including public washrooms, security check points, and ticket counters at railway stations and bus depots are segregated based on a strict gender binary. Transwomen have recounted experiences of being asked to shift to the men's queue in security check points.14

Although they are women and identify with the female gender, they are forced to accept a third party's assessment of their gender as being male. Just as a cisgender woman may feel intensely uncomfortable at using facilities meant for men, transgender women too may feel very uncomfortable. Over time, misgendering a person can have deleterious effects on their mental health and negatively impact their ability to function in the world.

13. Places of education and employment are also not spaces where gender identity and sexual orientation may be expressed devoid of discriminatory attitudes. The members of the queer community may be forced to quit their education or their job if they face oppression in these spaces. This would mean that they do not have equal opportunity. In professional environments, members of the queer community may face various forms of discrimination which may range from being denied opportunities to secure jobs to not being invited to office gatherings and to being passed over for promotions.

A human rights organization interviewed 3,619 transgender persons out of which only 12% were employed, with half of them earning less than Rs. 5,000 per month.15 Contrary to popular perception, the significant percentage of unemployment in the transgender community is not because transgender persons do not wish to work or because they prefer to beg, but because employers are unwilling to employ them due to their gender nonconformity.

In another study conducted by the National Human Rights Commission (NHRC) it was revealed that seventy-five percent of transgender persons in the National Capital Region and eighty-two percent of transgender persons in Uttar Pradesh never attended school or dropped out before tenth grade. Further, members of the transgender community face difficulty in obtaining proper identification documents which prevents them from accessing even those opportunities which are available to them.

14. The biological family is often the first site of violence and oppression for the queer community. It begins with family members rejecting the gender identities of their transgender children or consenting to "gender normalizing surgeries" for their intersex children (that is, those who have reproductive or sexual anatomy that does not fit into an exclusive male or female sex classification) without giving the child an opportunity to choose for themselves16. At a very young age, they face familial rejection. Instead of being nurtured with love and affection, they face contempt because of their identity which in turn makes them vulnerable and inexpressive.

The natal families of some homosexual persons force them to marry a person of the opposite sex once they come to know about their sexual orientation.17 A woman also recounted that she was wary of communicating the truth about her sexual orientation to her family because she was worried that they would stop her from going to school.18 Another woman recounted that after she disclosed her sexual orientation to her family, her movements were constantly monitored and even if she went away from home for an hour, her phone would be traced with the assistance of the Station House Officer.19

Families also consider a queer person's desire of gender expression to be a mental illness which requires cure. A person from the queer community recounted being forced to undergo 'conversion therapy' where they were given electroconvulsive shocks.20 Another queer person recounts the harrowing experience that they underwent at a rehabilitation centre:

"It was only later that I realised that I had been shifted to another rehabilitation centre [...]. Here, I was undressed and checked by a female warden. Afterward, I went to sleep for the night.

There was one bathroom in this rehabilitation centre, which everyone used together. There was no door, and there was no question of privacy. I have never been to jail in my life, but I've heard that it's better than this."

15. The transgender community is also discriminated against in other ways. The members of the community are not treated in a dignified manner in the healthcare sector for reasons which range from administrative formalities which are not gender-inclusive to a lack of knowledge about gender-related diseases.21 Similarly, the community also faces discrimination in the housing sector. Studies have shown that it is very difficult for members of the queer community to rent a house.22 Some members of the queer community recounted that they have shifted houses twice in four years because of neighbours who assumed that they had parties and caused disturbances.23

16. Often, instruments of the State which are tasked with protecting human rights, perpetuate violence. Police and prison officials exhibit violence towards the queer community. Research conducted by the National Institute of Epidemiology involving around 60,000 transgender participants revealed that the law enforcement agencies are the largest perpetrators of violence against the transgender community.24 A trans-woman lodged in a prison housing two thousand male inmates recounted the violence that she faced during her imprisonment.

She reported that the male prisoners sexually assaulted and mentally harassed her.25 Lesbian and gay couples often approach the police for protection from family violence. However, instead of granting protection to the couple, the police 'hand over' the couple to their families.26 In one such case, the police colluded with the family despite court orders granting protection to a couple from the queer community.

The parents of a cis-woman (who was in a relationship with a trans man) filed a missing persons case, The couple already had already filed an affidavit in court that they were in a live-in relationship. However, the police 'tracked them

down'.27 In some instances, the family's complaint is not recorded by the police. Instead, they try to force persons of the queer community to speak to their family.28 The violence and the discrimination that the queer community is subjected to leads to them being closeted or feeling compelled to imitate the expressive attitudes of heterosexual persons.29

17. This Court in NALSA (supra) declared that the transgender community must not be subsumed within the gender binary and must be treated as a "third gender" in the eyes of the law. This Court also directed the Central and the State governments to take steps to address the stigma and oppression faced by the community and create public awareness about the community and their struggles. Parliament enacted the Transgender Persons (Protection of Rights) Act 201930 to protect the rights of the transgender community and provide welfare measures for their betterment.

The enactment aims to protect the transgender community from discrimination and includes provisions for providing them with opportunities in the educational and social sectors. However, in spite of the decision of this Court in NALSA (supra) and the provisions of the Transgender Persons Act, members of the transgender community continue to be denied equal citizenship. They face immense physical and sexual violence. They are often forced to undergo sexreassignment surgeries before their rights as transgender persons are recognized, and are frequently subjected to hate speech. Stereotypes about the community are also reinforced in the media.

18. The grievance of the petitioners (who are members of the LGBTQIA+ community) is not that society discriminates against them in an informal (and invisible) manner. That is a secondary but an equally important stage of how discrimination pans out against a marginalised class. The petitioners claim that they are discriminated on a more formal (and visible) level.

The petitioners contend that the State through the operation of the current legal regime discriminates against the queer community by impliedly excluding the queer community from a civic institution: marriage. The petitioners have invoked the equality code of the Constitution to seek legal recognition of their relationship with their partner in the form of marriage. The petitioners do not seek exclusive benefits for the queer community, which are unavailable to heterosexuals. They claim that the State ought to treat them on par with the heterosexual community.

B. Submissions

19. Learned counsel appearing for the petitioners made the submissions detailed below. Since this Court is a court of record, the submissions of each of the counsel are set out.

20. Mr. Mukul Rohatgi, learned senior counsel, made the following submissions:

a. This Court's existing jurisprudence on LGBTQIA+ rights declares that LGBTQIA+ persons are entitled to dignity, equality, and privacy, which encompasses the fundamental right of LGBTQIA+ persons to marry a person of their choice. Accordingly, statutory recognition of such fundamental rights of LGBTQIA+ persons is merely a consequence of this Court's jurisprudence31;

b. Articles 19 and 21 of the Constitution guarantee all persons the right to marry a person of their choice, including LGBTQIA+ persons;

c. The Special Marriage Act (SMA) violates the right to dignity and decisional autonomy of LGBTQIA+ persons and therefore violates Article 2132;

d. Excluding LGBTQIA+ persons from the SMA discriminates against them on the basis of their sexual orientation and the sex of their partner. This violates Article 15 of the Constitution;

e. The SMA is violative of Article 14 of the Constitution because:

i. It denies LGBTQIA+ persons equal protection of the laws. Nonrecognition of same-sex and gender-non conforming marriage causes prejudice to LGBTQIA+ persons and denies them rights under social welfare and beneficial legislations;

ii. It is manifestly arbitrary to exclude LGBTQIA+ persons from the SMA. There is no fair or reasonable justification to exclude LGBTQIA+ couples from the institution of marriage;

iii. There is no constitutionally valid, intelligible differentia between LGBTQIA+ and non-LGBTQIA+ persons. The classification in the present case is based only on the sexual orientation and gender identity of the parties to a marriage, which is constitutionally impermissible. Further, there is no rational nexus with the object sought to be achieved by the SMA. The object of the SMA is to provide a civil form of marriage for couples who cannot or choose not to marry under their personal law. The exclusion of LGBTQ couples from the SMA has no rational nexus with this object;

f. There is no 'legitimate state interest' promoted or safeguarded by denying LGBTQ+ individuals the fundamental right of marriage;

g. Recognizing the right of LGBTQIA+ couples to marry upholds constitutional morality. Constitutional morality urges the organs of the state, including the judiciary, to preserve the heterogeneous nature of our society and encourage it to be pluralistic and inclusive;

h. Every person is entitled to marry someone of their choice. Queer people are equally entitled to the exercise of this right33.;

i. Denying LGBTQ+ individuals the right to marry inflicts personal harm on them and also inflicts a significant economic cost on the country;

j. Denial of the right to marry amounts to a deprivation of the entitlement to full citizenship as well as a denial of the right to intimacy;

k. The Constitution is a living document and ought to adapt to changing social realities. Notions of marriage equality are not necessarily opposed to social morality.;

l. If a statute appears to violate the Constitution, then this Court may either declare it unconstitutional, or read it expansively to save its constitutionality. Matrimonial as well as other statutes can be read in a gender-neutral manner to include LGBTQIA+ couples within their ambit;

m. There is growing international consensus (including judicial consensus) which recognizes same-sex and gender non-conforming marriages, and this is in line with India's international obligations;

n. Article 32 of the Constitution vests in persons or citizens a fundamental right to approach this Court for the enforcement of the rights guaranteed in Part III of the Constitution. It is therefore incorrect to argue that queer people must wait for Parliament to enact a law granting marriage equality;

o. Consequential reliefs must necessarily follow a declaration that the right to marry is vested equally in all persons including LGBTQIA+ persons;

p. The SMA ought to be read in a gender-neutral manner. Gendered terms such as "husband" and "wife" ought to be read as "spouse." The language used in the SMA facilitates a gender neutral interpretation. Section 4 of the SMA is with reference to "any two persons," Section 4(1)(a) refers to a "spouse" and Section 4(1)(b) refers to a "party";

q. The age that must be attained before a person is eligible to marry under the SMA ought to be twenty-one years for all persons; and

r. Transgender persons may fall into the categories of either "man" or "woman" in the SMA, depending on the gender they identify with.

21. Dr. Abhishek Manu Singhvi, learned senior counsel, made the following submissions:

a. The SMA is unconstitutional because it discriminates on the grounds of sexual orientation by preventing same-sex couples from solemnizing their marriages. Article 15(1) of the Constitution prohibits discrimination on the grounds of sex, which subsumes sexual orientation. The requirement in the SMA that a couple should consist of a man and a woman is one which is based on ascriptive characteristics (attributes that are pre-determined or designated by society or other external norms) and is an exclusion based on a marker of identity;

b. Marriage is not simply a benefit or privilege. Rather, it forms the very basis of a couple's ability to fully participate in society. Marriage is a source of social validation, dignity, self-respect, fulfilment, security (financial and otherwise), and other legal and civil benefits including in the domain of tax, inheritance, adoption, etc.;

c. The exclusion of same-sex couples from the SMA is violative of Article 14 of the Constitution. While there is an intelligible differentia for the classification in that the sexual orientation of heterosexual and homosexual persons is different, there is no rational nexus with any legitimate state purpose. A legislative purpose cannot itself be discriminatory or unconstitutional;

d. The exclusion of same-sex couples from the SMA is violative of Article 19 of the Constitution. The act of entering into a marital relationship is protected under Article 19(1)(a) of the Constitution, and is a socially valuable form of expression. The restriction on the right of queer persons to marry is not a reasonable restriction under Article 19(2)34;

e. The exclusion of same-sex couples from the SMA is violative of their right to dignity and is therefore violative of Article 21 of the Constitution. The exclusion of same-sex couples from the institution of marriage is being used to send a public message about their worth as unequal moral members of society and is inter alia akin to caste-based restrictions on temple entry and the refusal to accommodate disability in public examinations;

f. The SMA authorizes the solemnisation of same-sex marriages, when interpreted consistent with the Constitution. It can be read down in the following manner to include the solemnization of marriages between nonheterosexual persons:

i. The word "man" in Section 2(b) includes "any person", and that correspondingly, the word "woman" includes "any person";

ii. The words "man" and "woman" include trans-men and trans- women, intersex and non-binary individuals as the case may be35;

iii. Section 4(c) enacts only an age-based exclusion for persons otherwise eligible to marry under the provisions of Section 4, and shall not be construed to impose any disabilities based on gender, sexual orientation, or sexual identity of the parties. For same sex couples in particular, Section 4(c) can be read as a single age-restriction, be it eighteen or twenty-one.

In the alternative, Section 4(c) may be read as prescribing the minimum age as eighteen for both parties in the case of a lesbian relationship and twenty-one for both parties in the case of a gay relationship. For non-binary and inter-sex persons, the SMA may be read as imposing no restriction beyond that imposed by other laws which stipulate the age at which persons become capable of binding themselves under law i.e., eighteen years. In the alternative, this Court may lay down guidelines as an interim measure while leaving it open to Parliament to fill the vacuum in due course of time;

iv. The reference to "widow" and "widower" in Schedules II and III must be read as "widow or widower" and "widower or widow," as the case may be, and shall not be construed to impose any disabilities based on gender, sexual orientation, or sexual identity of the parties;

v. References to "bride" and "bridegroom" in Schedules III and IV must be read as "bride or bridegroom", as the case may be, and shall not be construed to impose any disabilities based on gender, sexual orientation, or sexual identity of the parties.

g. The Foreign Marriage Act 1969 can similarly be read down;

h. The relief sought by the petitioners is workable;

i. In reading down the SMA and the FMA to achieve a constitutionally compliant interpretation, neither the text of the statute nor the intention of Parliament act as a limitation. Only the underlying thrust of the legislation and the institutional capacity of this Court are relevant. The underlying thrust of the SMA is that it was designed to facilitate marriages lying outside the pale of social acceptability. Reliance was placed on Ghaidan v. Godin-Mendoza [2004] UKHL 30;

j. In the alternative, the principle of updating construction ought to be applied to the SMA. Courts may expand the existing words of a statute to further the march of social norms and contemporary realities;

k. Some laws (such as the Protection of Women Against Domestic Violence Act 2005, the Dowry Prohibition Act 1961, provisions pertaining to cruelty in the Indian Penal Code 186036) were enacted to address structural imbalances of power between men and women in a heteronormative setting. These provisions of law do not impact whether same-sex couples have a right to marry. These provisions are beyond the scope of the petitions and need not be interpreted in favour of either spouse in a non-heterosexual marriage;

l. There is no timeless and immutable conception of marriage. The SMA itself was enacted contrary to the cultural and social understanding of marriage which prevailed at the time. Further, the SMA is a secular and areligious law which was meant to serve as an alternative for those who could not or did not want to solemnize their marriages under the applicable personal law, which is rooted in religion. The conditions for the solemnization of a marriage under the SMA need not, therefore, conform to the cultural, social, or religious understandings of marriage;

m. The principles of equality and non-discrimination cannot be trumped by societal values. These principles, by definition, require a challenge to majoritarian social norms;

n. This Court is not being asked to act as a substitute for the legislature or to alter the "concept of marriage." Rather, this Court is being asked to find that the exclusion of a group of people from the SMA solely by virtue of their ascriptive characteristics is unconstitutional. A constitutionally compliant reading of the SMA to allow for marriage equality is within the bounds of legitimate statutory interpretation and is not judicial legislation; and

o. Civil unions are not an equal alternative to the legal and social institution of marriage. Relegating non-heterosexual relationships to civil unions would send the queer community a clear message of subordination - that their relationships are inferior to relationships that comply with the entrenched heteronormative social order.

22. Mr. Raju Ramachandran, learned senior counsel, made the following submissions:

a. The petitioners have a fundamental right to marry a person of one's own choice under Articles 14, 15, 19, 21 and 25 of the Constitution, and any exclusion or discrimination, as incorporated in Section 4(c) and other provisions

of the SMA, is ultra-vires the Constitution. The denial of their right to marry violates Articles 14, 15, 19, 21 and 25. Article 21 encompasses the right to happiness, which includes a fulfilling union with a person of one's choice;

b. The exclusion of the petitioners from the institution of civil marriage under SMA, 1954, is inconsistent with the very object of the law, i.e., to facilitate any marriage between two Indians, irrespective of caste, creed or religion;

c. The systemic nature of natal family violence against LGBTQIA+ persons, owing to their sexual or gender identity, and the misuse of the criminal law machinery by the families, often in collusion with local police, makes it imperative for this Court to frame guidelines concerning the police action in dealing with cases of adult and consenting queer and transgender persons37.

d. The special provisions for a wife in a heterosexual marriage under the SMA need not be interpreted by this Court while deciding this batch of petitions because they are protective provisions for women in pursuance of the constitutional mandate in Article 15(3). Similarly, gender-specific laws including penal laws need not be subject to any interpretative exercise. Religious personal laws are also not required to be interfered with;

e. Declarations by the court as to rights of people are followed by legislation. For instance, the rights declared in National Legal Services Authority (supra) were given effect to in the Transgender Persons Act;

f. The doctrine of reading-in is well-recognised in Indian jurisprudence; and

g. The Union of India has sought to argue that only Parliament can grant a new 'socio-legal status of marriage' to LGBTQ persons, after undertaking extensive consultations and eliciting views from every part of the nation. The rights of the LGBTQIA+ community cannot be made contingent on the opinion of the majority.

23. Mr. K V Vishwanathan, learned senior counsel, submitted that:

a. Under Article 21 of the Constitution, all persons have a fundamental right to choose a partner;

b. International covenants to which India is a signatory including the Universal Declaration of Human Rights38 and the International Covenant on Economic, Social and Cultural Rights39 enjoin a duty upon the state to not interfere with the right of a person to marry and have a family in terms of their own choice as well as to protect the familial rights of all persons without discrimination on the basis of inter alia sexuality, race, and religion;

c. Statutes regulating marriage in India must be read as inclusive of all gender identities and sexualities in view of the pronouncements of this Hon'ble Court in National Legal Services Authority (supra) and Navtej (supra). Such a reading is necessary to ensure that these statutes pass muster on the touchstone of Part III of the Constitution;

d. Courts across the country as well as state policies and welfare schemes have recognised and accorded equal status to unions between LGBTQ persons. A necessary corollary of the right to self-identify gender is to be able to express personal preference in terms of choice of partner, and, therefore a marriage entered into by a transgender person must be fully recognised by the State40;

e. This Court has previously issued guidelines to protect citizens against discrimination in cases where there existed a lacuna in the law41.;

f. The freedom to choose a partner in marriage would be covered under Article 19(1)(a) as an expression, under Article 19(1)(c) as an association or union and Article 19(1)(e), as an exercise of the right to reside and settle in any part of the territory of India42;

g. Excluding transgender persons from matrimonial statutes fails the reasonable classification test under Article 14;

h. Transgender persons have a right against discrimination under Articles 15 and 16;

i. The right of transgender persons to marry is enjoined by the Transgender Persons Act. The classification sought to be made by the Union of India between "biological" and transgender persons is untenable;

j. Procreation is not the sole purpose of marriage. Marriage is not merely the meeting and mating of two individuals but much more - it is the union of two souls;

k. If the contention of the Union of India that 'male' and 'female' as provided in statutes are to be construed to refer to cisgender males and females, it would lead to absurd and unjust outcomes in implementation of several laws. For instance, the Hindu Succession Act 195643 defines an 'heir' as any person 'male or female' entitled to succeed to the property of an intestate under said Act. If the Union of India's argument is taken to be correct, it would lead to a situation where a transgender heir of a person who has died intestate would not be able to inherit the property, even if they happen to be the sole heir;

l. The National Commission for Protection of Child Rights (NCPCR) has made unscientific claims on the effect of puberty blocker / sex-transition therapy on children. They are in complete disregard to the internationally accepted guidelines issued by World Profession Association for Transgender Health,44 which are also referenced in the Transgender Persons Act; and

m. The petitioners' constitutional rights cannot be denied based on an argument that it would offend the "will of the people." Constitutional morality cannot and ought not to be replaced by social morality.

24. Ms. Geetha Luthra, learned senior counsel, made the following submissions:

a. The FMA is applicable to a couple if at least one of them is an Indian citizen. The FMA travels with the citizen to a foreign jurisdiction to extend its protection by recognizing the citizen's marriage contracted under foreign law, or by allowing a citizen to solemnize their marriage under Indian law even when they are abroad. In terms of Section 17 of the FMA, a marriage must be valid in terms of foreign law and consistent with international law;

b. All citizens including LGBTQIA+ citizens are entitled to all rights available to Indian citizens, even if they are abroad. Articles 19 and 21 of the Constitution guarantee all persons the right to marry a person of their choice, including LGBTQIA+ citizens. The FMA violates the right to dignity and decisional autonomy of LGBTQIA+ persons and is discriminatory. Reliance was placed on National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs [2000] 4 LRC 292;

c. The object of the FMA in adopting the scheme of the SMA is to provide a uniform, civil and secular marriage law for a couple, either of whom is an Indian citizen. However, by recognizing marriages only between opposite sex couples, the effect of the law is to deny same-sex and gender non-conforming couples the right to marry a person of their choice, solely on grounds of their sexual orientation and gender identity. This is violative of Article 15 of the Constitution;

d. The SMA and the FMA are violative of Article 14 of the Constitution because they deny LGBTQIA+ persons the equal protection of laws, are manifestly arbitrary, and fail the rational nexus test. There is no intelligible differentia between LGBTQIA+ and non-LGBTQIA+ couples. The object of the FMA is to extend the protection of the Indian Constitution and its laws to a citizen abroad regardless of who they choose to marry and under whichever law they choose to do so, to provide for maximum international validity of a marriage, and in adopting the framework of the SMA, to provide for a uniform, civil and secular

law to govern foreign marriages. The exclusion of same-sex and gender non-conforming couples from the FMA has no rational nexus with these objects;

e. The FMA is pari materia to the SMA. They must be interpreted similarly with regard to same-sex and gender non-conforming marriages;

f. Recognition of marriage of same-sex and gender non-conforming couples under the FMA furthers the comity of nations; and

g. The grant of reliefs does not render the provisions of the FMA or other statutes employing gendered terminology unworkable.

25. Mr. Anand Grover, learned senior counsel, made the following submissions:

a. Marriage remains fundamental to the functioning of the society, and to avail important schemes under the modern nation - state, such as joint tax benefits and rights of surrogacy;

b. The FMA must be interpreted liberally to advance the cause of society at large. It must not be interpreted to cause hardship;

c. The failure of the SMA to recognize same-sex marriages violates Articles 14 and 15 of the Constitution because it fails the reasonable classification test, is manifestly arbitrary, and discriminates based on gender identity and sexual orientation;

d. The failure of the SMA to recognize same-sex marriages violates Article 19(1)(a) of the Constitution because sexuality, gender expression, and marriage are forms of expression;

e. The right to intimate associations is protected by Article 19(1)(c) of the Constitution. Reliance was placed on Griswold v. Connecticut 381 US 479 (1965);

f. Same-sex marriages or gender non-conforming marriages form a part of Indian tradition and culture. Reliance was placed on National Legal Services Authority (supra);

g. Queerness or homosexuality is not an urban, elite conception or expression. Numerous queer or homosexual couples from villages and towns in India have expressed their sexuality, chosen their partner, and entered into the institution of marriage; and

h. There is no traditional bar on marriage between non-heterosexual persons. Excerpts from various scriptures support this proposition.

26. Ms. Jayna Kothari, learned senior counsel, made the following submissions:

a. The SMA ought to be read to include the words "spouse" and "person" so as to include transgender persons within its ambit. Failure to do so amounts to a violation of the right of transgender persons to equality and to equal protection of the laws under Article 14 of the Constitution;

b. The SMA discriminates on the basis of sex, gender identity, and sexual orientation, thereby violating Article 15 of the Constitution;

c. The denial of the right to marry to persons based on their gender identity is a denial of the right to dignity, personal autonomy, and liberty under Article 21 of the Constitution; d. Inter-sex persons have the same rights as all other persons in India, including the right to marry; and

e. The right to a family is available under Article 21, and this right includes the right to marry. The SMA is violative of the right of transgender persons to have a family. Reliance was placed on Oliari v. Italy Applications nos. 18766/11 and 36030/11.

27. Dr Menaka Guruswamy, learned senior counsel, made the following submissions:

a. The Indian Parliament is a creature of the Constitution and does not enjoy unfettered sovereignty. The supremacy of the Constitution is protected by this Court by interpreting laws in consonance with constitutional values;

b. This Court's power of judicial review over legislative action is part of the basic structure of the Constitution;

c. Constitutional courts are empowered to review statutory law to ensure its conformity with constitutional values. The courts do not need to wait for the legislature to enact/amend law to recognize same-sex marriage;

d. The provisions of SMA, insofar as they do not recognize same-sex marriages, are unconstitutional as being violative of Articles 14, 15, 19, 21 and 25 of the Constitution. Hence, to save it from the vice of unconstitutionality, the SMA must be read up to recognise same-sex marriages;

e. Recognition of same-sex marriages under the SMA is consistent with the evolving conception of the institution of marriage;

f. Same-sex marriage is a time honoured tradition in the Indian society;

g. The gendered references in the SMA are capable of being read to recognize same-sex marriages;

h. The State has no legitimate interest in restricting the institution of marriage to heterosexual couples alone; and

i. The codification of Hindu personal laws commenced in 1941 with the colonial Government appointing the Hindu Law Committee, which prepared the first draft of the Hindu Code Bill. There was vociferous opposition to the Hindu Code Bill, which was later enacted into four distinct legislations - the Hindu Marriage Act 1955,45 the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act 1956, and the Hindu Adoptions and Maintenance Act 1956. Inter-caste marriages, sagotra marriages, the prescription of monogamy, and the introduction of divorce were met with great opposition. Despite vehement opposition, these reforms have stood the test of time and society has prospered overall as a result. Today, the objections raised on behalf of the Union of India opposing the recognition of same-sex marriage are akin to the opposition to the Hindu Code Bill.

28. Mr. Saurabh Kirpal, learned senior counsel, submitted that:

a. Depriving LGBTQ+ individuals of the right to marry violates Articles 14, 15, 19(1)(a) and 21 of the Constitution;

b. The right to marry a person of one's choice is itself a Fundamental Right under the Constitution;

c. The SMA is unconstitutional if it is interpreted to exclude access to LGBTQ individuals from its ambit;

d. The intent of Parliament when it enacted the SMA is not relevant. The doctrine of reading in does not aim to discover the intention of Parliament. The jurisprudential basis of the doctrine is that courts read something in to save a statute from the vice of unconstitutionality;

e. Having found a right to marry, this Court cannot hold that there is no remedy or a real possibility for the exercise of that right; and

f. By virtue of Article 13, the Constitution trumps a statute which violates the Constitution. Analysis under Article 13 does not extend to whether or not a statute or a system of law is workable after it is read up or after certain words or

phrases are read in to save it from being unconstitutional. It cannot be that a complex statute can defeat a fundamental right by virtue of its complexity.

29. Ms. Vrinda Grover, learned senior counsel, made the following submissions:

a. Interference, opposition and violence from natal families, irrespective of marital status, violates the fundamental right to life and personal Liberty under Article 21 of the Constitution;

b. Non-recognition of 'atypical families' or 'chosen families' beyond constraints of marriage, blood or adoption violates Articles 14, 15, 19 and 21;

c. Non-recognition of marriage between two consenting adults on the basis of gender identity or sexual orientation under the SMA violates Articles 14, 15, 19 and 21;

d. Constitutional courts sometimes accord undue deference to the natal family. This ignores the coercion and violence that queer and transgender persons face within their homes. Reference was made to Devu G v. State of Kerala, SLP (Criminal) No. 5027/2023, Order dated 6 February 2023;

e. This Court ought to issue directions to all state governments to instruct police officers to compulsorily follow the mandate of Sections 41 and 41-A of the Code of Criminal Procedure 197346 when responding to complaints involving queer and transgender adults who voluntarily leave natal homes;

f. Issues of 'workability' in statutory provisions do not preclude this Court from protecting rights under Part III of the Constitution.

30. Ms. Karuna Nundy, learned counsel, submitted that:

a. A spouse of foreign origin of an Indian Citizen or Overseas Citizen of India47 cardholder is entitled to apply for registration as an OCI under Section 7A(1)(d) of the Citizenship Act 1955.48 Section 7A(1)(d) is gender, sex and sexuality neutral, as distinct from the FMA and SMA. The absence of any conditions qua gender/ sex/sexuality of the parties is a casus omissus in the statute. This Court cannot supply a casus omissus into a statute by judicial interpretation, except in circumstances of clear necessity;

b. The recognition of a foreign marriage between two non-citizens is a mere ministerial Act. Only the substantive law of the foreign jurisdiction is relevant;

c. It would be manifestly arbitrary and contrary to Article 14, for the law to accord a larger ambit for registration of marriages to an OCI than to a citizen of

the country married in a foreign jurisdiction, and to the extent of the inconsistency a harmonious construction of the FMA with the Citizenship Act is required;

d. A denial of the right to marry for queer persons is violative of Articles 14, 15, 19, and 21 of the Constitution; and

e. Rule 5 of the Transgender Persons (Protection of Rights) Rules 2020 recognises marriage of transgender persons because Form 2 contains the word "spouse".

31. Ms. Anitha Shenoy, learned senior counsel, submitted that:

a. The petitioners have a fundamental right to marry a person of one's own choice under Articles 14, 15, 19, 21 and 25 of the Constitution, and any exclusion or discrimination from solemnization or registration, as incorporated in Section 4(c) and 17(2) and other provisions of the FMA is ultra-vires the Constitution;

b. The denial of recognition of the petitioners' marriage is inconsistent with the very object of the FMA not to invalidate marriages duly solemnized under foreign law by Indian citizens;

c. The requirement of proof of a 'marital relationship' by a 'married couple' for the purpose of joint adoption under Regulations 5(2)(a) and 5(3) is beyond the remit of Section 57 of the JJ Act that extends joint adoption to relationships that are 'marriage like' including marriages between same-sex couples solemnized overseas;

d. Regulations 5(2)(a) and 5(3) of the Adoption Regulations 202249 are ultra vires the Juvenile Justice (Care and Protection of Children) Act 2015.50 They also violate:

i. The principle of equality and non-discrimination on the basis of sexual orientation under Articles 14 and 15;

ii. The right to adoption and motherhood protected under Article 21; and

iii. The right of a child to be adopted recognised under the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption 1980 and the Convention on the Rights of Children 1989.

32. Ms. Arundhati Katju, learned counsel, made the following submissions:

a. Article 21 protects the right to found a family and the right to a meaningful family life for all persons including LGBTQ persons. The law defines "family" and "household" broadly and is not limited to a "biological" man and woman and their children. Surrogacy and adoption are available only to married couples, thus, denying LGBTQ couples the right to found a family;

b. A child's right to a meaningful family life under Article 21, and its best interest, is protected by recognizing its parents' relationship through marriage;

c. Denying LGBTQ couples the right to marry violates Article 14 qua them and their children;

d. The SMA should be read expansively to save it from the vice of unconstitutionality and in the alternative, it should be struck down;

e. Any interpretative difficulties which arise because of the exercise of readingin must be decided on a case-by-case basis by the courts before which such issues arise; and

f. A declaration of the rights of queer people by this Court will not preclude any debates or discussions about queerness either in Parliament or in society.

33. Ms. Amritananda Chakravorty, learned counsel, made the following submissions:

a. The Office Memorandum issued by CARA on 16 June 202251 is unconstitutional because they prevent same-sex couples and gender nonconforming couples from availing of joint adoption; and

b. The requirements prescribed in the CARA Circular travel beyond the remit of the JJ Act. Section 2(49) of the JJ Act defines the term "prospective adoptive parents" to mean "a person or persons eligible to adopt a child as per the provisions of section 57." Section 2(49) does not require the prospective adoptive parents to be heterosexual. Further, Section 57 does not specify marital status as a relevant factor to be considered while determining the eligibility of prospective adoptive parents.

34. Mr. Raghav Awasthi, learned counsel, sought to make submissions regarding the Hindu Marriage Act. This Court declined to hear arguments on this issue in the present proceedings.

35. Mr. Shivam Singh, learned counsel, made the following submissions:

a. It is unconstitutional for the state to discriminate against persons because of their innate characteristics;

b. Upholding the heterosexual notion of marriage as the only constitutionally and legally sanctioned notion of marriage will serve to perpetuate gender-based stereotypes proscribed by the Constitution and is therefore violative of Article 15; and

c. Resorting to the provisions of the General Clauses Act 1897, Section 4(c) of the SMA (which otherwise appears to be unconstitutional) can be read down such that the singular "male" and "female" includes the plural as well.

36. Manu Srinath, learned counsel, made the following submissions:

a. Persons whose fundamental rights are violated are entitled to seek judicial review of the violating act;

b. It is permissible for judicial review to result in an increase in the size of the intended pool of beneficiaries of a legislation. Such an exercise will not amount to legislation by courts; and

c. Judicial review is a tool to achieve social justice. It is also a tool by which constitutional aspirations and ideals are achieved.

37. Jaideep Gupta, learned counsel, made the following submissions:

a. If recognition is accorded to marriage by queer persons, they will be protected from so-called "conversion therapies" which attempt to "convert" the sexual orientation of queer people into a heterosexual orientation as well as forced marriages;

b. Queer marriages do not fall within the degrees of prohibited relationships; and

c. The classification on the basis of age in the SMA ought to be declared unconstitutional insofar as it mandates a different minimum age requirement for men and women. This Court ought to declare twentyone years as the ideal age for all marriages. The Prohibition of Child Marriage (Amendment) Bill 2021, which seeks to raise the legally permissible age of girls to marry from eighteen years to twenty-one years is currently pending in Parliament.

38. Thulasi Raj, learned counsel, submitted that:

a. The exclusion of the LGBT community from the institution of marriage is "demeaning" as defined by Deborah Hellman; and

b. Prejudicial notions about sexuality inform the SMA although its provisions may not expressly contain words which indicate such prejudices.

39. Tanushree Bhalla, learned counsel, submitted that:

a. The word "man" in the SMA ought to be read as meaning a cisgender man, a transgender man, and any person who assumes a role in the marriage that the statute or society or the institution of marriage confers on men. The word "woman" must be interpreted in a similar fashion;

b. Section 4(c) of the SMA excludes intersex persons; and

c. A minimum age at which persons of the "third gender" may marry may be read in, in Section 4(c) of the SMA.

40. In addition to the above submissions, some senior counsel and counsel sought to address this Court on the 'notice and objections regime' in the SMA (i.e., Sections 5 to 9 of the SMA which stipulate a set of procedural preconditions to the solemnization of marriages under the SMA). This Court has not heard arguments on this issue in the present proceedings.

41. Mr. R. Venkataramani, learned Attorney General of India appearing for the Union of India, made the following submissions:

a. This Court has already issued constitutional declarations on the right to form a family, and the right to marry of non-heterosexual persons in Navtej (supra). The issue in this batch of petitions relates to fitting the constitutional declaration into relevant laws;

b. The SMA is a species of the general marriage laws. Marriage is conceived to be a union between heterosexuals across all laws on marriage and procreation is an essential aspect of marriage;

c. At the time when the SMA was enacted, an alternative conception of a union of persons (other than heterosexuals) did not exist. The SMA is intended to regulate marriage between heterosexuals irrespective of caste and religion. Thus, the omission of non-heterosexual unions from the purview of the enactment would not render the enactment unconstitutional because of under-inclusiveness. The SMA will be underinclusive only when a class of heterosexuals is excluded by the statute;

d. There would be no internal cohesion in the SMA if Section 4 is read in a gender-neutral manner. Such an interpretation would render the implementation

of Sections 19 to 21A which link the SMA with other personal and non-personal laws difficult;

e. Courts can use the interpretative tool of reading-in only when the stated purpose of the law is not achieved. Since the purpose of SMA is to regulate heterosexual marriages, this Court cannot read words into the enactment to expand its purview beyond what was originally conceptualized;

f. It is up to Parliament to enact a special code regulating non-heterosexual unions and the specific issues that such unions would face during and after the partnership, after comprehensively engaging with all stakeholders;

g. The course adopted by this Court in Vishaka (supra) cannot be replicated for two reasons: one, there is no legislative vacuum in the instant case, and second, the non-inclusion of all possible kinds of unions cannot be construed as a constitutional omission;

h. Courts cannot issue directions granting legal recognition to non-heterosexual marriages because it would require the redesigning of several enactments and rules. Marriage rights must be given only through the parliamentary process after wide consultation; and

i. A declaration by this Court granting legal recognition to non-heterosexual marriages accompanied with a scheme of rights would be anathema to separation of powers. This Court must not venture into the realm of policy making and law making.

42. Mr. Tushar Mehta, learned Solicitor General appearing for the Union of India, made the following submissions:

a. The institution of marriage occupies a central role in the sustenance and progression of humankind. The prominent components of a marriage are companionship, sexual intimacy, and most importantly, procreation. Marriage (from an individual perspective) serves the purpose of sustaining an individual's gene pool. From a societal perspective, marriage contributes towards the proliferation of future generations for the sustenance of humankind;

b. The Constitution does not recognize a right to marry. An expression of a person's sexuality is protected under Article 19(1)(a) of the Constitution. However, marriage cannot be traced to the right to freedom of expression or the right to form unions under Article 19(1)(c);

c. This Court has not previously recognized the right to marry under the Constitution. The observations of this Court in Shafin Jahan (supra) and Shakti

Vahini (supra) that the petitioners' right to marry has been violated must be read in the specific context of these judgments. In these cases, the right to marry which is conferred by the legislature to inter-caste and interreligious couples was violated by State and non-State actors;

d. Marriage is a creation of statutes. The State by virtue of Entry 5 of List III of the Seventh Schedule has the power to regulate the institution of marriage. In exercise of this power, the legislature has prescribed various conditions which must be fulfilled before legal recognition can be given to a union. These conditions inter alia include the minimum age to be able to consent to a marriage, the prohibition of bigamy, and the bar against marrying within the degrees of prohibited relationship;

e. The State is not under an obligation to grant legal recognition to every type of relationship. The State only recognizes relationships when there exists a legitimate state interest. The State has a legitimate State interest in legally recognizing heterosexual relationships for the sustenance of society;

f. After the decriminalization of homosexuality in Navtej (supra), members of the LGBTQIA+ community have the freedom and autonomy to choose their partners without restraints on gender and sexuality. However, the decriminalization of the sexual offence does not cast an obligation on the State to grant legal recognition to such relationships or unions. Marriage is a legal privilege. It is conditional upon statutory or societal conditions. The right to choose a partner does not necessarily imply that there is a right to marry a partner of choice;

g. The Courts do not have the power to decide if legal recognition can be granted to a union of non-heterosexual individuals. This is an issue which must necessarily be decided by the legislature, being the elected representatives of the citizens;

h. It would become impossible to deny legal recognition to practices such as incest or polygamy if non-heterosexual couples are granted the right to marry;

i. Marriage is a public institution. It falls in the outer-most zone of privacy and is thus, susceptible to the highest degree of State regulation. This Court in Navtej (supra) only granted protection to the intimate and intermediate zone of privacy of non-heterosexual couples;

j. Both the father and the mother have a significant and unique role in the upbringing of children. In non-heterosexual unions, the child born out of surrogacy or artificial reproductive technology or adopted by the couple would feel the absence of either a father or a mother. The State does not grant legal

recognition to homosexual unions in the form of marriage to protect the interest of the children. This is a legitimate State interest. The petitioners have not submitted sufficient data to back their claim that the interest of a child brought up by a non-heterosexual couple is protected;

k. Granting legal recognition to non-heterosexual unions would dilute heterosexual marriages. For example, in Netherlands, more heterosexual couples have opted for domestic partnerships and cohabitation after legal recognition was granted to non-heterosexual unions. Non-heterosexual unions are not granted legal recognition to protect the institution of marriage;

l. The impugned provisions of the SMA are constitutional because:

i. The legislative debates during the introduction of the SMA indicate that Parliament made a conscious decision to exclude non-heterosexual unions from the ambit of the SMA;

ii. The object of the SMA is to grant (and regulate) legal recognition to inter-faith and inter-caste unions of heterosexual couples. The provisions of the SMA have a reasonable nexus to this object;

iii. There is an intelligible differentia in classifying unions into heterosexual and non-heterosexual partnerships because heterosexual couples sustain a society through precreation. In fact, the Transgender Persons Act also classifies persons into homosexuals and heterosexuals and grants substantive rights to the members of the LGBTQIA+ community in furtherance of the mandate of substantive equality. The Transgender Persons Act recognizes the autonomy of the members of the LGBTQI+ community to choose a partner of their choice;

iv. The constitutionality of a statute cannot be challenged on the ground of under-inclusion;

v. An emerging body of evidence indicates that homosexuality may be an acquired characteristic and not an innate characteristic. Children who have been exposed to homosexual experiences are more likely to identify as a homosexual on attaining adulthood. Thus, this Court must not approach this issue from a "linear reductionist perspective." Further, the argument of the petitioners that the SMA is unconstitutional because it is excludes a class based on innate characteristics is erroneous;

vi. The SMA would become unworkable if it is read in a gender-neutral manner. It would also amount to this Court re-drafting a large number of provisions:

A. Section 2(b) read with the First Schedule prescribes distinctive degrees of prohibited relationships for the bride and the groom;

B. According to Section 4(c), the male must have completed twentyone years of age and the female must have completed eighteen years of age at the time of marriage. Reading the phrase 'spouse' in place of 'male' and 'female' would render the distinctive minimum age requirement for marriage based on gender otiose;

C. The form of the statutory oath which the parties are required to take for the solemnization of their marriage expressly uses the phrases 'wife' and 'husband';

D. According to Section 21, the rules of succession provided in the Indian Succession Act 192552 govern the succession of property of any person who is married under the SMA. The ISA prescribes different rules and procedures for succession based on gender. Reading the provisions of the SMA in a gender-neutral manner would impact the interpretation of the provisions of the ISA as well;

E. By virtue of Section 21A, the rules of succession under the HMA shall apply for marriages solemnized between a male and female professing the Hindu, Buddist, Sikh or Jain religion. The HSA prescribes different rules for succession based on gender. Reading the provisions of the SMA in a gender-neutral manner would render the HSA unworkable; and

F. Other provisions of the SMA such as Sections 27, 31, 36, and 37 cater to the needs and requirements of a woman in a heterosexual marriage. A reading of the SMA in a gender-neutral manner would impact the interpretation of these provisions.

m. By declaring that non-heterosexual couples have a right to marry, this Court would be granting legal recognition to a new social relationship. Such a declaration by this Court could also pre-empt debates on this issue in the legislature; and

n. The term 'spouse' in Section 7A of the Citizenship Act 1955 cannot be read in a gender neutral manner. Section 7A of the Citizenship Act applies to the same class of persons to whom the FMA applies. The FMA expressly uses the phrases 'bride' and 'bridegroom.' Section 4 of the FMA prescribes the same conditions for the registration of a marriage as Section 4 of SMA.

43. Mr. Kapil Sibal, learned senior counsel appearing for intervenor made the following submissions:

a. Marriage was defined by the social acceptability of a relationship even before it was codified. The heterosexual nature of a marriage was not introduced by law. Law merely regulated unions which were socio-historically recognised. The law has always differentiated between heterosexual and nonheterosexual unions;

b. A legal recognition of a union is premised on the recognition of a relationship on an individual level, family level, and societal level;

c. The right of a person to choose a partner of their choice is protected under Article 21. However, the legislative recognition of such a choice is not a fundamental right;

d. The right to marry cannot be traced to the right to privacy. The right to privacy postulates the right to be left alone. There is a negative obligation on the State and the society to not interfere with choices of individuals. However, if the exercise of the right to privacy has a public dimension, the State must regulate the exercise of the right in the larger interest of the community. The State has, in the past, regulated the parameters of choice within the realm of marriage with respect to the number of partners and the age of marriage. Thus, the right to the recognition of non-heterosexual unions is not traceable in Article 21;

e. The South African Supreme Court in Minister of Home Affairs v. Fourie53 and the United States Supreme Court in Obergefell v. Hodges, Director, Department of Health54 while recognising the right to marry acknowledged the importance and relevance of social debate and public discourse on the issue. The courts observed that the public has become more accepting of non-heterosexual unions. While it may not be necessary to reach public consensus on social issues, it is still important to have some form of discourse on the issue be it through law commissions, referendums, bills in the legislature, or even High Court decisions;

f. Public engagement also goes hand-in-hand with an incrementalistic approach by the courts or the legislature. For example, Mexico City recognised cohabitation partnership of homosexual unions in 2006. Three years later, their right to marry was recognised. In South Africa, before the judgment in Fourie (supra), the constitutional court had dealt with the criminalisation of sodomy,55 the rights of same-sex immigrant partners56, the right to adoption of same-sex partners57, and the non-inclusion of same-sex partners in a statute providing pension rights58;

g. This Court instead of limiting its judgment to the reliefs sought by the petitioners, must also address the following issues:

(i) Whether the LGBTQIA+ community, being a sexual minority, is entitled to be protected even in the absence of a law;

(ii) The recognition of the hindrances faced by LGBTQIA+ unions and the procedure to resolve the difficulties; and

(iii) The necessity of administrative procedures and guidelines recognizing that sexual orientation is a physiological phenomenon and that same sex unions must not be discriminated against.

h. The assumption of the petitioners that both law and society must consider non-heterosexual unions as belonging to the same class as heterosexual unions without distinction based on sexual orientation is wrong. The exclusion of non-heterosexual unions from the SMA is not violative of Articles 14 and 15 of the Constitution;

i. Marriage between "any two persons" as provided in Section 4 of SMA and FMA cannot include non-heterosexual unions for the following reasons:

(i) Section 4(a) states that marriage cannot be solemnised if either party has a spouse living at the time of marriage. The SMA, when it was enacted, referred to marriages which had taken place before it came into force. In that case, the word 'spouse' could have only been used in the context of heterosexual marriages; and

(ii) The mere usage of a gender-neutral term does not indicate the legislative will to include non-heterosexual unions within the ambit of the enactment.

j. The statute is not underinclusive for impliedly excluding non-heterosexual unions from its purview because Parliament did not contemplate the inclusion of non-heterosexual marriages at the time of enactment. A statute will be under-inclusive only where a statute which must necessarily cover a category excludes them from the benefits it confers. The principle will not apply to persons who are not ex-facie covered by the statute;

k. The interpretative tool of "reading-in" means reading into the text of the statute and not altering it. Reading the word "spouse" into SMA where the words "husband" and "wife" are used would render provisions which are enacted based on conventional ideas about a heterosexual relationship redundant;

l. The legislative regime related to marriage and other allied issues has been enacted in response to the unique challenges that heterosexual marriages face. Even if this Court finds that the Constitution grants a right to legal recognition of non-heterosexual unions, a new legislative regime regulating non-heterosexual marriages must be introduced to respond to the unique challenges they face; and

m. This Court can use its power under Article 142 to fill legislative vacuums to the limited extent of laying down procedural guidelines. The court cannot create substantive rights and obligations to fill a legislative vacuum because it would amount to judicial legislation. This Court can neither direct the legislature to enact a law nor direct the legislature when to enact a law. These are established parameters of separation of powers and must be respected.

44. Mr. Arvind P Datar, learned senior counsel appearing for one of intervenors made the following submissions:

a. This Court has recognised the right to marry in KS Puttaswamy (9J) (supra), Shafin Jahan (supra), Shakti Vahini (supra) and Navtej (supra). However, only Justice Nariman's opinion in Navtej (supra) held that non-heterosexual couples also have a right to marry;

b. A statute can be struck down after a passage of time only if the rationale of the law ceases to exist as in the case of Section 377 of the IPC where medical research indicated that same sex relationships are not unnatural or against the order of nature;

c. This Court while interpreting provisions of a statute can "iron out the creases but not alter the fabric."

The exercise of reading up can only be undertaken by the Courts when it would be consistent with legislative intention, when it would not alter the nature of the enactment, and when the new state of affairs would be of the same kind as the earlier state of affairs to which the enactment applies;

d. The judgment of the High Court of Madras in Arunkumar (supra) interpreting the word "bride" in the Hindu Marriage Act to include transgender and intersex persons is contrary to the judgment of this Court in Madhu Kishwar v. State of Bihar59 where it was held that male pronouns must not be expansively interpreted to include female pronouns within their ambit;

e. The legal recognition of non-heterosexual unions is a polycentric issue which cannot be resolved solely by the judiciary;

f. Unenumerated rights or derivate rights, which are recognised by courts through judicial interpretation are inchoate rights because they are an exception to the rule of ubi jus ibi remedium.60 Thus, even if this Court recognises the petitioners' right to marry, it is not enforceable.

45. Ms. Aishwarya Bhati, learned Additional Solicitor General, appearing for one of the intervenors made the following submissions:

a. Article 21 guarantees that every child will have the best upbringing. The petitioners have not submitted any data to prove that the interests of the child would be protected if they are raised by non-heterosexual parents. A child born to a heterosexual couple is innately adaptable to a similar family environment and naturally seeks out a family environment which is comparable to their birth family;

b. Chapter II of the JJ Act which lays down the General Principles of Care and Protection of Children stresses upon the best interest of the child. Principle xiii states that every child in the juvenile justice system has a right to be restored to the same socio-economic and cultural status as they were earlier in;

c. Men and women are differentiated for the purpose of adoption, assisted reproduction, and surrogate reproduction. For example, the law does not permit a man to adopt a girl child. The scheme of the laws relating to adoption and surrogacy must be revamped for the inclusion of any of the excluded categories of intending parents; and

d. The law protects a child by assuming that they are incapable of entering in contracts, of committing an offence, and of consenting to a sexual relationship. Thus, children cannot be imposed upon with emerging and evolving notions of gender fluidity. Children cannot be made guinea pigs of an evolving social experiment. The state is justified in prescribing reasonable restrictions for adoption, assisted reproductive technology, and surrogacy based on the welfare of children.

46. Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the State of Madhya Pradesh made the following submissions:

a. Only thirty-four of the one hundred and ninety-four countries have recognised marriage between non-heterosexual individuals. Out of the thirty-four countries, the legislature has recognized it in twenty-four of them. At least twenty of the twenty-four countries enacted a framework for registered partnerships or civil unions for granting legal recognition to non-heterosexual unions. In ten countries, the courts have directed the State to recognise nonheterosexual marriages. The approach taken by the courts in these ten countries is not uniform. The approach is specific to social complexities and legal arrangements in each of the countries;

b. The laws relating to marriage, and the benefits (and rights) which accrue because of marriage are not uniform. The laws take into account religious and regional differences. The principle of non-discrimination in Article 14 and 15(1)

does not mandate that marriage must be organised and recognised in a uniform manner. The principle of equality does not postulate uniformity;

c. The principle of non-discrimination in Article 14 is not violated if the law is not "all-embracing." The legislature can choose to remedy certain degrees of harm;

d. It is for the legislature to decide if non-heterosexual unions must be legally recognised, and what benefits and entitlements must be conferred to the union;

e. Legislations governing unions and the benefits which accrue because of unions do not become unconstitutional after the decriminalisation of homosexuality in Navtej (supra). Decriminalisation of a sexual offence does not automatically confer legal recognition to a union;

f. The opinion of the majority in Navtej (supra) held that homosexuals have a right to form a union under Article 21. This Court specifically observed that a union does not mean marriage. Thus, Navtej (supra) has ruled out the possibility of non-heterosexual marriages; and

g. The observation in Puttaswamy (9J) (supra) that the State has a positive obligation to provide legal protection to enable the exercise of choice was limited to the specific context of data protection. Such an obligation can be imposed on the State only when a right is infringed because of actions of the State.

47. Mr. Maninder Singh, learned senior counsel, submitted that Section 112 of the Indian Evidence Act 1872 which provides that birth during the sustenance of marriage or two hundred and eighty days after the dissolution of marriage is a conclusive proof of legitimacy establishes that procreation is a chief component of marriage. He further submitted that an alteration of the chief component of marriage would render other laws which are premised on the heteronormative nature of marriage unworkable.

48. Mr. Atamaram Nadkarni, senior counsel appearing for an intervenor (Akhil Bharatiya Sant Samiti) submitted that the SMA is interwoven with personal law. He argued that the recognition of non-heterosexual marriages under the SMA would impact personal laws on succession, and adoption.

49. Ms. Manisha Lavkumar, learned senior counsel appearing for the State of Gujarat made the following submissions:

a. Though the rules of marriage continue to evolve, they are still grounded in heterosexual relationships;

b. There is an overarching State interest in excluding non-heterosexual unions from the ambit of marriage because it:

(a) regulates matrimonial conduct;

(b) preserves social order; and

(c) ensures the progression of society in a legitimate manner;

c. The State can impose reasonable restrictions on individual autonomy and consent by introducing conditions such as the number of marriages, the minimum age for marriage and the degrees of prohibited relationship. The heterosexual nature of a relationship is one such reasonable restriction; and

d. The FMA is modelled on the SMA. The FMA also envisages a heterosexual union. Section 23 of the FMA states that the Central Government may recognise marriages solemnised in a foreign country as valid in India only if the law in the foreign country on marriage is similar to the FMA. Since the FMA only includes heterosexual unions, a non-heterosexual marriage solemnised in a foreign country cannot be recognised in India.

50. Mr. J Sai Deepak, learned counsel appearing on behalf of an intervenor made the following submissions:

a. A judicial sanctioned legal recognition of non-heterosexual union would be a colonial top-down imposition of morality. Such an approach would diminish democratic voices in the process;

b. The issue of lack of legal recognition of non-heterosexual unions is placed differently as opposed to the legislative vacuum on sexual harassment at workplaces. The history and purpose of the SMA does not permit the Court to issue guidelines under Article 141 as it did in Vishaka (supra). The power under Article 141 to issue guidelines must be used sparingly. The power must not be used to take over the functions of the other organs of the State;

c. The judgments of this Court in NALSA (supra) and the Madras High Court in Arun Kumar (supra) suffer from internal and external inconsistencies; and

d. The LGBTQIA+ community is not a homogenous class. The court cannot cater to the interests of a heterogenous class which they constitute. The legislature would be better placed to cater to their needs.

51. Mr. MR Shamshad, learned counsel appearing for an intervenor submitted that a declaration that non-heterosexual couples have a right to marry would

conflict with the tenets of religion where marriage is considered a heterosexual union.

52. Ms. Priya Aristotle, learned counsel appearing for an intervenor submitted that granting non-heterosexual couples parental rights would affect the children of heterosexual couples.

53. Mr. Sasmit Patra, learned counsel appearing for the intervenor submitted that:

a. Granting legal recognition to non-heterosexual unions would require wide ranging amendments to various laws. It is only the legislature which has the capacity and functionality to deal with matters of such wide implication;

b. A declaration by this Court that non-heterosexual unions have a right to marry cannot be implemented without the aid of the legislature and executive; and

c. A social change of this magnitude will not be fructified if the role of the polity in the process is negligent.

54. Ms. Archana Pathak Dave, learned counsel appearing for an intervenor (Ex-Servicemen Advocates Welfare Association) submitted that non-heterosexual marriages must not be permitted particularly for personnel working in the armed forces because Article 33 permits restrictions on their fundamental rights. It was submitted that granting legal recognition to non-heterosexual marriages may dilute the disciplinary code in the army, the navy, and the air force, would create conflicts in the workplace over personal and religious beliefs, and would raise concerns about shared facilities such as communal showers and shared rooms.

55. Ms. Manisha Narain Agarwal, learned counsel appearing for an intervenor submitted that the petitioners are seeking social acceptance of their relationships through an order the Court. This Court does not have powers of such magnitude.

56. Mr. Atulesh Kumar, Ms. Sanjeevani Agarwal, and Mr. Som Thomas appearing on behalf of various intervenors adopted the above arguments.

C. Reliefs sought in the proceedings

57. The petitioners in this batch of petitions have made certain general prayers, in addition to the prayers specific to the facts of their case. The general reliefs sought are summarized below. The petitioners seek that this Court declare that:

a. LGBTQ persons have a right to marry a person of their choice regardless of religion, gender and sexual orientation;

b. The SMA is violative of Articles 14, 15, 19, 21, and 25 of the Constitution insofar as it does not provide for the solemnization of marriage between same-sex, gender non-conforming or LGBTQ couples;

c. The SMA applies to any two persons who seek to get married, regardless of their gender identity and sexual orientation;

d. The words "husband" and "wife" as well as any other gender-specific term in the SMA ought to be substituted by the word "party" or "spouse";

e. All rights, entitlements and benefits associated with the solemnization and registration of marriage under the SMA are applicable to LGBTQ persons;

f. Sections 5, 6, 7, 8, 9, 10 and 46 of the SMA which contain requirements regarding the publication of a public notice of a proposed marriage and the domicile of the couple, and which empower the Marriage Registrar to receive and decide objections to the proposed marriage are violative of Articles 14, 15, 19 and 21 of the Constitution;

g. The validity of marriages already solemnized or registered under the SMA will not be jeopardized if one spouse transitions to their self-determined gender identity;

h. The word "spouse" in Section 7A(1)(d) of the Citizenship Act is gender-neutral and is applicable to all spouses of foreign origin regardless of sex or sexual orientation;

i. LGBTQ couples have a right to register their marriages under Section 5 of the HMA and under Section 17 of the FMA if they are lawfully married in a foreign jurisdiction and at least one of them is an Indian citizen;

j. The FMA violates Articles 14, 15, 19 and 21 of the Constitution of India and is unconstitutional and void insofar as it does not provide for the registration of marriages between same-sex or gender non-conforming or LGBTQ couples;

k. The FMA applies to any two persons who seek to get married, regardless of their gender identity and sexual orientation;

l. The words "bride" and "bridegroom" as well as any other gender-specific term in the FMA have to be substituted by the word "party" or "spouse";

m. All rights, entitlements, and benefits associated with the solemnization and registration of marriage under the FMA are applicable to LGBTQ persons;

n. Regulations 5(2)(a) and 5(3) read with Schedules II, III and VI of the Adoption Regulations are unconstitutional and ultra vires the JJ Act insofar as they exclude LGBTQ couples from joint adoption;

o. The words "married couple" and "marital relationship" used in Regulations 5(2)(a) and 5(3) of the Adoption Regulations encompass LGBTQ couples married under foreign laws;

p. The phrases "male applicant" and "female applicant" are substituted by the phrases "Prospective Adoptive Parent 1" and "Prospective Adoptive Parent 2 (in case of applicant couples)" in Schedules II, III, VI and VII of the Adoption Regulations;

q. Section 5 of the HMA does not distinguish between homosexual and heterosexual couples and the former have a right to marry under the HMA;

r. LGBTQ persons have a constitutional right to a "chosen family" in lieu of next of kin under all laws as an intrinsic part of their right to a dignified life under Article 21;

s. An unmarried person can nominate "any person(s)" to act as their nominee or next of kin, irrespective of whether such person is a "guardian, close relative or family member," with respect to healthcare decisions in case of incapacity such as the execution of Advance Directives and assigning any legal right, interest, title, claim or benefit accrued to the person;

t. The State Governments must apply all preventative, remedial, protective, and punitive measures including the establishment of safe houses similar to the Garima Greh welfare scheme, in order to guarantee the safety and security of all individuals irrespective of gender identity and sexual orientation;

u. The provisions of matrimonial statutes including the rules and regulations framed thereunder, to the extent that they are construed as requiring one "male" or "bridegroom" and one "female" or "bride" for the solemnization of marriage be read as neutral as to gender identity and sexual orientation; and

v. All marriages between couples in which either one or both partners are transgender or gender non-conforming or who otherwise do not identify with the sex assigned to them at birth, may be solemnized under matrimonial statutes regardless of their gender identity and sexual orientation.

58. In addition, the petitioners have sought directions to the Union Government, the State Governments, and district and police authorities to adopt and follow a

protocol in cases which concern adult, consenting LGBTQ persons who require protection from their families, regardless of whether such persons are married;

D. Analysis

i. This Court is vested with the authority to hear this case

59. The respondents argued that this Court should not decide the issue of whether legal recognition in the form of marriage can be given to non-heterosexual relationships. It was argued that this issue must necessarily be decided by the people by themselves or through the elected representatives. It was also submitted that this Court, by deciding the issue one way or the other, would pre-empt any debate in the legislature.

60. The respondent's submission is two-fold: first, the Court does not have the power to decide this issue; and second, such a decision can be arrived at only through a process that reflects the electoral will.

a. Article 32 vests this Court with the power to enforce the rights in Part III of the Constitution

61. Part III of the Constitution of India enshrines the fundamental rights of the people of India. Article 13 of the Constitution stipulates that the State shall not make any law which takes away or abridges the rights conferred in Part III and that any law made in contravention of this condition, shall, to the extent of the contravention, be void. Article 32 complements Article 13 and provides the right to a constitutional remedy for the enforcement of rights conferred by Part III:

"Article 32. Remedies for the enforcement of rights conferred by this Part.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

(emphasis supplied)

62. The Constitution of India is unique in that its provisions expressly accord the judiciary with the power to review the actions of the legislative and executive branches of government, unlike in many other countries. Article 32 makes fundamental rights justiciable and is worded broadly. The right to approach this

Court for the enforcement of the fundamental rights embodied in Part III is itself a fundamental right by virtue of Clause (1) of Article 32. It states that this Court may be moved "by appropriate proceedings." This expression means that the appropriateness of the proceedings depends on the relief sought by the petitioner.61 Clause (1) of Article 32 does not place any constraints on the power of this Court to entertain claims that the rights enumerated in Part III have been violated.

63. Similarly, Clause (2) is worded expansively and enlarges the scope of the powers of this Court to enforce fundamental rights. This is evident from two parts of the clause:

a. First, Clause (2) provides this Court with the power to issue "directions, orders, or writs," which indicates that this Court may mould the relief according to the requirements of the case before it and that it is not constrained to a particular set of cases in which a particular relief or set of reliefs may be granted. This expression indicates that the power of this Court is not limited to striking down an offending statute, rule, or policy. Rather, it extends to issuing directions or orders or writs for the enforcement of fundamental rights. Put differently, this means that the power of this Court is not only 'negative' in the sense that it may restrain the state from doing something which infringes upon the fundamental rights of people but is also 'positive' in the sense that it may compel the state to do something or act in a manner which gives effect to such rights; and

b. Second, the word "including" in Clause (2) indicates that the five writs mentioned in that clause are illustrative. The word "including" is used as a word of enlargement. This Court may issue directions, orders, or writs other than the five writs specified.62

Therefore, the manner in which Article 32 has been drafted does not limit the powers of this Court. To the contrary, it clearly and unambiguously vests this Court with the power to conduct judicial review and give effect to the fundamental rights enumerated in Part III.

64. The extent of the powers vested in this Court by Article 32 as envisaged by the framers of the Constitution can be understood from the Constituent Assembly's discussion of the provision which was eventually adopted as Article 32.63 Mr. H V Kamath was of the opinion that it was unwise to particularize the writs which this Court ought to issue, and that this Court should have the power to issue any directions it considered appropriate in a case.64 In service of this idea, he moved an amendment to substitute clause (2) of the provision which is now Article 32. The substituted clause was to read:

"The Supreme Court shall have power to issue such directions or orders or writs as it may consider necessary or appropriate for the enforcement of any of the rights conferred by this part."65

65. Responding to this proposal, Dr. B R Ambedkar underscored that this Court had been endowed with wide powers of a general nature:

"what has been done in the draft is to give general power as well as to propose particular remedies. The language of the article is very clear. These are quite general and wide terms. these writs ought to be mentioned by their name in the Constitution without prejudice to the right of the Supreme Court to do justice in some other way if it felt it was desirable to do so. I, therefore, say that Mr. Kamath need have no ground of complaint on that account."66

(emphasis supplied)

The power of this Court to do justice is not, therefore, limited either by the manner in which Article 32 has been constructed or by any part of the Constitution. It is amply clear from both the plain meaning of Article 32 as well as the Constituent Assembly Debates that this Court has the power to issue directions, orders, or writs for the enforcement of the rights incorporated in Part III of the Constitution.

b. Judicial review and separation of powers

66. The doctrine of separation of powers, as it is traditionally understood, means that each of the three organs of the state (the legislature, the executive, and the judiciary) perform distinct functions in distinct spheres. No branch performs the function of any other branch. The traditional understanding of this doctrine (also termed the "pure doctrine"67) does not animate the functioning of most modern democracies.

That our Constitution does not reflect a rigid understanding of this doctrine has long been acknowledged by this Court.68 In practice, a functional and nuanced version of this doctrine operates, where the essential functions of one arm of the state are not taken over by another arm and institutional comity guides the actions of each arm.69 In other words, the functional understanding of the separation of powers demands that no arm of the state reigns supreme over another.

67. Thu Union of India suggested that this Court would be violating the doctrine of separation of powers if it determines the lis in this case. The separation of powers undoubtedly forms a part of the basic structure of the Constitution, but equally, the power of courts to conduct judicial review is also a basic feature of

the Constitution.70 The doctrine of separation of powers certainly does not operate as a bar against judicial review.71

In fact, judicial review promotes the separation of powers by seeing to it that no organ acts in excess of its constitutional mandate. It ensures that each organ acts within the bounds of its remit. Further, as discussed in the previous segment of this judgment, the Constitution demands that this Court conduct judicial review and enforce the fundamental rights of the people. The framers of our Constitution were no doubt conscious of this doctrine when they provided for the power of judicial review.

Being aware of its existence and what it postulates, they chose to adopt Article 32 which vests this Court with broad powers. The doctrine of separation of powers cannot, therefore, stand in the way of this Court issuing directions, orders, or writs for the enforcement of fundamental rights. The directions, orders, or writs issued for this purpose cannot encroach upon the domain of the legislature. This Court cannot make law, it can only interpret it and give effect to it.

68. The existence of the power of judicial review cannot be conflated with the manner in which the power is exercised. The exercise of the power of judicial review abides by settled restraints which acknowledge that the power of law making is entrusted to democratically elected legislative bodies and that the formulation and implementation of policy is entrusted to a government which is accountable to the legislature.

In the exercise of its the legislative function the legislature may incorporate policies which will operate as binding rules of conduct to operate in social, economic and political spaces. Judicial review is all about adjudicating the validity of legislative or executive action (or inaction) on the anvil of the fundamental freedoms incorporated in Part III and on the basis of constitutional provisions which structure and limit the exercise of power by the legislative and executive arms of the State.

69. Judicial review is a constitutionally entrenched principle which emanates from Article 13. It is not a judicial construct. The power of judicial review has been expressly conferred by the Constitution. In the exercise of the power of judicial review, the Court is cognizant of the fact that the legislature is a democratically elected body which is mandated to carry out the will of the people.

It is in furtherance of this mandate that Parliament and the State legislatures enact laws. Courts are empowered to adjudicate upon the validity of legislation

and administrative action on the anvil of the Constitution. In the exercise of the power of judicial review, the Court does not design legislative policy or enter upon the legislative domain. This Court, will hence not enter into the legislative domain by issuing directions which for all intents and purposes would amount to enacting law or framing policy.

c. The power of this Court to enforce rights under Article 32 is different from the power of the legislature to enact laws

70. In Powers, Privileges and Immunities of State Legislatures, In re,72 a seven-Judge Bench of this Court held:

"whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country."

Hence, it falls squarely within the powers of this Court to adjudicate whether the fundamental rights of queer persons have been infringed, as claimed by the petitioners.

71. This Court will not issue a mandamus to Parliament but will determine the scope and effect of certain fundamental rights. What do these rights mean and what are their incidents₹ What do they require of the state₹ What are their boundaries₹ In answering these questions, this Court is not enacting law or framing policy but is performing its constitutionally mandated function of interpreting the Constitution and enforcing the rights it recognizes. This Court cannot ignore its duty to fulfil the mandate of Articles 13 and 32. The distinction between law-making and adjudicating the rights of the people by interpreting the Constitution and enforcing these rights, as required by Article 32, cannot be forgotten.

72. This Court has previously utilized its power under Article 32 to issue directions or orders for the enforcement of fundamental rights. This power does not extend only to striking down an offending legislation but also to issuing substantive directions to give effect to fundamental rights, in certain situations. In Common Cause v. Union of India,73 a Constitution Bench of this Court (of which one of us, Justice D Y Chandrachud was a part) found that the right to

life, dignity, selfdetermination, and individual autonomy meant that people had a right to die with dignity.

This Court delineated guidelines and safeguards in terms of which Advance Directives could be issued to cease medical treatment in certain circumstances. Similarly, in Vishaka (supra) this Court issued guidelines for the protection of women from sexual harassment at the workplace. These guidelines were grounded in the fundamental rights to equality under Article 14, to practise any profession or to carry out any occupation, trade or business under Article 19(1)(g), and to life and liberty under Article 21. The decisions of this Court in Common Cause (supra) and Vishaka (supra) are significant because this Court issued directions for the enforcement of fundamental rights in the absence of a law which was impugned before it.

d. The power of judicial review must be construed in terms of the Constitution of India and not in terms of the position of law in other jurisdictions

73. A common mistake in the legal community is to refer to the doctrines and decisions of other jurisdictions regardless of the context in which they arose. The jurisprudence of other countries no doubt facilitates an exchange of ideas and acquaints us with the best practices in the field. It illuminates the potential benefits and pitfalls of a particular approach and enables us to dwell on whether to accept and if we do so, whether to improve on that approach.

However, a particular doctrine or legal standard ought not to be borrowed blindly. The first and foremost authority is the Constitution or any law in India. An appropriate tool of interpretation must be used to discern the law as laid down by the Constitution or by any statute, rule, or regulation. This precept applies with equal force to the question of judicial review in India. Judicial review has to be conscious of our own social and cultural milieu and its diversity.

74. Parliament being sovereign in England, the courts of England do not have the power to strike down a statute as being contrary to its basic law. This status of affairs cannot, of course, be superimposed on the relationship between our legislative bodies and courts.

In Powers, Privileges and Immunities of State Legislatures, In re (supra), this Court held that the Constitution is supreme and sovereign in India and that legislative bodies in India are not sovereign in the same way as Parliament is in England. Hence, the limitations which apply to the Supreme Court of the United Kingdom while it conducts judicial review do not apply to this Court. Similarly,

the restrictions on judicial review in the United States of America cannot be imported without any regard to our Constitution.

75. The Union of India relied on various decisions of the Supreme Court of the United States of America including the decisions in Day-Brite Lighting Inc. v. Missouri74 and the dissenting opinion of Oliver Wendell Holmes, J. in Lochner v. New York75 for the proposition that this Court would be in danger of becoming a "super legislature" if it decided the issues which arise in the present proceedings. This argument misses the crux of the matter. The Supreme Court of the United States of America established its power of judicial review in Marbury v. Madison.76

The text of the US Constitution does not vest their courts with this power, unlike in India. The Constitution of India expressly authorises judicial review. While doing this the Constitution confers broad powers on this Court as discussed in the previous segment of this judgment. This being the case, it is injudicious to borrow from the jurisprudence of the US on judicial review, its boundaries, legitimacy, and the type of cases which warrant deference to legislative bodies. In State of Madras v. V.G. Row,77 a Constitution Bench of this Court held:

"20. we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution."

Similarly, in Romesh Thappar v. State of Madras,78 this Court held that there was no remedy in the US which was analogous to the one provided by Article 32 of the Constitution of India. Therefore, the contours of the power of this Court to conduct judicial review must be construed in terms of the Constitution of India and not in terms of the position of law in other jurisdictions.

e. The role of courts in the democratic process

76. The argument of the respondents that any decision by this Court on this issue would be anti-democratic is not an argument that is specific to the issues which have been raised before us in this batch of petitions. Rather, it is an argument which strikes at the legitimacy of the judicial branch. The argument that the decision of the elected branch is democratic and that of the judicial branch is not is premised on the principle of electoral representation. The proposition is that the exercise of the power of judicial review would constrain the right of citizens

to participate in political processes. This is because courts are vested with the power to overturn the will of the people which is expressed through their elected representatives.

77. This is a narrow definition of democracy, where democracy is viewed through electoral mandates and not in constitutional terms. Additionally, it overlooks the importance of a Constitution which prescribes underlying values and rules of governance for the sustenance of a democratic regime. If all decisions of the elected wing of the State are considered to be democratic decisions purely because of the manner in which it is vested with power, what then, is the purpose of the fundamental rights and the purpose of vesting this Court with the power of judicial review₹ Framing the argument on the legitimacy of the decisions of this Court purely in terms of electoral democracy ignores the Constitution itself and the values it seeks to engender.

78. Electoral democracy - the process of elections based on the principle of 'one person one vote' where all citizens who have the capacity to make rational decisions (which the law assumes are those who have crossed the age of eighteen) contribute towards collective decision making is a cardinal element of constitutional democracy. Yet the Constitution does not confine the universe of a constitutional democracy to an electoral democracy. Other institutions of governance have critical roles and functions in enhancing the values of constitutional democracy.

The Constitution does not envisage a narrow and procedural form of democracy. When the people of India entered into a social contract in the form of a Constitution, they chose the conception of democracy which not only focused on rule by elected bodies but also on certain substantive values and on institutional governance. The Constitution defined democracy in terms of equal rights in political participation and of self-determination.

79. When democracy is viewed in this substantive and broad manner, the role of courts is not democracy-disabling but democracy-enabling. Much like the elected branch, the legitimacy of courts is also rooted in democracy. It is rooted in not operating in a democratic manner because if it was, then courts may be swayed by considerations which govern and guide electoral democracy.79

By vesting the judicial branch with the power to review the actions of other institutions of governance (including the legislature and the executive) on the touchstone of constitutional values, the Constitution assigns a role to the judiciary.80 The institutions of governance place a check on the exercise of power of the other institutions to further constitutional values and produce better, more democratic outcomes.

80. Courts contribute to the democratic process while deciding an issue based on competing constitutional values, or when persons who are unable to exercise their constitutional rights through the political process knock on its doors. For instance, members of marginalized communities who are excluded from the political process because of the structural imbalance of power can approach the court through its writ jurisdiction to seek the enforcement of their rights.

ii. Is queerness 'un-Indian'₹ Who is an Indian₹ What practices are Indian₹

a. Queerness is a natural phenomenon which is known to India since ancient times

81. The question of whether homosexuality or queerness is unnatural is no longer res integra, in view of the decision in Navtej Singh Johar (supra) where this Court held that it is innate and natural. The contention of the Union of India that heterosexual unions precede law while homosexual unions do not cannot be accepted in view of the decision in Navtej Singh Johar (supra) where this Court held that queer love has flourished in India since ancient times.

82. The respondents have also averred that homosexuality or gender queerness is not native to India. This contention does not hold any water. In India, persons with a gender queer identity who do not fit into the binary of 'male' and 'female' have long been known by different names including hijras, kothis, aravanis, jogappas, thiru nambis, nupi maanbas and nupi maanbis.

In fact, the term 'transgender person' as it is understood in English or the 'third gender' does not always fully or accurately describe the gender identity of those who are known by some of these terms. Additionally, the social structure of the communities of transgender persons in India is unique and does not mirror 'western' structures. It is native to our country. The judgment of this Court in NALSA (supra) also explored the presence of the transgender identity and other forms of gender queerness in Indian lore.

83. In With Respect to Sex: Negotiating Hijra Identity in South India,81 Gayatri Reddy documents the different manifestations of kinship in hijra communities, including the guru-chela (or teacher-disciple) relationship, the mother-daughter relationship, and the 'jodi' (or bond) with a husband. She describes how many hijras enter into unions with men, who are referred to as their 'pantis.'

These unions span over many months or many decades, depending on the couple in question. Many men in such unions have made their natal families aware about their relationship with their partner, and in some cases, the hijras would sometimes meet their partner's natal family. They sometimes referred to their relationship as one of 'marriage.'

Men also assaulted their partners and displayed other violent tendencies. Some hijras maintained contact with their biological family, most notably the mother. Although many hijras were in romantic, long-lasting partnerships with men or in touch with their natal family, they considered other hijras as constituting their family as opposed to their 'pantis' or their biological families.82 In many communities, hijras are customarily invited to auspicious events (such as the birth of a child) to bless the family in question.

84. Like the English language, some English words employed to describe queer identities may have originated in other countries. However, gender queerness, transgenderism, homosexuality, and queer sexual orientations are natural, age-old phenomena which have historically been present in India. They have not been 'imported' from the 'west.' Moreover, if queerness is natural (which it is), it is by definition impossible for it to be borrowed from another culture or be an imitation of another culture.

b. Queerness is not urban or elite

85. The respondents, including the Union of India, have contended that homosexuality and queer gender identities or transgenderism are predominantly present in urban areas and amongst the elite sections of society. They assert that variations in gender and sexual identity are largely unknown to rural India and amongst the working classes. Nothing could be further from the truth. While they may not use the words "homosexuality," "queer," "lesbian," "gay" or any other term which populates the lexicon of English-speaking persons, they enter into unions with persons of the same sex as them or with gender queer persons; these unions are often long-lasting, and the couple performs a marriage ceremony.

The incidence of queerness amongst the rural and working-class communities has been documented in academic scholarship as well as newspaper reports. In the absence of evidence aliunde, the details narrated in newspaper reports are not facts which are proved in terms of the Indian Evidence Act 1872.83 However, in cases (such as the present one) which require this Court to examine social phenomena and their incidence, newspaper reports serve as a useful tool in the exercise of illuminating social realities.

86. This Court need look no further than the petitioners in this case to illustrate the point that queerness is neither urban nor elite:

a. One of the petitioners grew up in Durgapur, West Bengal and Delhi and states that she came to terms with her sexuality when she was an adult. Another

petitioner in the same case grew up in Varanasi, Uttar Pradesh and states that she knew that she was a lesbian from a young age;

b. One of the petitioners hails from Muktsar, Punjab and happens to be OBC. Another petitioner in the same case happens to be Dalit. They come from working class backgrounds;

c. Another petitioner was born in Mumbai to Catholic parents. She attempted to die by suicide and later had to beg on the streets in order to survive;

d. Some petitioners before this Court are transgender persons and activists. One of them is a public personality - Akkai Padmashali. She hails from a non-English speaking, working class background. At a young age, she left home. She worked as an assistant in a shop selling ceramics but quit because she unable to hide her true gender identity. Circumstance forced her to become a sex worker to sustain herself. Later, she was awarded the Karnataka Rajyotsava Award, Karnataka's second highest civilian award, for her contribution to social service.

e. Yet another petitioner who is a transgender person was born in a family of farmers who grew coconuts and betel leaves. She later worked in a factory. In her case, too, circumstance forced her to become a sex worker. She is now a social activist; and

f. One of the petitioners is a lesbian who lives in Vadodara, Gujarat.

87. Ruth Vanita, an academician, studied the history of queer marriage in India in her scholarly works. She narrates that she married a Jewish woman in 2000 with both Hindu and Jewish ceremonies.84 Her book titled Love's Rite: Same-Sex Marriage in India and the West85 records numerous instances of queer unions and partnerships in India:

a. Two young women who were classmates fell in love. One of them underwent a sex reassignment surgery in 1989. The two then married each other but one of their fathers (a wireless operator) opposed their union. He filed a complaint stating that the partner of his child had abducted her. When the young woman was produced in court, she stated that she wished to live with her husband. She was then released and the couple proceeded to live together;

b. In 1993, two women in Faridabad married each other in a Banke Bihari temple, with a priest officiating;

c. Two men, one Indian and the other American, married according to Hindu rites in a ceremony in New Delhi in 1993;

d. In 2004, a twenty-four year old Dalit woman and a twenty-two year old Jat woman travelled to Delhi and performed the rites of marriage in a temple. Their families opposed the union;

e. Two young women, whose parents were construction workers in Bhopal, Madhya Pradesh, lived in a slum. One of them was employed as a peon in a school and the other was unemployed. They ran away in 2004 and are reported to have told the police that they would live together regardless of any attempts to separate them;

f. Also in 2004, a twenty-one year old Christian woman and a twenty-three year old Hindu woman from a southern state in India declared their life-long commitment to one another after a tabloid alleged that they were lesbians;

g. Two young Muslim men (one aged twenty-two and the other aged twentyeight) married in Ghaziabad, Uttar Pradesh. Their friends and family physically assaulted them for marrying but it was reported that they continued to intend to live together; and

h. Two nurses in Patel Nagar, Delhi met as students, fell in love, declared that they were life partners, and decided to live together. At the time the book was written, they had shared a home for fifteen years. Their neighbours were aware of their relationship and were unfazed by it.

88. In addition, other sources record varied instances of persons entering into atypical unions or expressing their homosexuality or gender identity:

a. Two women who happened to be Adivasi married according to the customs of their tribe, in a small village in Koraput district, Orissa;86

b. A woman who was the daughter of a government school teacher and a woman whose father was a labourer garlanded each other in Hamirpur district, Uttar Pradesh and sought to register their marriage at the local subregistrar's office. They each divorced their husbands before entering into this union;87

c. Two women from Kanpur travelled to Delhi to marry each other;88 and

d. Young, gay men in a small town called Barasat in West Bengal expressed their desire to be a part of the queer community. One of them worked in a clerical job.89

89. The AIDS Bhedbhav Virodhi Andolan (the AIDS Anti-Discrimination Movement) released a citizen's report on the status of homosexuality in India, titled 'Less Than Gay' in 1991.90 The report discusses some of the arguments

which were put forth more than three decades ago. In its attempt to address whether homosexuality is a 'western' concept or is restricted to the socioeconomically privileged classes, it asserts that the queer community is not a "coherent, easily definable group."91

The report details the various lived experiences of gay men and lesbian women, information regarding which was collected by interviewing them. It tells the stories of a lesbian hostel warden, a gay teacher at a government polytechnic college in Madhya Pradesh, an auto-rickshaw driver in Pune, two male municipal sweepers in Mumbai who lived together and loved each other, and a gay man from a slum in Delhi.92

90. Ruth Vanita also documents attempted suicides and suicides arising from the difficulties faced by persons in queer relationships:93

a. In 1980, Jyotsna and Jayshree died by suicide after they jumped in front of a train in Gujarat. In a letter they left behind, they explained that they chose to die because they could not endure having to live apart after their marriages to men;

b. Gita Darji and Kishori Shah died by hanging in a village in Gujarat, in 1988. They were nurses and worked in a hospital; and

c. In January 2000, two young women named Bindu and Rajni were stopped from eloping. A few days later, they jumped into a granite quarry in Kerala and died. They each left behind notes to their families in which they explained that they wished to die because it was impossible for them to live together.

91. In Loving Women: Being Lesbian in Unprivileged India,94 Maya Sharma gives an account of various persons (most of whom are women) in same-sex or queer relationships. The book was written after detailed interviews with its subjects, and focuses on working class persons. The author explains that one of the purposes of the book was to:

"dispel the myth that lesbians in India were all urban, Westernised and came from the upper and middle classes."

The author also highlights that public discourse has not created space for the voices and experiences of persons from the LGBTQ community who also belong to marginalized communities:

"the lives of most of our subjects are equally distant and alienated from upperclass, urban Indian as well as all Western representations of homosexuality, and their personal struggles, which cannot be separated from

their socioeconomic struggles and traditional contexts, are largely unmirrored and therefore remain largely unknown."

The book variously gives accounts of women in queer relationships from different religions and communities, hailing from different parts of the country. They or their family members worked as domestic workers, factory workers, construction labourers, and Home Guards, amongst other professions.

92. The discussion in this segment has not scratched the surface of the rich history of the lives of LGBTQ persons in India, which continue into the present. Yet, even the limited exploration of the literature and reportage on the subject makes it abundantly clear that homosexuality or queerness is not solely an urban concept, nor is it restricted to the upper classes or privileged communities. The discussion in the preceding paragraphs reveals the diversity of the queer population. People may be queer regardless of whether they are from villages, small towns, or semiurban and urban spaces.

Similarly, they may be queer regardless of their caste and economic location. It is not just the English-speaking man with a white-collar job who lives in a metropolitan city and is otherwise affluent who can lay claim to being queer but also (and equally) the woman who works in a farm in an agricultural community. Persons may or may not identify with the labels 'queer,' 'gay,' 'lesbian,' 'trans,' etc. either because they speak languages which are not English or for other reasons, but the fact remains that many Indians are gender queer or enter into relationships with others of the same sex. In the words of a person (assigned female at birth) who worked at a factory in Ajmer:

"You ask if I have heard the word "lesbian". No, I have not heard it. I consider myself a male. I am attracted to women. Why create categories, such deep differences between male and female₹ Only our bodies make us different. We are all human beings, aren't we₹ When a human being is born, he does not know anything. He is told, "These are your parents, sisters, father and brothers".

Similarly we are told, "You are boys, and you are girls". But I say I am a man. I choose to be one. Despite our physical differences, we can be who we want to be and do what we want to do. But the final analysis, we are all the same, we are all human beings, we are all equal, regardless of what kind of bodies we have. This common factor should be considered, not the ways in which we are different."95

93. To imagine queer persons as existing only in urban and affluent spaces is to erase them even as they exist in other parts of the country. It would also be a mistake to conflate the 'urban' with the 'elite.' This renders invisible large segments of the population who live in urban spaces but are poor or otherwise

marginalized. Urban centres are themselves geographically and socially divided along the lines of class, religion, and caste and not all those who live in cities can be termed elite merely by virtue of their residence in cities.

94. Finally, it is essential to recognize that expressions of queerness may be more visible in urban centres for a variety of reasons. For one, cities may afford their inhabitants a degree of anonymity, which permit them to live their true lives or express themselves freely. This may not always be possible in smaller towns or villages, where the families or communities of queer persons may subject them to censure and disapprobation, or worse.96

The experiences of queer persons may also be more visible in urban spaces because such persons have greater access to the various resources required to make one's voice heard. This only means that the marginalized are yet to be heard when they speak and not that they do not exist. This is not to say that society does not inflict violence upon the LGBTQ community in cities but only to indicate potential reasons for their increased visibility in cities. In conclusion, queerness is not urban or elite. Persons of any geographic location or background may be queer.

c. The rise of Victorian morality in colonial India and the reasons for the re-assertion of the queer identity

95. In pre-colonial times, the Indian subcontinent was home to a diverse population with its own, unique understanding of sexuality, companionship, morality and love. Stories, history, myths, and cultural practices in India indicate that what we now term 'queerness' was present in pre-colonial India. It would not be a faithful description of the times to say that queerness was "accepted" by the populace.

Rather, society did not often view (many manifestations of) the queer identity as something that required acceptance to begin with because it formed a part of ordinary, day-to-day life, similar to the heterosexual or cisgender identities. This was true for many parts of the country at many points of time, though perhaps not everywhere and at all times. This is not to suggest that society did not inflict any violence upon members of the LBGTQ community in pre-colonial times. Rather, it is to highlight that current beliefs, attitudes, and practices which are hostile to the LGBTQ community are not necessarily natural successors of the past.

96. The native way of life gradually changed with the entry of the British, who brought with them their own sense of morality. It was not their morality alone that they brought with them but also their laws. This Court discussed the legal

legacy of the colonizers at length in National Legal Services Authority (supra) and Navtej Singh Johar (supra). To recapitulate, Section 377 of the IPC inter alia criminalized queer sexual acts and in so doing, imposed the morality of the British on the Indian cultural landscape.

The British also enacted the Criminal Tribes Act 187197 to provide for the "registration, surveillance and control of certain criminal tribes and eunuchs."98 It permitted the government to declare a group of persons a "criminal tribe" if it was of the opinion that the group was "addicted to the systematic commission of non-bailable offences."99

Part II of the Criminal Tribes Act regulated transgender persons (which it referred to as 'eunuchs') and subjected them to enormous indignity inter alia by permitting the government to medically examine them, providing for harsh penalties if they dressed "like a woman" or danced or played music, preventing them from making gifts, and rendering their wills invalid. Although the Criminal Tribes Act was repealed by the government after independence, its underlying prejudices seem to continue in various central and state enactments on 'habitual offenders.'

97. The criminalization of the LGBTQ community and their resultant prosecution and conviction under these laws100 coupled with the violence enabled by these laws drove large sections of the community underground and into the proverbial closet. Society stigmatized any sexual orientation which was not heterosexual and any gender identity which was not cisgender. Persons with an atypical gender identity and / or sexual orientation were therefore compelled to conceal their true selves from the world.

Their presence in the public sphere gradually shrunk even as homophobia and transphobia flourished. Despite their alienation from mainstream society, many queer persons continued to live their lives in ways that were visible to the public eye. Indeed, many of them (such as hijras) often did not have a choice but to do so. Others expressed their sexual orientation only in the comfort of their homes, in the presence of their families and friends.

Yet others led double lives - they pretended to be heterosexual in public and while with their families and made their sexual orientation known to a select few persons, who were often themselves of an atypical sexual orientation. Some people entered into 'lavender marriages' or 'front marriages' which are marriages of convenience meant to conceal the sexual orientation of one or both partners.

98. It is evident that it is not queerness which is of foreign origin but that many shades of prejudice in India are remnants of a colonial past. Colonial laws and

convictions engendered discriminatory attitudes which continue into the present. Those who suggest that queerness is borrowed from foreign soil point to the relatively recent increase in the expression of queer identities as evidence of the fact that queerness is 'new,' 'modern,' or 'borrowed.' Persons who champion this view overlook two vital details. The first is that this recent visibility of queerness is not an assertion of an entirely novel identity but the reassertion of an age-old one.

The second factor is that establishment of a democratic nation-state and the concomitant nurturing of democratic systems and values over six decades has enabled more queer persons to exercise their inherent rights. An environment has been fostered which is conducive to queer persons expressing themselves without the fear of opprobrium. This Court also recognizes that queer persons have themselves been crucial in the project of fostering such an environment.

The constitutional guarantees of liberty and equality have gradually been made available to an increasing number of people. This seems to be true across the world - the global turn towards democracy has created the conditions for the empowerment of queer people everywhere. Progress has perhaps been inconsistent, non-linear, and at a less than ideal pace but progress there has been. We must recognize the vital role of Indian society in contributing to the evolving social mores. The evolution may at times seem imperceptible, but surely it is.

d. Who is an Indian and what practices are Indian₹

99. The tenor of the arguments put forth by some of the respondents implied that a union between two persons of the same sex is not Indian. To determine whether this contention is correct, it is necessary to query when something or someone is 'Indian.' This question is all the more important in a country as diverse as ours, with twenty-eight States, eight Union Territories, a population of more than one billion persons, twenty-two languages recognized by the Constitution and scores more which are spoken by its people, at least eight religions, tribal and nontribal populations, and varying cultures which are sometimes at odds with one another.

A thing, an occurrence, or a practice is 'Indian' when it is present in India, takes place here, or is practised by Indian citizens. Something which is Indian could be present from time immemorial or it could be a recent development. Regardless, this is not a game of numbers. The constitutional guarantee certainly does not fade based on the level of acceptability that a particular practice has achieved. Sexual and gender minorities are as Indian as their fellow citizens who are cisgender and heterosexual.

iii. Understanding the institution of marriage

a. There is no universal conception of marriage

100. There is no universal definition of marriage. Marriage is understood differently in law, in religion, and in culture. Some religions consider marriage a sacrament while others consider it a contract. The law defines the conditions for a valid marriage, such as the minimum age required of a party to the marriage, whether both parties have consented to the marriage, or whether the parties are within the degrees of prohibited relationship. A marriage is valid in the eyes of the law as long as the preconditions in the concerned law(s) are satisfied.

A precondition is different from a feature or characteristic in that the former is a prerequisite to a valid marriage whereas the latter is not. The law provides remedies which either party may avail of in the presence or absence of certain features or characteristics. For example, Section 27 of the SMA provides that a party to a marriage may present a petition for divorce on the ground that the other party is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the IPC. However, it does not automatically render a marriage void if one of the parties is imprisoned.

101. Once a couple marries, it is left to them to give meaning ang content to their relationship. It is their prerogative to determine the characteristics of their marriage and give meaning to their relationship. These aspects of a marriage vary with each relationship, and it is impossible for this Court to authoritatively state that a particular idea of marriage is the only valid understanding of marriage. This being the case, any attempt to formulate a general and universally applicable definition of marriage is fraught with difficulty. With this qualification, this Court will list some features of marriage that are considered its core components.

102. Marriage is a voluntary union - of the mind, the body, and the soul. Marriage signifies a deep and abiding commitment to one another and a devotion to the relationship. When two people marry, they intend to be in a life-long relationship. Both the parties to the marriage provide emotional, financial, and spiritual support to the other. Each is an intellectual partner of the other, as also a friend. Love, respect and companionship are said to be the hallmarks of a successful marriage.

Marriage is a gateway into the creation of a family through childbearing and childrearing, although it is not a precondition to the creation or existence of a family. The sole purpose of marriage is not to facilitate sexual relations or procreation, although that may be one of the main motivations for entering into a

marriage. Marriage has emotional and associational components to it, which cannot be relegated to the background even as the sexual component is foregrounded.

Important as they are, sexual relations and procreation alone are not the exclusive foundation for marriage. Although the aspects of marriage discussed in this paragraph are considered to be core components of marriage, the existence of a valid marriage (by legal, religious, or cultural definitions) is not predicated upon the existence of any of these elements. This may be due to choice or circumstance or even some combination of the two.

103. A married couple may not have biological children because of their age, problems with fertility, or simply because they choose not to. Many couples who choose to have children may do so through assisted reproductive technologies, surrogacy, adoption or other methods which are not traditional. Many married couples may choose not to engage in sexual relations for various reasons. In some marriages, the couple may not reside in the same home or even city, temporarily or permanently.

The emotional, financial, or spiritual contribution to a marriage may vary with each couple. While the law identifies certain conduct or behaviour as grounds for divorce they do not render a marriage void in and of themselves. The marriage continues to be a marriage, even if it is atypical or runs contrary to the notion of an 'ideal marriage' that a person may have. This is not only true for the legal conception of marriage, but also of the cultural and social conceptions.

Society continues to consider a marriage to be a marriage even if, say, a married couple decides to live apart because they work in different cities or countries or if they do not have children. This is equally true of the other facets of marriage discussed in this paragraph. The exercise of defining the content of the institution of marriage as well as delineating its purpose is a subjective exercise undertaken by the couple in question.

104. The respondents suggested that an 'ideal marriage' has many or all of the components discussed in the preceding paragraphs. This argument acknowledges that many of these components are not necessarily present in the institution of marriage but places them in the realm of normative or aspirational values. In other words, the argument is that marriages ought to fit with these components even if a given marriage does not fit with them. The answer to this argument is straightforward - there is no legal basis to elevate these personals ideals to the status of normative requirements.

To the contrary, every effort must be made to practice and inculcate constitutional ideas - the ideals of human dignity, liberty, equality, and fraternity - in our everyday lives. These constitutional ideals demand that we respect the autonomy and dignity of each person. We must respect their decisions and choices. It is only when a particular decision or action is contrary to the law or an affront to constitutional values that this Court may step in. In all other instances, citizens are empowered to define the content of their lives and find meaning in their relationships.

105. Different religions may have different understandings of marriage, for instance, whether marriage is a sacrament or a contract. There may be diverse social constructs of marriage within a religious grouping. Similarly, there may be different conceptions of marriage within a particular community. This is best understood with the aid of an example. Section 5(iv) of the HMA stipulates that a marriage may be solemnised between two persons if they are not within the degrees of prohibited relationship, unless a custom or usage governing the parties permits their marriage.

One of the degrees of prohibited relationship is an uncle and his niece.101 In many communities, an uncle cannot marry his niece because the community does not have a custom or usage which permits such a marriage. Yet, in many other communities such a marriage is customary and therefore permitted in terms of the HMA. The customs of many tribes of the country similarly permit an uncle to marry his niece.

Many tribal communities are governed by their own customs and usages. Such marriages are valid and recognised by tribal customs although they are not recognised by the law governing other communities in the country. The solemnisation of a marriage, too, takes different forms in different communities. What may be customary, and therefore not only accepted but encouraged in a particular religion or community may not have a parallel in another religion or community.

106. While each individual is entitled to their own conception of marriage, a universal conception of marriage, its purpose, and content would be difficult to encapsulate in an exhaustive enumeration. Consequently, the argument advanced by the respondents that the very conception of marriage does not permit queer individuals to marry cannot be accepted. Each religion, each community, each couple defines the institution of marriage for itself. The queer community is just as much a community as any other, though perhaps not in the traditional sense in which the term is used with respect to customs which govern marriage.

107. There is no gainsaying the fact that procreation and the human desire to have a family constitute significant characteristics of the institution of marriage. Yet, even heterosexual couples may find themselves unable or unwilling to procreate. Age, health and a variety of circumstances may bear on the decision of a heterosexual couple to bear or not to bear children.

The inability of queer couples to procreate does not act as a barrier to the entry of queer persons to the institution of marriage just as it does not prevent heterosexual couples who are unable or choose not to procreate. Viewing marriage solely through the lens of sexual relations or procreation is a disservice to married couples everywhere including heterosexual couples because it renders invisible the myriad other aspects of a marriage as an emotional union. It relegates the aspects of companionship and love in a marriage to an inferior status. Such a conception of marriage is narrow and factually incorrect.

b. The conception of marriage is not static

108. The understanding of marriage - socially, culturally, and legally - has undergone a sea change over time. Some changes which are specific to India are discussed in this segment. This segment is not an exhaustive discussion of the changes to the institution of marriage in India. It illustrates some changes in service of the point that the conception of marriage is not static.

I. Sati

109. Although far from a universal practice, sati was once permitted and practiced in India. This abhorrent practice was inextricably intertwined with the institution of marriage because a widow was either tied to the funeral pyre of her deceased husband or pressed upon to jump into it. Various rules and regulations restricted and later, barred the practice in the colonial era. In modern day India, the Commission of Sati (Prevention) Act 1987 criminalizes attempts to commit sati, the abetment of sati, as well as its glorification.

II. Widow remarriage

110. In accordance with long-standing custom, women (mostly from the dominant castes) were not permitted to remarry if their husbands died. In many communities, the heads of widows were shaved and they were prohibited from wearing jewellery or colourful clothes. This was considered a 'living death.' Many (including Mahatma Jyotirao Phule, the Brahmo Samaj, Ishwar Chandra Vidyasagar, and Tarabai Shinde) attempted to reform the institution of marriage to permit widows to remarry. Civil society offered tremendous resistance to their attempts at reform.102 Ultimately, the Hindu Widows' Remarriage Act 1856 was enacted, permitting widows to remarry.

III. Child marriage and the age of consent

111. A discussion of the history of marriage in India would be incomplete without reference to child marriage and the legal age of consent. Child marriage was widespread in most religions and communities. The age of consent for girls was fixed at ten years in 1860.

In 1890, a thirty-five year old man called Hari Mohan Maity caused the death of his ten year old wife Phulmoni Das (also known as Phulomonee Das) through violent sexual intercourse with her. While this would be considered rape and / or aggravated penetrative sexual assault of a child by prevailing legal standards, the concerned court ruled that Hari Mohan Maity had a legal right to engage in sexual relations with Phulmoni Das because she was above the age of consent at the time.103 The age of consent for girls was then raised to twelve.

112. Decades later, the Child Marriage Restraint Act 1929 raised the minimum age of marriage for girls from twelve to fourteen. In 1949, the criminal law of the country stipulated that the age of consent for girls was fifteen years. The HMA set the minimum age of marriage at fifteen for girls and eighteen for boys. In 1978, the HMA was amended to raise the minimum age of marriage to eighteen for girls and twenty-one for boys. The Prohibition of Child Marriage Act 2006 provided that child marriages would be voidable at the option of the contracting party who was a child at the time of the marriage. Further, this statute criminalizes the act of performing, conducting, directing, abetting, promoting or permitting a child marriage.

113. The Protection of Children from Sexual Offences Act 2012104 was enacted about a decade ago. It is a child-specific legislation which inter alia criminalizes sexual abuse in its various forms. A "child" is defined as any person below the age of eighteen years. In Independent Thought v. Union of India,105 this Court was confronted with the inconsistency between the POCSO Act which criminalized sexual relations with a child and Exception 2 to Section 375 of the IPC which provided that sexual intercourse by a man with his wife was not rape if the wife was above fifteen years of age.

As a consequence of this inconsistency, a person could have been guilty under the POCSO Act but not under Section 375 of the IPC. This Court held that Exception 2 was violative of Articles 14, 15 and 21 of the Constitution and was an affront to constitutional morality. The Court read down Exception 2 as exempting a man from the offence of rape if his wife was above the age of eighteen. Currently, it is a punishable offence for a man to have sexual intercourse with a child, regardless of whether that child is his wife. It is evident that the law governing marriage has come a long way from Phulmoni Das' time.

IV. Other violence in marriage

114. Acts which were once considered the norm in a marriage are no longer countenanced by the law. The giving and taking of dowry, which was and continues to be prevalent in most communities, was criminalised by the enactment of the Dowry Prohibition Act 1961. Prior to its enactment, there was no penalty in law for demanding, giving, or accepting dowry. The family of the bride was often expected to pay large sums of money or present "gift" items of value to the groom or his family, as a condition of the marriage.

The maternal families of innumerable women are harassed and violence is inflicted upon them, in relation to demands for dowry. Parliament inserted Section 498-A of the IPC in 1983. Section 498-A criminalizes the act of a husband or his relative subjecting her to cruelty, as defined in the section. In many cases, the matrimonial families (the husband, the mother-in-law, the father-in-law, and other relatives) murdered the woman because of what they viewed as insufficient dowry or unmet demands for dowry. This led to Parliament amending the IPC in 1986 to include Section 304-B which criminalises 'dowry death.'

115. These provisions of law did not, however, adequately account for genderbased violence in a marriage which are unconnected to dowry. Domestic violence was (and continues to be) prevalent. About two decades ago, the Protection of Women from Domestic Violence Act 2005 was enacted to protect the rights of women who were survivors or victims of domestic violence, either by their husbands or the relatives of their husbands. Prior to the enactment of the law, intimate partner violence which women are generally subject to was not criminalized.

V. Inter-caste and interfaith marriage

116. Inter-caste and interfaith marriages were uncommon in the colonial era and established customs or usages did not govern such marriages. Then, as now, society subjected those who entered into inter-caste and interfaith marriages to discrimination and violence. There was initially no legal framework in place which governed such marriages.

The Special Marriage Act 1872 was enacted to enable the solemnisation of marriages independent of personal law. If two people belonging to different religions wished to marry, they were each required to renounce their respective religion in order to avail of its provisions. The law at the time did not supply a framework in terms of which two persons belonging to different religions could

retain their association or spiritual connection to their respective religions and still marry one another.

117. Parliament was conscious of the limiting and restrictive character of the Special Marriage Act 1872 and enacted the SMA in 1954, which was a more permissive legislation in that any two persons could marry, without having to repudiate their respective religions. By stipulating that "a marriage between any two persons may be solemnized under this Act,"106 the SMA also set out a mechanism for inter-caste marriages to be solemnized independent of personal law.

118. The families or relatives of couples who entered into inter-caste or interfaith marriages would frequently inflict violence upon them, even to the extent of brutally murdering them. Their communities would either ordain or participate in these atrocities. Such murders are colloquially referred to as "honour killings" and are more accurately termed as caste-based murders.

It is a most unfortunate truth that this culture of violence persists to date. Couples who face this opprobrium have knocked on the doors of this Court inter alia seeking protection from their families and others who oppose their relationship107 and this Court has otherwise been seized of cases arising from violence in this context.108 In Shakti Vahini v. Union of India,109 this Court took note of the violence against couples in inter-caste and interfaith marriages. It directed the state machinery to take preventive as well as remedial measures to protect such couples who wished to marry or who were recently married.

119. It is beyond dispute that couples in inter-caste and interfaith relationships have historically been forced to contend with and continue to contend with enormous difficulty while solemnizing their unions. As evident from the discussion in the preceding paragraph, large sections of society were and are fiercely opposed to such marriages. The opposition stems, at least in part, from a belief that a marriage ought to consist of two individuals from the same religion or caste.

Parliament chose to enact the SMA despite the opposition to atypical marriages and has not chosen to repeal the SMA or otherwise exclude the celebration of intercaste marriages under personal laws despite continuing hostility from the communities of such couples. Parliament has presumably done so because it is cognizant of the fact that the exercise of fundamental rights is not contingent upon the approval of the community.

Similarly, this Court has carried out the constitutional mandate by protecting the rights of individuals and couples in the face of considerable opposition from

their families. In a democracy, certain rights inhere in all individuals. If the exercise of rights was contingent upon everyone else or, at least a substantial portion of the community approving of such exercise, we would be doing a disservice to a constitutional democracy. The Constitution does not require individuals to first convince others of the legitimacy of the exercise of constitutional rights before they exercise them.

VI. Divorce

120. Section 10 of the Indian Divorce Act 1869, which is applicable to Christians, previously permitted the husband to file a petition for divorce on the ground that his wife was guilty of adultery. However, the wife was permitted to file a petition for divorce on the ground that her husband was guilty of adultery only in conjunction with certain other grounds (such as conversion to another religion or bigamy).

In Mary Sonia Zachariah v. Union of India,110 the Kerala High Court inter alia struck down a part of Section 10 and permitted Christian women to seek divorce on the ground of adultery alone. Parliament amended the Indian Divorce Act 1869 in 2001 by substituting Section 10 with a provision that made various grounds of divorce (including adultery) available to both the husband and the wife, equally.111 It also introduced Section 10A, which permitted Christian marriages to be dissolved by mutual consent, for the first time.

121. In terms of Hindu customary law, certain communities permitted divorce whereas others did not. The HMA extended the right of divorce to all Hindus when it was enacted in 1955. In 1976, Section 13B was introduced in the HMA, permitting Hindus to dissolve their marriage by mutual consent, for the first time. In Shilpa Sailesh v. Varun Sreenivasan,112 this Court held that it has the authority to grant divorce when there is a complete and irretrievable breakdown of marriage notwithstanding the opposition of one of the parties to the marriage to its dissolution.

122. Islamic customary law permitted divorce in certain situations and through certain modes. One of the modes was talaq-e-biddat or triple talaq by which the husband could instantly, irrevocably, and unilaterally divorce his wife. In Shayara Bano v. Union of India,113 this Court held that the practice of severing the marital bond through the mode of talaq-e-biddat was unconstitutional.

VII. The implications of the discussion in this segment

123. Mahatma Jyotirao Phule, Ishwar Chandra Vidyasagar, Pandita Ramabai, Tarabai Shinde, Raja Ram Mohun Roy and countless others voiced their opposition (to varying degrees and to varying effects) to one or the other practice

discussed in this segment. Their views were met with fierce opposition on the ground that the religious and cultural values of the subcontinent did not permit a departure from tradition. In some cases, the opposing groups relied on scriptures to justify their respective stances.114 When Dr. B R Ambedkar introduced the Hindu Code Bill, many opposed the provision for divorce on the ground that the Hindu religion did not envisage divorce because it was a sacrament.115

It is seen that there are competing understandings of the institution of marriage at every stage of its evolution. Yet, the understanding which was grounded in justice and the rights of the people has prevailed. Injustice in the law in relation to the institution of marriage (in the form of demands for dowry, dowry death, or child sexual abuse) or as incidental to the institution (as in the case of sati or widow remarriage) is slowly but surely in the process of being eradicated. While these practices were once permitted and encouraged, they are currently not only frowned upon but also criminalized.

124. This walk through history is not an attempt by this Court to take on the mantle of historians. The discussion demonstrates that the institution of marriage has not remained static or stagnant. To the contrary, it is change which characterizes the institution. All social institutions transmogrify with time and marriage is no exception. From sati and widow remarriage to child marriage and inter-caste or interfaith marriages, marriage has metamorphosed.

The institution as we know it today would perhaps be unrecognizable to our ancestors from two hundred years ago. Despite vehement opposition to any departure from practice, the institution of marriage has changed. This is an incontrovertible truth. Here, it is also important to take note of the fact that these changes were brought about largely by acts of Parliament or the legislatures of the states.

While the passage of many laws was preceded by significant social activism, it was the legislature which ultimately responded to the call for change. Even as Parliament (and in some cases, the courts) expand the liberties of the people to conduct their lives in a manner they see fit (in accordance with law), many sections of society remain opposed to these changes. Regardless of such opposition, the institution of marriage has undergone a sea change. It is therefore incorrect to characterise marriage as a static, stagnant or unchanging institution.

c. The implications of this discussion for the right of queer persons to marry

125. From the discussion in this segment of the judgment, it is evident that the institution of marriage is built and re-built by societies, communities, and individuals. A universal conception of marriage is not present nor is the

conception of marriage static over time. The only facet of marriage which is constant across religion, community, caste, and region is that the couple is in a legally binding relationship - one which recognizes an emotional bond of togetherness, loyalty and commitment - that is recognised by the law. The law recognises the commitment that the couple has for one another by regulating the institution of marriage and conferring certain rights and privileges on them.

126. In Shafin Jahan (supra), a three-Judge Bench of this Court held:

"84. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences."

127. The consequence of the judgment of this Court in National Legal Services Authority (supra) and Navtej Singh Johar (supra) is that the members of the queer community are no longer second-class citizens of our country. Their individual and group rights are on par with any other citizen of this country. Their gender identity or sexual orientation cannot be a ground on which they are discriminated against.

128. Mr. Tushar Mehta, the learned Solicitor General, submitted during the course of his arguments that two persons from the LGBTQ community have the right and the liberty to celebrate their union and label the union with any term they see fit, including 'marriage.' The Union of India does not, however, wish to accord legal recognition to such ceremonies and unions. If the marriages of queer people were to be recognized by law enacted by Parliament, it would be the next step in its progression.

iv. The significance of marriage as a socio-legal institution

129. One of us (DY Chandrachud, J.) in Navtej (supra) held that the members of the LGBTQIA+ community have a right to navigate public spaces without the interference of the State. The claim of the petitioners in this case, however, is on a slightly different footing. The petitioners seek the active involvement of the State in their relationships through conferring recognition. Through marriage, the State confers legal recognition to a relationship between two heterosexual persons.

By doing so, it recognises that relationships in the form of marriage are not merely a lifestyle but an important constituent unit for the sustenance of social life. The State confers innumerable benefits, both tangible and intangible, to a family unit constituted by marriage. The petitioners seek that the State grant legal recognition to the relationship between non-heterosexual persons in the form of marriage because they are otherwise excluded from the express and

implied benefits of marriage. They claim that non-heterosexual unions have not been able to attain social sanctity because their relationship is invisible in the eyes of the law.

130. Before we discuss the State's interest in regulating the personal relationship between two persons to understand the necessity of its interference in the private sphere, it is important to discuss the manner in which the State regulates marriages.

131. The State: firstly, prescribes conditions with respect to who can enter into a valid marriage; secondly, regulates the marital relationship during its sustenance; and thirdly, regulates the repercussions of the breakdown of a relationship of marriage.

132. The State prescribes various conditions for the solemnization of a valid marriage which inter alia includes the conditions of consent, a minimum age requirement, and whether the parties are within the degrees of prohibited relationship. The law regulates the conduct of the parties to a marriage in numerous ways. For example, the law penalises the husband and his family members if they treat the wife cruelly, including demands for dowry.116

Similarly, the Protection of Women from Domestic Violence Act 2005117 penalises persons for domestic violence in the course of a domestic relationship which has been defined to include marriage.118 The grounds for divorce prescribed in various marriage laws also regulate the conduct of parties because their actions during the sustenance of a marriage may be a ground for the legal dissolution of that marriage. The valid grounds for divorce include where one of the parties has a sexual relationship outside of marriage,119 or has deserted their spouse,120 or treats the spouse with cruelty.121

The State regulates the relationship between the parties after the divorce by prescribing the payment of maintenance. Under the SMA, the wife can claim alimony or maintenance and under the HMA, both the husband and the wife can claim maintenance. The above discussion elucidates that the State plays a crucial role in regulating marriage. Marriage has attained both social and legal significance because of the active involvement of the State at every stage of the marital relationship - during entry into it, during its subsistence, and in its aftermath.

133. Marriage was earlier a purely social institution unregulated by the State. What prompted the State to regulate personal relationships₹ There are two prominent reasons. The first reason was to regulate the social order. The State regulated social order by firstly, regulating the sexual conduct of persons

through marriage, and secondly, by prescribing a legal mechanism for the devolution of property based on the legitimacy of the heir.

134. With respect to the first of the reasons, the State used marriage as a tool to regulate sexual behaviour.122 The State prescribed social rules through the vehicle of law by devising marriage as an exclusive relationship. Engaging in sexual conduct outside of marriage is a ground for divorce under personal marriage laws and the civil marriage law.

It is also crucial to note that impotency and not sterility is a ground for divorce.123 Impotency is the inability of a man to engage in sexual intercourse. On the other hand, sterility is the inability of a man or a woman to procreate. By prescribing impotency as a ground for declaring a marriage void (and not sterility), the State emphasised the centrality of sexual relations in a marriage as opposed to procreation. In this way, the State governs the conduct of society by regulating sexual conduct in a marital relationship.

135. Another manner in which the State intended to regulate social order by regulating marriage is by placing marriage at the centre of property devolutions. Ownership and control over property was viewed as being important for the establishment of a just social order. One of the reasons for the establishment of a social contract for the creation of a State by which individuals gave up their right to live as unregulated free individuals in exchange of protection of their rights and freedom is for safeguarding of property rights.

136. There must be rules for the devolution of property to avoid conflicts. These rules may vary in nature. Societies may establish rules for a common property system, or private property system, or a mixture of both. These legal rules have two primary components which concern how the title over the property is secured and how the title further devolves in case of intestate succession. Legal rules for the devolution of title are premised on marriage in modern societies.

137. Brian H Bix in the paper "State interest and Marriage" argues that there is sufficient material to establish that the State regulates marriage to respond to the special interests of specific social groups.124 It has been argued that the propertied classes wanted to reduce any uncertainty about succession, which may have arisen because of a lack of clarity regarding the line of succession.

It has also been argued that noble families desired to prevent their children's marriages with partners of lower social status. Irrespective of whether the State regulated marriage to further entrench the existing social order or to transform the existing social order based on constitutional values, it is clear that property also plays a prominent role in the regulation of marriage.

138. The second reason for the State to be involved in the regulation of personal relationships was to remodel society, premised on the constitutional value of equality. A constitutional order premised on equality, dignity, and autonomy would be unworkable if personal relationships which are the building blocks of a just society are grounded on values that are antithetical to the Constitution. The Constitution declares that there shall be no discrimination on the grounds of religion, race, caste, and sex.

How would it be a just society if on the one hand the Constitution declares that there shall be no discrimination, and on the other hand, inter-faith and inter-caste relationships bear the brunt of a brutal society through ostracization and "honour" killings or caste-based murders₹ How just would society really be if in spite of the constitutional guarantees of equality of women in public posts and educational institutions, they suffer patriarchal attitudes in the private sphere₹

139. The State regulates marriage to create a space of equal living where neither caste, religion, and sex prevent any person from forming bonds for eternity nor do they contribute to the creation of an unequal relationship. The State's regulation of marriage recognised that even though a married couple is a 'unit' for the purposes of laws, they still retain their individual identity and are entitled to constitutional guarantees. For example, one of the parties need not necessarily be at fault for the couple to secure divorce.

Our laws recognise divorce by mutual consent. They recognise that the parties to a marriage are in the best position to decide if they should continue with the marital relationship. Divorce by mutual consent is grounded on the principle of autonomy. The involvement of the State in the regulation of marriage opened up the space for inter-caste marriages and interfaith marriages, and secured prominent constitutional rights.

140. The regulation by the State and its attempts to create a more equal personal sphere also contribute towards factual equality where women are empowered to defy patriarchal notions of gender roles in daily life. The impact of the State's involvement in creating a more just personal space by reforming the institution of marriage on the basis of constitutional ideals can be seen when a wife chooses to retain her surname after her marriage or where the partners equally contribute towards raising their child.

141. The State recognised that a Constitution which upholds the values of freedom, liberty, and equality cannot permit the sustenance of a feudal institution undermining the rights of marginalised communities. Thus, it is important to view the involvement of the State in regulating the institution of

marriage in terms of its transformative potential in ensuring equality in the personal sphere and in family life.

142. Having discussed why and how the State regulates the institution of marriage, it is important that this Court recognise the effect of such regulation. Apart from the benefits of the State's involvement which are recognised above (that is, in creating a social order in consonance with the principles laid down in the Constitution), there are other benefits. These benefits can be segregated into tangible and intangible benefits.

143. The intangible benefits of marriage are guided by hidden law. Hidden law comprises of norms and conventions which organize social expectations and regulate everyday behaviour.125 The benefits which are conferred by a legal institution must not be measured solely in terms of the benefits which are conferred by the law. It must also include the benefits which are conferred by hidden law. These are benefits which are not traceable to law but which are created by norms. One such benefit of marriage which is traceable to hidden law is the social validity and recognition which marriage as an institution confers upon relationships.

144. It is pertinent to note that the State only regulates heterosexual marriages. The law confers numerous rights and benefits which flow from a marriage but ignores the existence of any other form of relationship. The invisibilization of relationships which are not in the form of marriage on the one hand bestows sanctity and commitment to marriages and on the other hand strengthens the perception that any other form of relationship is fleeting and non-committal.

145. The DV Act has come the closest to recognising the existence of relationships in forms other than marriage. The Act defines "domestic relationship" as a relationship between two persons who live together in a shared household, when they are related by consanguinity, marriage, or 'through a relationship in the nature of marriage. In Indra Sarma v. VKV Sarma126, the issue before this Court was whether live-in relationships can be considered to be a relationship in the nature of marriage. A two-Judge Bench of this Court observed that a relationship in the nature of marriage is distinct from a marriage.

It was further observed that for a relationship to be considered to be in the nature of marriage, factors such as the duration of the relationship, whether the couple live in a shared household, the pooling of resources and financial arrangements such as long-term investment plans which indicate the existence of a long standing relationship, and domestic arrangements such as entrusting the responsibility especially on women to run the household and do household

activities, the sexual relationship, procreation, socialisation in public, and the intention and conduct of the parties must be considered.

146. The observations of this Court in Indra Sarma (supra) elucidate that a relationship is in the nature of marriage only when an inference can be drawn from the surrounding circumstances that it will be a long-lasting relationship. Thus, while there is a positive presumption that marriages are long-lasting, there is also a negative inference that all other relationships which are not in the form of marriage are short-lived.

147. In addition, the observations of this Court in Indra Sarma (supra) indicate that marriage has always been understood and continues to be understood in terms of the stereotyped traditional gender roles. The wife is entrusted with the responsibility of taking care of household chores and the husband is expected to be the breadwinner of the family. The public-private divide is stark. Women are relegated to the private sphere where their contribution towards running the household is diminished.

An inherent feature of the institution of marriage is the unequal heteronormative setting in which it operates. It is important for us to observe that the State while recognising the relationship between two heterosexual individuals in the form of marriage does not recognise or promote the gendered division of labour in the home. The State by regulating marriage has sought to redefine heterosexual relationships by emphasising on the autonomy of both parties.

148. The intangible benefits of marriage extend beyond the conferment of social recognition to the relationship of the couple. It also confers benefits which cannot be measured in tangible form to the children born of the marital relationship. The law confers on children who are born of wedlock with benefits in succession. In addition, the law's recognition of the concepts of legitimate and illegitimate children have social repercussions in that illegitimate children are shunned by the society.

These intangible benefits of marriage indicate that society regards marriage as the primary and sole unit through which familial relationships can be forged. As Marshall CJ observed in Goodridge v. Department of Public Health,127 in a very real sense, there are three partners in a civil marriage: two willing partners and an approving State.

149. There are numerous tangible benefits conferred by the State which flow from marriage and touch upon every aspect of life. Tangible benefits conferred by marriage can be classified into (i) matrimonial and child care related benefits;

(ii) property benefits; (iii) monetary benefits; (iv) evidentiary privilege; (v) civic benefits; and (vi) miscellaneous benefits.

150. Matrimonial and child care related benefits include the provisions of permanent alimony and maintenance,128 maintenance if a person with sufficient means refuses to maintain his wife129, to adopt a child as a couple130, and to avail rights related to surrogacy131. Property benefits would include securing a share in case of intestate succession132. Legislation such as Section 16 of the HMA has conferred legitimacy on children born from void or voidable marriages with a consequential right to or in the property of the parents (and not of any other person).

Monetary or financial benefits which flow from marriage include the provisions to be nominated for the payment of gratuity133, to receive funeral expenditure for the deceased spouse, 134 for the payment of medical benefits to the spouse of the insured person,135 and to claim provident fund as the dependent of a deceased spouse.136 Additionally, the provisions of the Income Tax Act 1961 provide numerous tax benefits for payments made on behalf of the spouse. For example, Section 80C of the Income Tax Act 1961 permits deduction of the insurance premia paid for the spouse's life insurance policy and Section 80D permits deduction of expenses towards the premium of spouses health insurance.

151. Evidentiary privilege includes the privilege accorded to communications during marriage under the Indian Evidence Act 1872137. Civic benefits include the provision to apply for citizenship or to be an overseas citizen of India by virtue of the spouse's citizenship138. Miscellaneous benefits include other benefits under law which cannot be grouped under the above categories which inter alia includes the recognition of a spouse as a 'near relative' for the purpose of the Transplantation of Human Organs and Tissues Act 1994139.

152. At this juncture, it is important to recall the submission made by the learned Solicitor General that even today, as the law exists, there is no prohibition against two queer persons holding a marriage ceremony. However, they would not be recognised as married partners by State and non-State entities for the purposes of the law. The non-recognition of non-heterosexual marriages denies the petitioners the social and material benefits which flow from marriage which captures the true essence of marriage. Access to the institution of marriage is crucial to "individual self-definition, autonomy, and the pursuit of happiness"140 because of these expressive and material benefits which flow from marriage.

v. The nature of fundamental rights: positive and negative postulates

153. Before we embark on an analysis of whether the Constitution recognises the right to marry, it is imperative that we discuss how the courts recognise unenumerated rights or derivative rights. The Ninth Amendment to the US Constitution states that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". Though the Indian Constitution does not contain such a provision, it is implied that the rights enumerated in Part III are not exhaustive. The fundamental rights recognised in Part III are identified in the level of abstraction- that is, equality, liberty, and expression.

The Constitution does not provide a detailed enumeration of the facets of each enumerated right. The Courts, while determining the scope of an enumerated right, lay down its facets and conceptions. For example, Courts have held that the true essence of the right to equality is not encompassed in formal equality where all persons are treated alike irrespective of the unequal socioeconomic status but in substantive equality.141 Similarly, this Court has in numerous judgments held that the right to life and liberty recognised under Article 21 would be obscure if other crucial facets of liberty are not recognised. It is in this vein that this Court recognised, inter alia, the right to livelihood,142 the right to speedy trial,143 and the right to education.144

154. Fundamental rights are characterized as positive rights and negative rights. In fact, some draw a distinction between fundamental rights (Part III) and the Directive Principles of State Policy (Part IV) by arguing that the former consists of negative rights and the latter of positive rights. In constitutional theory, negative rights are understood to involve freedom from governmental action whereas, positive rights place a duty on the State to provide an individual or a group with benefits which they would not be able to access by themselves.

155. Indian jurisprudence on the scope of fundamental rights can be divided into two thematical facets. In the first facet, the distinction between negative rights and positive rights faded with the harmonious reading of fundamental rights and Directive Principles of State Policy by the courts.145 The Courts used the Directive Principles to inform the scope of fundamental rights.

In Unnikrishnan v. State of Andhra Pradesh146, the issue before this Court was whether the Constitution guarantees a fundamental right to education to its citizens. This Court held in the affirmative and traced the right to Article 21 and the Preamble of the Constitution. Jeevan Reddy, J. writing for the majority observed that education is of transcendental importance in the life of an individual without which the objectives set forth in the Preamble cannot be achieved.

It was further emphasised that the Constitution expressly refers to education in Articles 41, 45, and 46 of the Constitution which indicates the importance conferred to it. However, this Court limited the scope of the right to education in view of Article 45 which states that the State shall endeavour to provide free and compulsory education for all children until they complete the age of fourteen years. Thus, this Court held that the Constitution guarantees a right to free education for all children until they complete the age of fourteen years.

156. In the second facet, the Courts read fundamental rights to include both negative and positive postulates independent of the Directive Principles of State policy. YV Chandrachud, C.J. writing the opinion for the majority in Minerva Mills v. Union of India,147 observed that fundamental rights deal with both negative and positive postulates.

In Indibily Creative Private limited v. Government of West Bengal148, one of us (DY Chandrachud, J. as he then was) observed that Article 19 imposes a negative restraint on the State to not interfere with the freedoms of all citizens and a duty on the State to ensure that conditions for the free and unrestrained exercise of the freedom are created. In Justice KS Puttaswamy (9J) (supra), a nine-Judge Bench of this Court held that the Constitution guarantees the right to privacy. This Court expressly held that the right to privacy includes both negative and positive postulates. The negative postulate consists of the right to be left alone and the positive postulate places a duty on the State to adopt measures for protecting and safeguarding individual privacy.149

157. The second facet on the scope of fundamental rights is now cemented in Indian constitutional jurisprudence. Fundamental rights consist of both negative and positive postulates preventing the State from interfering with the rights of the citizens and creating conditions for the exercise of such rights respectively. This understanding of fundamental rights is unique to Indian constitutional jurisprudence. Fundamental rights have been construed in this wide manner by Indian Courts because of the constitutional conception of the role of the State. Viewing fundamental rights purely as negative rights runs the risk of undermining the role of the State.

158. Fundamental rights are not merely a restraint on the power of the State but provisions which promote and safeguard the interests of the citizens. They require the State to restrain its exercise of power and create conducive conditions for the exercise of rights. If such a positive obligation is not read into the State's power, then the rights which are guaranteed by the Constitution would become a dead letter. This is because the question of whether the State is curtailing the rights of citizens would only arise if the citizens have the capacity and capability to exercise such rights in the first place.

159. Thus, if the Constitution guarantees a fundamental right to marry then a corresponding positive obligation is placed on the State to establish the institution of marriage if the legal regime does not provide for it. This warrants us to inquire if the institution of marriage is in itself so crucial that it must be elevated to the status of a fundamental right. As elucidated in the previous section of this judgment, marriage as an institution has attained social and legal significance because of its expressive and material benefits. This Court while determining if the Constitution guarantees the right to marry must account for these considerations as well.

vi. Approaches to identifying unenumerated rights

160. The courts identify unenumerated rights by tracing them either to specific provisions of Part III of the Constitution or to the chief values which the Constitution espouses. The premise of this exercise undertaken by courts is that the rights guaranteed in Part III of the Constitution can only be effectively secured if certain other entitlements are safeguarded. That is, the rights guaranteed expressly by the Constitution would remain parchment rights, if conditions for the effective exercise of them are not created.

To put it differently, rights will only be secured if citizens possess capabilities to exercise the right.150 In fact, the positive and negative postulations of fundamental rights arise from this broad understanding of the purpose served by fundamental rights. In this method of deriving rights, the court traces unenumerated rights to specific provisions of the Constitution such as liberty (Article 21) or freedom of expression (Article 19) or equality (Article 14).

161. In the second method used by courts to derive unenumerated rights, rights are not traced to specific fundamental rights but to the values or the identity of the Constitution. This method of deriving unenumerated rights attained prominence after the judgment of this Court in RC Cooper v. Union of India151 which held that fundamental rights are not water-tight compartments and that the thread of reasonableness contemplated in Article 14 runs through Article 21 aswell.

The aspirational values of the Indian Constitution reflected in the preamble is to secure justice, liberty, equality, and fraternity to all its citizens. However, constitutional identity is not readily borrowed from preambular values. Constitutional identity is secured by a gradual process which is characterized by a dialogue between the institutions of governance (such as the legislature, the executive, the courts, and the statutory commissions) and the public over internal and external dissonances.152

There is external dissonance when there is an apparent conflict between a Constitution's aspirational ideals and the socio-political reality.153 It is characterized by internal dissonance when there is a conflict between the provisions of the Constitution. The Indian jurisprudence on the equality code is an apt example of how constitutional identity has evolved through dialogue between various stakeholders to advance the conception of factual equality.

This Court has been using both the above mentioned approaches to identify unenumerated rights. For example, this Court in Justice KS Puttaswamy (9J) held that the Constitution guarantees the right to privacy by using both the specific rights approach and the identity approach. This Court grounded the right to privacy in the concepts of liberty,154 freedom,155 dignity,156 and the idea of individual self-development which runs through the provisions of the Constitution.157 vii. The scope of the State's regulation of the 'intimate zone'

162. The learned Solicitor General made the following two arguments:

(i) Intimate relationships, whether between homosexual or a heterosexual couples cannot be subject to State regulation because it falls in the 'intimate zone of privacy';

(ii) The State regulates heterosexual marriages only because there is public interest in sustaining the human population through procreation.

163. For this Court to determine if the State has a duty to confer recognition upon all relationships, it must firstly delineate the contours of the State's regulation of intimate relationships vis-Ã -vis privacy concerns. The plurality opinion authored by one of us (Justice D.Y. Chandrachud) in Justice KS Puttaswamy (9J) (supra), while discussing the scope of the right to privacy, refers to an article titled "A typology of privacy"158 which classifies privacy into nine categories.

164. In addition to listing various forms of privacy, the authors have also classified the forms of privacy based on those which are necessary for the fulfilment of the freedom to be let alone and the freedom to self-development. The intimate zone of privacy subsumes spatial privacy (which corresponds to the freedom to let alone) and decisional privacy (which corresponds to the freedom of self-development). The formation of human relationships falls within the intimate zone because relationships are relegated to the sphere of the home or the private zone and they involve intimate choices.

165. The intimate zone is shielded from State regulation because relationships operate in a 'private space' and decisions taken in a private space in exercise of an individual's autonomy (such as the choice of partner, or procreation) are

'private activities.' This Court in Justice KS Puttaswamy (9J) (supra) held that privacy is intrinsic to the realization of constitutional values and entrenched fundamental rights. The judgment emphasized the importance of being left alone and the autonomy of individuals to take crucial decisions affecting their personhood, such as procreation and abortion.159

166. At this juncture, it must be noted that the Indian Constitution does not recognize family or partnerships as a unit for securing rights. For example, the Irish Constitution recognizes the family as a natural unit of society and a moral institution possessing inalienable rights.160 The Constitution by not recognizing the family as a rights bearing unit has rejected the school of thought where rights of individuals in a family or partnership are subsumed within the larger unit of the family. The Constitution does not promote a framework of rights where the rights of a family are given precedence over individual rights of citizens constituting that family.

167. Relegating actions to the 'private' zone has certain shortcomings. The disadvantage must be understood in consequentialist terms, that is, by identifying the effect of classifying certain activities as 'private.' One of the prominent effects of classifying actions as 'private' is that such actions are protected from regulation by the State.

168. Depending on how relationships are organized and managed, they can be "a beacon of freedom, or a prison."161 While there are relationships which are characterized by love, mutual-respect, and devotion to one another, certain relationships are also characterized by the hierarchical power structure in which they operate. Identities such as caste, religion, gender and sexuality more often than not contribute towards the unequal power structure in the private sphere.

To recall, in a segment above, we observed that the State's interest in regulating relationships in the form of marriage is to democratize the private space by ensuring that actions in the intimate space are in consonance with constitutional values. For the reasons in the preceding paragraph, the argument of the learned Solicitor General that the State regulates relationships in the form of marriage solely because they result in procreation is erroneous.

The State's interest in democratizing personal relationships is not specific to the institution of marriage. The State's regulation of marriage is merely one of the many ways by which it can fulfill these State aims. However, it is open to the State to use other forms of regulation to fulfill the interests identified above. There is public interest in the State's regulation of all relationships because relationships involving two persons may be unequal by their very nature.

Scholars have emphasized that the democratization of personal relationships serves two purposes. First, it contributes towards eliminating the inequality of the power structure in a relationship thereby preventing exploitation and subjugation; and second, it contributes towards creating a more independent and self-sufficient citizenry which would have the ability to see alternative viewpoints.162

169. The withdrawal of the State from the domestic space leaves the disadvantaged party unprotected since classifying certain actions as being private has different connotations for those with and without power. In the case of personal relationships which are characterized by inequality, the actions of the more powerful person gains immunity from scrutiny and a degree of legitimacy.163 Thus, all activities in the 'private space' dealing with intimate choices must not readily and blindly be categorized to be beyond the scope of the State's regulation. The State must assess if its interest in democratizing the private space overrides the interests of privacy in a given situation.

170. The State has identified specific areas in the private sphere where the interest in democratizing that space overrides the interests of privacy. For example, the State regulates relationships which are in the nature of marriage through the DV Act. The preamble to the DV Act provides that the statute was enacted to protect the rights of women "who are victims of violence of any kind occurring within a family."

The Act regulates the conduct of persons in a domestic relationship which has been defined as a relationship between two persons who live together in a shared household where they are related by marriage, a relationship in the nature of marriage, adoption, or consanguinity. By criminalizing actions of domestic violence against women, the State recognizes that there is an unequal power structure which operates in heterosexual relationships. The State also recognizes that the party with lesser power and autonomy may be subjected to violence and suppression and consequently, seeks to democratize the space through regulation.

171. However, in certain other circumstances, the State and the Courts have recognized that there is no State interest in regulating the personal space. For example, this Court has recognized that Article 21 protects a woman's reproductive choices which includes whether she wants to terminate her pregnancy.164 The Medical Termination of Pregnancy Act 1971 recognizes the decisional autonomy of women over procreation, which is an intimate aspect of their lives.

In very narrow circumstances, the State regulates intimate choices about child birth and procreation. For example, the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 regulates the intimate zone by prohibiting sex-selection before and after conception. In this case, the State recognizes that the interest in preventing female foeticide and infanticide overrides the privacy interests and decisional autonomy of individuals.

The argument that the State has an interest in regulating heterosexual marriages only to sustain society through procreation is fallacious because the state does not impose a compelled choice of procreation on married heterosexual couples. Moreover, heterosexual couples need not be married to procreate nor is marriage a criteria for procreation.

viii. The right to marry a. Have the courts recognised the right to marry₹

172. The petitioners submit that this Court has held that the Constitution guarantees the right to marry in Shafin Jahan (supra) and Shakti Vahini (supra). In Shafin Jahan (supra), Ashokan, the father of Akhila alias Hadiya moved a habeas corpus petition before the High Court of Kerala with the apprehension that his daughter was likely to be transported out of the country. During the course of the hearing, the High Court was informed that she had married the petitioner.

However, the High Court allowed the petition and directed that (i) Hadiya shall be escorted from the hostel in which she was residing to the house of the father; and (ii) the marriage between Hadiya and Shafin Jahan was void. The High Court observed that twenty-four year old Hadiya was capable of being exploited and that the Court is concerned with her welfare in exercising parens patriae jurisdiction. On appeal, this Court set aside the judgment of the High Court. Dipak Misra, C.J. writing for the majority observed that Hadiya was entitled to choose a partner of her choice and curtailing the expression of choice would amount to clipping a person's identity.

One of us (D.Y. Chandrachud, J. as he then was) authoring the concurring judgment observed that the High Court's exercise of jurisdiction to declare the marriage null and void amounted to judicial overreach. This Court observed that the choice of a partner, whether within or outside of marriage lies in the exclusive domain of the individual, and that the State cannot dictate or limit the freedom to choose a partner. In this context, this Court observed that the right to marry a person of one's choice is integral to Article 21 of the Constitution. The relevant observations are extracted below:

"84. [...] The absolute faith of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propogate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an areas where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the State not the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.

86. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty.

Society has no role to play in determining our choice of partners.

88.[...] Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the State. Courts as upholders of constitutional freedoms must safeguard these freedoms."

(emphasis supplied)

173. In Shakti Vahini (supra), proceedings under Article 32 of the Constitution were instituted seeking directions (i) to State Governments and the Central Government to initiate steps to combat "honour crimes" or caste-based or religionbased murder and submit a national plan of action and a State plan of action to curb such crimes; (ii) to direct State Governments to constitute special cells in each district; and (iii) to launch prosecutions in each case of "honour killing" or caste based or religion-based murder. This Court disposed of the writ petition by directing preventive steps, remedial measures, and punitive measures to curb honour killings. Writing for a three-Judge Bench, Dipak Misra, C.J. observed that the ability of an individual to make choices is an inextricable part of dignity and "that when two adults choose to marry out of their own volition [...] they have a right to do so."165

174. In Justice KS Puttaswamy (9J) (supra), Justice Nariman (in his concurring opinion) observed that the right to privacy extends beyond the right to be let alone to recognising the vital personal choices such as the right to abort a fetus, and the right of same sex to marry. In Navtej (supra), this Court while

decriminalising homosexuality did not hold that the Constitution recognises a right to marry. Dipak Misra, C.J. writing for the majority held that an individual has a right to a union which encompasses physical, mental, sexual or emotional companionship under Article 21 of the Constitution.

175. In Shafin Jahan (supra) and Shakti Vahini (supra), the issue before this Court was whether State or non-State actors could interfere with a person's choice of whom to marry. The law prescribes certain essential conditions for a valid marriage. In both these cases, this Court dealt with situations where State or non- State actors prevented a couple which was otherwise entitled to marry, from marrying.

In the case of Shafin Jahan (supra), the restriction was sought to be imposed because the partners belonged to different religions and in Shakti Vahini (supra), this Court dealt with the issue of restraints placed by the society on the exercise of a person's right to marry a person of a difference caste and religion. In Shafin Jahan (supra) this Court held that religion and caste cannot be impediments in the exercise of a person's right to choose whom to marry. In Shafin Jahan (supra) this Court held that no State or non-State entity can interfere with their right to marry a person of their choice.

176. Neither the majority in Justice KS Puttaswamy (9J) (supra) nor the majority in Navtej (supra) hold that the Constitution guarantees the right to marry. Moreover, the opinion of Justice Nariman in Justice KS Puttawamy (9J) (supra) only made a passing reference to the right to marry.

It did not trace the right to marry to any of the entrenched fundamental rights nor did it comment on the scope of such a right. In Justice KS Puttaswamy (9J), the issue before this Court was whether the Constitution recognises a right to privacy. Thus, this case did not address the issue of whether the Constitution recognises the right to marry. It now falls upon this Court for the first time to decide if the Constitution recognises such a right.

b. There is no fundamental right to marry

177. The petitioners relied on the judgment of the US Supreme Court in Obergefell (supra) in which the right to marry was recognised as a fundamental right. In Obergefell (supra), the Supreme Court of the United States held that the Fourteenth Amendment of the Constitution of the United States imposes a positive obligation on the State to license a marriage between two people of the same sex. In Michigan, Kentucky, Ohio, and Tennessee, marriage was defined as a union between one man and one woman.

The petitioners (who were same-sex couples) claimed that their exclusion from the institution of marriage violated the Fourteenth Amendment of the US Constitution.166 The petitioners filed suits in US district courts in their home States. The district courts ruled in their favour. On appeal, the United States Court of Appeal consolidated the cases and reversed the judgment of the District Court holding that the State has no constitutional obligation to license same-sex marriages or to recognise same-sex marriages performed out of State.

178. The issue before the US Supreme Court was not whether the Constitution recognises the right to marry but whether the Fourteenth Amendment requires a State to license a marriage between two people of the same-sex. Various decisions of the US Supreme Court had already recognised the right to marry.167 Justice Kennedy (writing for the majority) observed that the right to marry consists of the following four components:

(i) the right of choice;

(ii) the protection of intimate association by supporting the union of two persons;

(iii) safeguards for children and families, and

(iv) cornerstone of social order because marriage is the basis for governmental rights, benefits, and responsibilities.

179. The opinion of the majority held that the components of marriage are not exclusive to heterosexual couples. Thus, the State by not recognising a same-sex union (which is legal) and by not granting benefits which accrue from a marriage was held to be treating same-sex couples unequally, violating the equal protection clause.

180. Earlier judgments of the US Courts had held that marriage is a civic right because it is fundamental to existence and survival168, is part of the fundamental right to privacy169, and essential to the orderly pursuit of happiness.170 It was also held that without the right to marry, one is excluded from the full range of human experience and is denied "full protection of the laws for one's avowed commitment to an intimate and lasting relationship."171 The jurisprudence which has emanated from the US Courts indicates that the right to marry is recognised as a fundamental right because of the benefits (both expressive and material) attached to it.

181. Entry 5 of the Concurrent List of the Seventh Schedule to the Constitution grants both the State legislature and Parliament the power to enact laws with respect to marriage. The provision reads as follows:

"Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

(emphasis supplied)

182. In pursuance of the power conferred by Articles 245 and 246 read with Entry 5 of the Concurrent List, Parliament has enacted laws creating and regulating the socio-legal institution of marriage. The State legislatures have made amendments to such laws with the assent of the President, since the subject of marriage is in the Concurrent list.

The petitioners seek that the Court recognise the right to marry as a fundamental right. As explained above, this would mean that even if Parliament and the State legislatures have not created an institution of marriage in exercise of their powers under Entry 5 of the Concurrent list, they would be obligated to create an institution because of the positive postulate encompassed in the right to marry. This argument cannot be accepted.

183. As explained in the previous section, the State through the instrument of law characterises marriage with two constituent elements: the expressive component and the material component. Marriage may not have attained the social and legal significance it currently has if the State had not regulated it through law. Thus, while marriage is not fundamental in itself, it may have attained significance because of the benefits which are realised through regulation.

184. This Court in Justice KS Puttaswamy (9J) (supra) while holding that privacy is a fundamental right was not guided by the content given to privacy by the State. This Court was of the opinion that if the right to privacy is not secured, the full purport of the rights entrenched in the Constitution could not be secured. Similarly, this Court in Unnikrishnan (supra) held that the right to education is a fundamental right.

The right to education was derived from the provisions of the Directive Principles of the State Policy and their centrality to development of an individual. Entry 25 of the Concurrent list authorizes Parliament and State legislatures to enact laws on "education." The State in pursuance of this power has enacted numerous legislations relating to education such as laws establishing and regulating universities and colleges.

However, the right to education was held to be a fundamental right, not because of any statute or law but because of its centrality to the values that the

Constitution espouses. The arguments of the petitioners that the Constitution recognises a right to marry is hinged on the meaning accorded to marriage by statutes, which cannot be accepted.

185. The Constitution does not expressly recognize a fundamental right to marry. Yet it cannot be gainsaid that many of our constitutional values, including the right to life and personal liberty may comprehend the values which a marital relationship entails. They may at the very least entail respect for the choice of a person whether and when to enter upon marriage and the right to choose a marital partner.

c. The challenge to the SMA

I. The scheme of the SMA

186. The SMA was enacted to provide a special form of marriage for couples belonging to different religions and castes. Section 4 of the SMA prescribes conditions relating to the solemnization of special marriages. The relevant portion of the provision is extracted below:

"4. Conditions relating to solemnization of special marriages.-

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:-

(a) neither party has a spouse living;

[(b) neither party-

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

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

(iii) has been subject to recurrent attacks of insanity

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; [...] "

(emphasis supplied)

187. Section 4(a) and (b) use the gender-neutral word 'party.' However, Section 4(c) stipulates that the male must have completed twenty-one years and the female must have completed eighteen years. Section 4(d) stipulates that the parties should not be within the degrees of prohibited relationship. Section 2(b) defines "degrees of prohibited relationship: as follows:

"(b) "degrees of prohibited relationship"-a man and any of the persons mentioned in Part I of the First Schedule and a woman and any of the persons mentioned in Part II of the said Schedule are within the degrees of prohibited relationship.

(emphasis supplied)

188. Part I of the First Schedule consists only of women's relationships with men, such as mother and daughter. Part II of the First Schedule consists only of men's relationships with women, such as father and son. The conditions stipulated in Section 4 when read with the definition of prohibited relationship in Section 2(b), limit the application of the SMA to heterosexual unions.

189. Chapter IV of the enactment lays down the consequences of marriage under the SMA. Section 19 stipulates that the marriage solemnized under the SMA of any member of an undivided family who professes the Hindu, Buddhist, Sikh, or Jain religions shall be deemed to effect their severance from such family. Section 20 provides that subject to the provisions of Section 19, any person whose marriage is solemnized under this Act shall have the same rights and shall be subject to the same disabilities in regard to the right of succession as a person to whom the Caste Disabilities Removal Act 1850 applies.

The Caste Disabilities Removal Act 1950 provides that any law or usage which inflicts the forfeiture of rights or property, or which would affect the right of inheritance because of renouncing religion, having been excluded from the communion of religion, or being deprived of caste shall cease to be enforced by law. Thus, subject to Section 19 of the Act, a person's right to inheritance shall be not forfeited because they married a person of another religion or caste.

190. Section 21 states that succession to the property of any person whose marriage is solemnized under this Act shall be regulated by the provisions of the Indian Succession Act 1925. Section 21A provides a special provision in certain

cases. The provision states that Sections 19, 20 (to the extent that it creates a disability), and 21 shall not apply when a marriage is solemnized between a person who professes the Hindu, Buddhist, Sikh, or Jain religion with a person who professes the Hindu, Buddhist, Sikh or Jain religion.

The rules of succession under the ISA shall not apply where two persons who solemnize their marriage under the SMA belong to the Hindu, Buddhist, Sikh, or Jain religion. Section 21 essentially ruptured the cord between a Hindu, Buddhist, Sikh, or Jain and their personal laws if they married under the provisions of the SMA. Section 21A was introduced in 1976 as a progressive provision. Section 21A links the SMA with the HSA if both the parties belong to a religion to which the HSA applies. Section 21A was introduced to remedy the disability brought in by Section 21.

191. Section 27 deals with divorce. Section 27(1A) grants the wife additional grounds of divorce. Section 31 stipulates the Court to which a petition for divorce must be made. Sub-Section (2) of the Section is a special provision available to the wife for the presentation of a divorce petition. Section 36 stipulates that the husband may be directed to pay expenses of the proceedings and such sum based on the income of the husband when the wife has no independent income, sufficient to support herself and necessary for divorce proceedings. Section 37 stipulates that the court may order the husband to pay the wife permanent alimony and maintenance.

192. The petitioners argue that Section 4 of the SMA is unconstitutional not because it expressly excludes or bars the marriage between two persons of the same-sex but because it excludes the solemnization of marriage between non-heterosexual persons by implication since it only governs a heterosexual union.

II. The decision of the South African Constitutional Court in Fourie

193. The petitioners have relied on Fourie (supra), a case which emanated from South Africa, to argue that provisions of the SMA must be read in a gender-neutral manner. In Fourie (supra), the common law definition of marriage and Section 30(1) of the Marriage Act (Act 25 of 1961)172 were challenged. The common law definition of marriage in South Africa is that it is a "union of one man with one woman, to the exclusion, while its lasts, of all others." The formula for marriage prescribed by Section 30(1) of the Marriage Act is extracted below:

"Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)₹', and thereupon

the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: 'I declare that A.B. and C.D. here present have been lawfully married."

(emphasis supplied)

194. The petitioners in Fourie (supra) argued that the reference of "husband or wife" in Section 30(1) excluded same-sex couples. The South African Constitutional Court allowed the petition by holding that Section 30(1) was unconstitutional because it excluded same-sex couples. The opinion of the majority authored by Justice Albie Sachs suspended the declaration of invalidity for one year to cure defects in view of Section 172(1)(b) of the South African Constitution.

If the defect was not cured within the time frame stipulated, the word 'spouse' was to be read in the place of "wife (or husband)". Justice Kate O Regan who authored the minority opinion disagreed with the majority on the question of the remedy. The learned Judge observed that the scales of justice and equity necessitate immediate relief and not a suspended declaration of invalidity.

195. The Court observed that Section 30(1) of the South African Marriage Act was underinclusive because it excluded same-sex unions by silence and omission. Such omission was as effective in law and practice as if effected by express language. The Court held that it would be discriminatory if same-sex couples were not given the benefits (both tangible and intangible) which were available to heterosexual couples through marriage.

The State justified the exclusion of samesex couples from the institution of marriage because of the social nature of marriage and strong religious beliefs. The Court rejected this argument on the ground that the reasons which were used to justify the exclusion were grounded in prejudice and that it was not a valid justification for the violation of fundamental rights.

196. On the question of relief, the Court made the following observations:

a. Parliament had expressly and impliedly recognised same-sex partnerships. The Domestic Violence Act 116 of 1998 defined a domestic partnership as a relationship between a complainant and a respondent who are of the same or opposite sex and who live/lived together in a relationship in the nature of marriage. The Estate Duty Act 45 of 1955 stipulated that the spouse in relation to a deceased person includes a person who at the time of death of the deceased person was a partner of such person in a samesex or heterosexual union;

b. Section 172(1)(b) of the Constitution granted the Court the power to issue such order including suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect;

c. There was extensive consultation with the public on the issue of same-sex marriage. The South African Law Reform Commission's memorandum on domestic partnership harmonised family law principles with the Bill of Rights which was preceded by extensive public consultation; and

d. The Court instead of reading in must grant the remedy of suspended declaration because reading in would be a temporary remedial measure which would be far less likely to achieve equality. Legislative action was well-suited for this purpose.

197. Though facially the case mounted by the petitioners before us is similar to the case mounted by the petitioners in Fourie (supra), the legal and the constitutional regime in South Africa and India varies. First, it must be noticed that unlike the SMA, there was only one provision in the South African Marriage Act (that is, Section 30(1)) which made a reference to heterosexual relationships.

However, as indicated above, various provisions of the SMA (Sections 4, 27(1A), 31, 36, and 37) confine marriage to a union between heterosexual persons. Second, various enactments in South Africa already recognised same-sex unions unlike the Indian legal landscape where no law even remotely recognises the union between a same-sex couple. Thus, the canvas of the challenge before the South African Constitutional Court in Fourie (supra) and the legal and constitutional regime in place varies widely from that in India.

III. The decision of the UK House of Lords in Ghaidan

198. Learned counsel for the petitioners argued that this Court ought to interpret the SMA to make it 'constitutionally compliant.' They relied on the decision of the House of Lords of the United Kingdom in Ghaidan (supra) and urged this Court to adopt the principle of interpretation which had been adopted in that case.

199. In that case, the respondent was in a stable and monogamous homosexual relationship with his partner who was a tenant in the house that the couple shared. The respondent and his partner were living together when the latter died. The appellant (being the landlord) claimed possession of the house. The respondent resisted the claim on the ground that he ought to be considered a 'statutory tenant' in terms of UK's Rent Act 1977.173 This enactment provided that a surviving spouse of the original tenant shall be the statutory tenant if the

surviving spouse was residing in the house in question immediately before the death of the original tenant.

It also stipulated that a person who was living with the original tenant "as his or her wife or husband" shall be treated as the spouse of the original tenant. In essence, the Rent Act protected the tenancy rights of a heterosexual couple when the couple was in a relationship that was of a similar character as marriage. The surviving partner in a homosexual relationship could have become entitled to an 'assured tenancy' which was less advantageous than a statutory tenancy.

200. The respondent contended that the difference in the treatment of heterosexual couples and homosexual couples was based on their sexual orientation alone, and lacked justification, infringing Article 14 (prohibition of discrimination) read with Article 8 (right to respect for private and family life) of the European Convention on Human Rights.174 He further argued that the court had a duty under Section 3 of the UK's Human Rights Act 1998175 to read and give effect to the Rent Act in a way which was compliant with the ECHR.

In other words, he urged the court to read the Rent Act such that it granted the surviving partner in a close and stable homosexual relationship the same rights as the surviving partner in a heterosexual relationship of a similar nature - the right to succeed the tenancy as a statutory tenant. The court of first instance rejected the respondent's arguments. The first appellate court allowed the appeal, leading to proceedings before the final appellate authority, the House of Lords (now, the Supreme Court of the UK).

201. The House of Lords accepted the respondent's arguments.176 It noted that the rationale of the Rent Act was that the security of tenure in a house which a couple had made their home ought not to depend upon which of them dies first. It held that there was no legitimate state aim which justified the difference in treatment of heterosexual and homosexual couples, and found that the Rent Act therefore violated the rights of the respondent under the ECHR. Having so found, it relied on Section 3 of the Human Rights Act to interpret the Rent Act to mean that the survivor of a homosexual couple would have rights on par with the survivor of a heterosexual relationship for the purposes of succession as a statutory tenant.

202. Section 3 of the Human Rights Act reads as follows:

"3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

As noticed by the House of Lords in Ghaidan (supra):

a. This provision was one of the primary means by which rights under the ECHR were brought into the law of the UK;

b. Section 3 permitted courts in the UK to depart from the unambiguous meaning of a statute, if required;

c. It also authorized courts in the UK to depart from legislative intent in interpreting the language used in a statute, if required;

d. It allowed courts to read in words to a statute which changed the meaning of that statute, to make it compliant with the ECHR as long as the new meaning was compatible with the underlying thrust of that enactment; and

e. Section 3 did not authorize courts to make decisions for which they were not equipped, such as when there were many ways of making a particular provision compliant with the ECHR. The House of Lords also noted that difficult problems could arise in some cases.

203. It is not open to this Court to adopt the interpretative principle laid down in Section 3 of the Human Rights Act for a simple reason: the House of Lords derived the power to depart from legislative intent and read words into a statute such that it was compliant with the ECHR from the Human Rights Act, a statute enacted by the Parliament of UK. It did not rely on a common law principle or fashion a principle of interpretation based on common law.

The House of Lords itself noted that "the interpretative obligation decreed by section 3 is of an unusual and far-reaching character."177 In India, there is no legislation which permits this Court to depart from legislative intent and read words into a legislation such that it is compliant with the Constitution.178 As discussed in the previous segment of this judgment on the power of judicial review, courts in India must be circumspect in relying on the law in other jurisdictions, torn from the context in which those decisions have been crafted.

It is not permissible for this Court to exercise a power which the Parliament of another country conferred on its courts, absent a similar conferment of power under the Indian Constitution. This Court must exercise those powers which it has by virtue of the Constitution of India or any other Indian law. In any event, as the House of Lords held, courts may not exercise this power to make decisions for which they are ill equipped. This Court is not equipped to recognize the right of queer persons to marry under the SMA for reasons discussed in subsequent segments.

IV. Institutional limitations with respect to the interpretation of SMA

204. It must be noted that this Court in the beginning of the hearing restricted the breadth of the challenge to non-personal marriage law. However, on a careful perusal of the provisions of the SMA, it is evident that Section 21A links the SMA to personal and non-personal laws of succession. In fact, such is the complexity of the SMA that the petitioners themselves had to submit lengthy charts on workability, which in effect reworked the structure of the SMA to include non-heterosexual unions.

205. Dr. Abhishek Manu Singhvi, appearing for one of the petitioners submitted that there are three plausible interpretations of Section 21A in its application to marriages between two Hindus under the provisions of the SMA:

a. The Court may choose not to decide on the applicability of Section 21A to non-heterosexual Hindu couples in the present litigation and leave the question of succession open for future litigation;

b. The succession of Hindu non-heterosexual couples will be governed by the HSA and that of other interfaith non-heterosexual couples will be governed by the ISA (similar to interfaith heterosexual couples or heterosexual couples of other religions). This requires a gender-neutral reading of the HSA and the ISA. The words "widow" and "widower" in the ISA and "male Hindu", "female Hindu", "widow", and "widower" in the HSA can be interpreted in a gender neutral manner. This interpretation must only be limited to issues related to marriage. To include transgender persons, the Court may hold that the words "male" and "female" under Sections 8 and 15 of the HSA may be read as "persons"; or

c. Since by agreement of parties, religious and personal law related issues are beyond the scope of this litigation, it follows that provisions of secular law that relate back to personal laws (like Section 21A) are excluded from consideration. Since Section 21A was introduced as an exception to the regime under Sections 19 to 21, non-consideration of the issue would revert the law to the position before the introduction of Section 21A which is that ISA would apply to all marriages under the SMA.

206. In addition to the 'reading in' of the provisions of other statutes such as ISA and HSA, the petitioners argue that the Court must also read into the following provisions of the SMA:

a. The words "widow" and "widower" in Schedules II and III of SMA must be read as "widow or widower" and "widower or widow"; and

b. Section 4(c) of SMA may be interpreted in the following way:

i. For same-sex couples, the provision may be read as prescribing eighteen years as the minimum age for both parties in a lesbian relationship, and twenty-one years for both parties in a gay relationship;

ii. For transgender persons, the minimum age requirement would depend on whichever gender/sex they identify as. So, a trans-man would be eligible to marry at twenty one years of age while a transwoman would be eligible to marry at eighteen years; and

iii. For those who do not identify either as a man or a woman, the following approach shall be adopted to ensure the inclusion of nonbinary and intersex individuals:

A. The silence of the SMA on the minimum age qualification for persons other than 'men' and 'women' may be read as imposing no restriction other than the restriction imposed by other laws that stipulate the age at which persons are capable of making decisions for themselves, which is eighteen years; and

B. Alternatively, the Court may lay down guidelines as an interim measure and until Parliament fills the legislative vacuum.

207. If the Court finds that a provision is contrary to Part III of the Constitution, it shall declare that it is void,179 or read it down (by deleting phrases) or read words in (by adding or substituting phrases) to save it from being declared void. If, in the present batch of petitions, this Court holds that Section 4 is unconstitutional because it is underinclusive to the extent that it excludes, by implication, the marriage between same-sex couples, the court could either strike down Section 4 of the SMA or follow the workability model submitted by the petitioners.

If the Court follows the first approach, the purpose of a progressive legislation such as the SMA would be lost. The SMA was enacted to enable persons of different religions and castes to marry. If the SMA is held void for excluding same-sex couples, it would take India back to the pre-independence era were two persons of different religions and caste were unable to celebrate love in the form of marriage. Such a judicial verdict would not only have the effect of taking the nation back to the era when it was clothed in social inequality and religious intolerance but would also push the courts to choose between eradicating one form of discrimination and prejudice at the cost of permitting another.

208. If this Court takes the second approach and reads words into the provisions of the SMA and provisions of other allied laws such as the ISA and HSA, it

would in effect be entering into the realm of the legislature. The submissions of the petitioners indicate that this Court would be required to extensively read words into numerous provisions of the SMA and other allied laws. The Court is not equipped to undertake an exercise of such wide amplitude because of its institutional limitations.

This Court would in effect be redrafting the law(s) in the garb of reading words into the provisions. It is trite law that judicial legislation is impermissible. We are conscious that the court usually first determines if the law is unconstitutional, and then proceeds to decide on the relief. However, in this case, an exercise to determine whether the SMA is unconstitutional because of under-inclusivity would be futile because of the limitations of this Court's power to grant a remedy.

Whether a change should be brought into the legislative regime of the SMA is for Parliament to determine. Parliament has access to varied sources of information and represents in itself a diversity of viewpoints in the polity. The Court in the exercise of the power of judicial review must be careful not to tread into the legislative domain. It is clarified that this Court has not adjudicated upon the validity of any laws other than the SMA, the FMA, the Adoption Regulations, and the CARA Circular.

d. The challenge to the FMA

209. Some petitioners have challenged the constitutionality of the FMA and have sought a declaration that it applies to any two persons who seek to get married, regardless of their gender identity and sexual orientation. The FMA applies to two categories of persons - to parties who seek to solemnize their marriage under the FMA in a foreign country180 and to those who seek to register their marriage under the FMA when their marriage has been solemnized in a foreign country in accordance with the law of that country.181 In both cases, at least one of the parties to the marriage must be a citizen of India.182 Section 4 of the FMA specifies certain conditions which must be fulfilled before the parties can avail of its provisions:

"4. Conditions relating to solemnization of foreign marriages. â€”

A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:â€”

(a) neither party has a spouse living,

(b) neither party is an idiot or a lunatic,

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

(d) the parties are not within the degrees of prohibited relationship:

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship."

210. Clauses (c) and (d) contain requirements which prevent this Court from interpreting the FMA as applying to persons regardless of their sexual orientation. Clause (c) requires the bridegroom to be at least twenty-one years and the bride to be at least eighteen years of age. If this Court were to interpret Section 4 as applying to same-sex relationships, the question of how clause (c) would apply to such relationships would arise.

Various approaches were proposed including reading the provision as requiring a minimum age of twenty-one for all men and eighteen for all women, such that two men who sought to marry would both be required to be twenty-one years and two women who sought to marry would both have to be eighteen years. Another approach that was proposed was to interpret the provision as requiring a common minimum age for all same-sex couples. This Court is of the opinion that such an exercise would amount to judicial legislation. When there are various options open for a legislative change and policy considerations abound, it is best left to Parliament to engage in democratic decision-making and settle upon a suitable course of action.

211. Clause (d) requires the parties not to be within the degrees of prohibited relationship. Section 2(a) defines the phrase 'degrees of prohibited relationship' as having the same meaning as in the SMA. The reasons why the degrees of prohibited relationship cannot be interpreted by this Court to include same-sex relationships has been discussed in the preceding paragraphs. The same reasons apply to Clause (d) of the FMA.

212. The FMA recognizes the right of an Indian citizen to marry outside India or to a marry a person from a foreign country. In essence, it recognizes the right of a citizen of India to choose a life partner who is not a citizen of India. It follows that citizens of India may enter into an abiding union with a person of their choice, including a person of the same sex as them, even if that person is not a citizen of India. It is accordingly clarified that the right of a citizen of India to enter into an abiding union with a foreign citizen of the same sex is preserved.

ix. The right to enter into a union

"The need to love is as important a force in human society as is the will to power. Power wants to destroy or consume or drive away the other, the one who is different, whose will is different. Love wants the other to remain, always nearby, but always itself, always other."183

a. The goal of self-development and what it means to be human

213. Over the years, through dialogue both inside and outside the courts, it has been established that the negative and positive postulates of fundamental freedoms and the Constitution as a whole inter alia secure conditions for selfdevelopment at both an individual and a group level. This understanding can be traced to numerous provisions of Part III of the Constitution, the preambular values, and the jurisprudence which has emanated from Courts. For example, this Court has held that the right to live under Article 21 secures more than the right of physical existence.

It includes, inter alia, the right to a quality life which has been interpreted to include the right to live in an environment free from smoke and pollution,184 the right to access good roads,185 and a suitable accommodation which would enable them to grow in every aspect - mental, physical, and intellectual.186 Similarly, it has been established that a free exchange of ideas recognized under Article 19 is an integral aspect of the right to self-development.187

The rights against exploitation188 and against discrimination and untouchability189 secure the creation of equal spaces in public and private spheres, which is essential for self-growth. The right to quality education without discrimination190 also ensures that every citizen secures basic education to develop themselves. The freedom to profess and practice religion191 also enables individuals to evolve spiritually.

214. This understanding of the Constitution is substantiated on a reading of Part IV of the Constitution. To illustrate, Article 38 states that the State shall strive to promote the welfare of the people, Article 42 stipulates that the State shall endeavour to secure just and humane conditions of work, and Article 47 places a duty on the State to raise the level of nutrition and the standard of living. The Constitution, through both positive and negative postulations, inter alia capacitates citizens in their quest to develop themselves.

Such capacity-building enables them to achieve their full potential in both the private and the public space, and to be happy. The Indian Constitution (unlike, say, the South African Constitution) does not expressly provide that the Constitution seeks to improve the quality of life and free the potential of each person. However, such an understanding can be gleaned from the provisions of

Part III and Part IV of the Constitution. Thus, one of the purposes of the rights framework is to enable the citizenry to attain the goal of selfdevelopment.

215. Martha C. Nussbaum laid down a list of ten capabilities which are central requirements to live a quality life.192 Two of the identified capabilities are crucial for our discussion.193 The first is 'emotions' which is characterized as follows:

"5. Emotions: Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development)"

(emphasis supplied)

The second is 'affiliation' which is characterized as follows:

"7. Affiliation: A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliations, and also protecting the freedom of assembly and political speech)."

(emphasis supplied)

216. The capabilities of 'emotions' and 'affiliations' identified by Nussbaum for self-development and sustaining a quality life are crucial for two important reasons. First, both capabilities focus on the human side of a person, that is, the ability and necessity of a person to emote and form relationships and associations. Second, the distinction between the capabilities of 'emotions' and 'affiliation' is that in the former, the emphasis is upon the agency of the individual and the freedom they have to form bonds with other people while in the latter, the emphasis is upon granting recognition to such associations.

217. Humans are unique in many respects. We live in complex societies, are able to think, communicate, imagine, strategize, and do more. However, that which sets us apart from other species does not by itself make us human. These qualities are necessary elements of our humanity but taken alone, they paint an incomplete picture. In addition to these qualities, our ability to feel love and affection for one another makes us human. We may not be unique in our ability to feel the emotion of love but it is certainly a fundamental feature of our humanity.

We have an innate need to see and to be seen - to have our identity, emotions, and needs fully acknowledged, recognized, and accepted. The ability to feel emotions such as grief, happiness, anger, and affection and the need to share them with others makes us who we are. As human beings, we seek companionship and most of us value abiding relationships with other human beings in different forms and capacities. These relationships may take many forms - the natal family, cousins and relatives, friends, romantic partnerships, mentors, or students.

Of these, the natal family as well as the family created with one's life partner form the fundamental groups of society.194 The need and ability to be a part of a family forms a core component of our humanity. These relationships which nourish the emotional and spiritual aspects of our humanity are important in and of themselves. Further, they are as important to self-development as the intellectual (and eventually, financial) nourishment we receive through education. Self-development cannot be measured solely in terms of educational qualifications and financial capabilities. Such a description is to forget what makes as human.

218. It is insufficient if persons have the ability and freedom to form relationships unregulated by the State. For the full enjoyment of the such relationships, it is necessary that the State accord recognition to such relationships. Thus, the right to enter into a union includes the right to associate with a partner of one's choice, according recognition to the association, and ensuring that there is no denial of access to basic goods and services is crucial to achieve the goal of selfdevelopment.

b. The rights under Article 19

I. The right to freedom of speech and expression and to form intimate associations

219. Article 19(1)(a) of the Constitution recognizes the right to freedom of speech and expression. Freedom postulates within its meaning, both, an absence of State control as well as actions by the State which create the conditions for the exercise of rights and freedoms. Article 19(1)(c) of the Constitution recognizes the freedom to form associations or unions or co-operative societies. The freedom of speech and expression is not limited to expressive words.

It also includes other forms of expression such as the manifestation of complex identities of persons through the expression of their sexual identity, choice of partner, and the expression of sexual desire to a consenting party. Earlier judgments of this Court have held that expression of gender identity is a

protected freedom under Article 19(1)(a). In NALSA (supra), this Court held that the expression of gender identity is a form of protected expression under Article 19(1)(a). In Navtej (supra), this Court held that Section 377 of the IPC infringes upon the freedom of expression of queer persons, protected under Article 19(1)(a).

220. Courts have traditionally interpreted the right to form an association guaranteed under Article 19(1)(c) to mean associations formed by workers or employees for collective bargaining to attain equitable working conditions. However, the entire gamut of the freedom protected under Article 19(1)(c) cannot be restricted to this singular conception.

The ambit of the freedom under Article 19(1)(c) is much wider. The provision does not merely protect the freedom to form an association to create spaces for political speech or for espousing the cause of labour rights. While that is a very crucial component of the freedom protected under Article 19(1)(c), the provision also protects the freedom to engage in other forms of association to realize all forms of expression protected under Article 19(1)(a).

221. In Roberts v. United States Jaycees,195 the US Supreme Court read 'freedom of association' widely to include the freedom to form intimate associations. The factual matrix before the Court was that regular membership to the respondent-corporation was restricted to men between the ages of fifteen to thirty-five.

Associate membership was offered to those to whom regular membership was not available. Complaints were filed alleging that the exclusion of women from full membership violated the Minnesota Human Rights Act which made it discriminatory to deny to any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

The US Supreme Court had to decide if any interference with the organization's membership policy would violate the respondent's freedom of association guaranteed under the First Amendment. Justice Brennan, writing for the majority, observed that the freedom of association constitutes two facets. First, the freedom to enter into intimate human relationships secure from undue state interference ("the intrinsic element"); and second, the freedom to form associations to engage in activities protected by the First Amendment such as speech, assembly, and the exercise of religion ("the instrumental element").

The Court observed that individuals have the freedom to form intimate associations because individual liberty can be secured only when the State does not unjustifiably interfere with the formation and preservation of certain kinds of highly personal relationships. The Constitution protects such relationships because individuals draw emotional enrichment from close ties such as those created by marriage, children, and cohabitation, which contribute towards identity building and selfdevelopment. Justice Brenan qualified the freedom by observing that only personal relationships (which are characterized by their attributes such as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, the seclusion from others in critical aspects of the relationship) are protected.196

222. Kenneth L. Karst, who developed the idea of the freedom of intimate association197 argues that the Courts have traditionally not permitted the State to interfere or regulate in certain kinds of personal relationships, thereby elevating it to a distinct freedom. Intimate association is characterized by a sense of collectivity which exists beyond two individuals.

One of the prominent ideas embraced by the freedom of intimate association is the opportunity it affords to enjoy the society of the other person who is a part of the relationship and the ability to choose to form and maintain such a relationship.198 The opportunity to enjoy the society of one's partner may be denied either directly or indirectly. It could be denied directly when the law prohibits such an association. The operation of Section 377 of the IPC criminalizing homosexual activity is a form of direct restriction on the freedom of association.

223. On the other hand, the State could indirectly infringe upon the freedom when it does not create sufficient space to exercise that freedom. A formal associational status or recognition of the association is necessary for the free and unrestricted exercise of the freedom to form intimate associations. Needless to say, there may be reasonable restrictions on this right. However, other than legally valid and binding restrictions, the right to intimate associations must be unrestricted. The State by not endorsing a form of relationship encourages certain preferences over others.199

In a previous segment of this judgment, we have discussed the tangible and intangible benefits of recognizing relationships in the form of marriage. While the tangible benefits of marriage are traceable to the content of law, the intangible benefits are secured merely because State recognises the relationship through the instrument of law. Intangible benefits in the form of expressive advantages exist irrespective of the content of the law. Even if the law does not

grant any special material benefits to a relationship, the relationship would still be considered to be legitimate in the eyes of the society.

The freedom to choose a partner and the freedom to enjoy their society which are essential components of the right to enter into a union (and the freedom of intimate association) would be rendered otiose if the relationship were to be discriminated against. For the right to have real meaning, the State must recognise a bouquet of entitlements which flow from an abiding relationship of this kind. A failure to recognise such entitlements would result in systemic discrimination against queer couples.

Unlike heterosexual couples who may choose to marry, queer couples are not conferred with the right to marry by statute. To remedy this, during the course of the hearing, the Solicitor General of India made a statement that a Committee chaired by the Cabinet Secretary will be constituted to set out the rights which will be available to queer couples in unions. The Committee shall set out the scope of the benefits which accrue to such couples.

II. The right to settle in any part of India

224. Article 19(1)(e) of the Constitution stipulates that all citizens shall have the right to reside and settle in any part of the territory of India. In exercise of this right, citizens may reside in any village, town, or city in any state or union territory irrespective of the state in which they were born or are domiciled. Article 19(1)(e) proscribes differentiation on the basis of the native place of a person. As with other fundamental rights, it is subject to reasonable restrictions.

In Maneka Gandhi v. Union of India,200 this Court observed that it was a historical fact that there were rivalries between some states in the country. It was therefore not beyond the realm of possibility that a particular state would restrain individuals domiciled in another state from residing or settling in the first state. In view of this, the Court held that the intention behind Article 19(1)(d) (the right to move freely throughout the territory of India) and Article 19(1)(e) was to prevent the states from imposing such restrictions. In this way, the provision was thought to emphasize the unity and oneness of India.

225. Article 19(1)(e) uses the expressions "reside" and "settle." The term "reside" can mean either a temporary residence or a permanent residence but there is a certain level of permanency attached to the word "settle" in India. One can reside in a particular place in the course of their education or employment but to settle down in that place means to build one's life there and reside their permanently.201 In P. Ramanatha Aiyar's Law Lexicon (1997 edition), it is stated:

"The word "settled" has no precise or determinate meaning. In popular language, it intends going into a town or place to live and take up one's abode. A person is said to be settled where he has his domicile or home."

Colloquially, people say that a person has "settled down" when they are well established in their careers or when they have chosen a life partner or married somebody.

226. Citizens of India have the right to settle in any part of the territory of India in terms of Article 19(1)(e). They, like all other citizens, may exercise this right in two ways: a. First, they may build their lives in a place of their choosing (in accordance with law) either by themselves or with their partner. They may reside in that place permanently (subject to other reasonable restrictions including those intended to protect the rights of tribal communities).

This right is uniquely significant to persecuted groups (such as queer persons, inter-caste couples, or interfaith couples) who migrate from their hometowns to other places in the country, including cities;202 and b. Second, they may "settle down" with another person by entering into a lasting relationship with them. In fact, this mode of the exercising the right under Article 19(1)(e) is encompassed by the first mode because to many people, building a life includes choosing their life partner. Hence, the right to enter into a union is also grounded in Article 19(1)(e). c. Facets of the right to life and liberty under Article 21

I. The atypical family

227. One's natal family usually consists of one's immediate relatives. The people who constitute one's 'immediate relatives' vary from society to society. For instance, many Indians grow up in a Hindu Undivided Family which is commonly known as a 'joint family' and which is recognised by the law.

The family is typically thought of as comprising a mother and a father, to which a life partner is added (usually in a heterosexual relationship). Later, children join this family, and so the cycle continues. While this conception of a family dominates our collective understanding, it is not the only valid mode by which a family can be formed. Myriad persons do not follow this blueprint for the creation of a family. They instead have their own, atypical blueprint.

228. In Deepika Singh (supra), this Court rightly acknowledged the existence of atypical families:

"26. The predominant understanding of the concept of a "family" both in the law and in society is that it consists of a single, unchanging unit with a mother and a father (who remain constant over time) and their children. This assumption

ignores both, the many circumstances which may lead to a change in one's familial structure, and the fact that many families do not conform to this expectation to begin with. Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. A household may be a single parent household for any number of reasons, including the death of a spouse, separation, or divorce.

Similarly, the guardians and caretakers (who traditionally occupy the roles of the "mother" and the "father") of children may change with remarriage, adoption, or fostering. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones."

229. Queer relationships may constitute one's family. Persons in such relationships are fulfilling their innate and human need to be a part of a family and to create their family. This conception of a family may be atypical but its atypical nature does not detract from the fact that it is a family. Further, queer persons are often rejected by their natal families and have only their partner or their chosen community to fall back on.

In addition to the different forms of kinship recognized in Deepika Singh (supra), the guru-chela bond of transgender persons (discussed in the previous section of this judgment) may also be a familial bond. Unlike hijras who often have the option of joining the hijra community and forming the guruchela bond, transmen do not have traditions or customs which may lead to the creation of non-biological familial bonds with other transmen as a group.

Regardless, they form close bonds with other transmen and many consider these bonds to be familial.203 These atypical manifestations of the family unit equally constitute the fundamental groups of society. The Constitution accounts for plural identities and values. It protects the right of every person to be different. Atypical families, by their very nature, assert the right to be different. Difference cannot be discriminated against simply because it exists. Articles 19 and 21 protect the rights of every citizen and not some citizens.

230. Some petitioners have suggested that the atypical family is a queer person's 'chosen family.' Chosen families comprise people who are selected to be one's kin, with the exercise of one's agency.204 Some have argued that the entire spectrum of queer relationships in India may not always be based on choice, with guru-chela relationships often assigned rather than chosen.205 Hence,

while some queer relationships may accurately be described as the 'chosen family,' all of them are the 'atypical family.'

II. The right to dignity, autonomy, and privacy

231. It is not only formal freedom which is significant but also substantive freedom or the opportunity to achieve what one sets out to achieve and the conditions which enable this. The freedom guaranteed under the Constitution is realised in substance only when the conditions for their effective exercise are created. Formal freedom is translated into substantive freedom through the formulation of schemes and policies.

When citizens are prevented from exercising their rights, the courts of the country create the conditions for their exercise by giving effect to the laws enacted by the legislative wing or the schemes formulated by the executive wing. In the process, courts interpret the Constitution and the rights and freedoms it recognizes. This exercise lies at the core of Article 21 of the Constitution, which guarantees the right to life and personal liberty.

232. A few paragraphs ago, this Court discussed what it means to be human. The question of what it means to be free - or to have liberty - is of equal significance. It is a question which has plagued philosophers, ethicists, and economists alike. The answer may mean different things to different people and may change depending on the circumstances in which the question is asked. Simply put, the ability to do what one wishes to do and be who one wishes to be (in accordance with law) lies at the heart of freedom.

233. Article 21 is available to all persons including queer persons. Article 21 encompasses the rights to dignity, autonomy, and privacy. Each of these facets animates the others. It is not possible to speak of the right to enter into a union without also speaking of the right to intimacy, which emanates from these rights. These rights demand that each individual be free to determine the course of their life, as long as their actions are not barred by law.

Choosing a life partner is an integral part of determining the course of one's life. Most people consider this decision to be one of the most important decisions of their lives - one which defines their very identity. Life partners live together, spend a significant amount of time with one other, merge their respective families, create a family of their own, care for each other in times of sickness, support one another and much more.

Hence, the ability to choose one's partner and to build a life together goes to the root of the right to life and liberty under Article 21. Undoubtedly, many persons choose not to have a life partner - but this is by choice and not by a deprivation

of their agency. The law constrains the right to choose a partner in certain situations such as when they are within prohibited degrees of relationships or are in a consanguineous relationship.

234. Principle 24 of the Yogyakarta Principles (on the application of international human rights law in relation to sexual orientation and gender identity)206 states that all people have the right to found a family:

"Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members."

While India is not a signatory to the Yogyakarta Principles, this Court has recognized their relevance to the adjudication of cases concerning sexual minorities.207 Depriving someone of the freedom to choose their life partner robs them of their autonomy, which in turn is an affront to their dignity. Preventing members of the LGBTQ community from entering into a union also has the result of denying (in effect) the validity of their sexuality because their sexuality is the reason for such denial.

This, too, would violate the right to autonomy which extends to choosing a gender identity and sexual orientation. The act of entering into an intimate relationship and the choices made in such relationships are also protected by the right to privacy. As held by this Court in Navtej (supra) and Justice KS Puttaswamy (9J) (supra), the right to privacy is not merely the right to be left alone but extends to decisional privacy or privacy of choice.

III. The right to health

235. The right to health is also a crucial component of the right to life and liberty.208 The health of a person includes both, their physical and their mental wellbeing. Parliament enacted the Mental Healthcare Act 2017209 to regulate the provision of mental healthcare services. An assessment of the mental health of a person cannot be limited to considering whether they have a mental illness or disease but must also include an assessment of whether their mental health is thriving. The Constitution of the World Health Organization declares that:

"Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity."

Mental health is therefore a state of complete mental wellbeing and not merely the absence of mental illnesses. Parliament is also cognizant of this fact as evident from the overall scheme and provisions of the Mental Healthcare Act.

Though this statute is primarily concerned with mental illnesses and access to healthcare, Chapter VI recognizes the value of complete mental wellbeing by providing for the promotion of and awareness about mental health.

A person's mental well-being can only be secured if they are allowed the freedom and liberty to make choices about their lives. If their choices are restrained, their overall mental well-being would undoubtedly be degraded. Choices may be restrained by expressly denying them their freedom or by failing to create conditions for the exercise of such freedom.

236. The right of queer persons to access mental healthcare is recognized by Section 18 which stipulates that persons have a right to access mental healthcare without being discriminated against on the basis of their sex, gender, or sexual orientation. This is undoubtedly a progressive step in line with constitutional ideals. The mental health of members of the LGBTQ community may suffer not only because of the discrimination they may face at the hands of their families or society in general but also because they are prevented from choosing their life partner and entering into a meaningful, long-lasting relationship with them.

The effect of the right to life under Article 21 read with Section 18 of the Mental Healthcare Act is that queer people have the right to complete mental health, without being discriminated against because of their sex, gender, or sexual orientation. A natural consequence of this is that they have the right to enter into a lasting relationship with their partner. They also have a right not to be subjected to inhumane and cruel practices or procedures.

d. The right to freedom of conscience under Article 25

237. Article 25(1) of the Constitution is as follows:

"25. Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

Article 25(1) has four components - the first component makes the right available to all persons. The second component indicates that all persons are equally entitled to the rights it codifies. The third component deals with two distinct concepts: the right to freedom of conscience and the right freely to profess, practice and propagate religion.

While the freedom of conscience subsumes within its fold the right to profess, practice and propagate religion, it is not restricted to this right alone. The rights with respect to religion are one aspect of the freedom of conscience. The fourth component makes the rights codified in Article 25 subject to public order, morality, health, and the other provisions of Part III. The right under Article 25 is an individual right because conscience inheres in an individual.210

238. The right under Article 25 is also available to members of the LGBTQ community since it is available to all persons. But what does this freedom entail, beyond religious rights₹ Black's Law Dictionary defines conscience in the following terms:

"Conscience. The moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception and judgment of the moral qualities of his own conduct, but in a wider sense, denoting similar application of the standards of morality to the acts of others. The sense of right and wrong inherent in every person by virtue of his existence as a social entity."211

(emphasis supplied)

239. All persons, including members of the queer community, have the right to judge the moral quality of the actions in their own lives, and having judged their moral quality, have the right to act on their judgment in a manner they see fit. This attribute is of course not absolute and is capable of being regulated by law. In the segment of this judgment on the right to life and liberty, this Court noticed that the meaning of liberty is - at its core - the ability to do what one wishes to do and be who one wishes to be, in accordance with law.

All persons may arrive at a decision regarding what they want to do and who they want to be by exercising their freedom of conscience. They may apply their sense of right and wrong to their lives and live as they desire, in accordance with law. Some of the decisions the moral quality of which they will judge include the decision on who their life partner will be and the manner in which they will build their life together. Each individual is entitled to decide this for themselves, in accordance with their conscience.

240. The right under Article 25 is subject to four exceptions - public order, morality, health, and the other provisions of Part III. The respondents have not demonstrated that public order will be in peril or that the health of the public at large or of individuals will be adversely impacted, if queer persons enter into a union with their partners. As for morality, it is settled law that Article 25 speaks of constitutional morality and not societal morality. In Indian Young Lawyers

Assn. v. State of Kerala,212 a five-Judge Bench of this Court (of which one of us, DY Chandrachud, J. was a part) held:

"Morality for the purposes of Articles 25 and 26 cannot have an ephemeral existence. Popular notions about what is moral and what is not are transient and fleeting. Popular notions about what is or is not moral may in fact be deeply offensive to individual dignity and human rights. Individual dignity cannot be allowed to be subordinate to the morality of the mob. Nor can the intolerance of society operate as a marauding morality to control individual self-expression in its manifest form. The expression has been adopted in a constitutional text and it would be inappropriate to give it a content which is momentary or impermanent.

Then again, the expression 'morality' cannot be equated with prevailing social conceptions or those which may be subsumed within mainstream thinking in society at a given time. The content of morality is founded on the four precepts which emerge from the Preamble. The first among them is the need to ensure justice in its social, economic and political dimensions. The second is the postulate of individual liberty in matters of thought, expression, belief, faith and worship. The third is equality of status and opportunity amongst all citizens. The fourth is the sense of fraternity amongst all citizens which assures the dignity of human life."

Hence, the content of morality must be determined on the basis of the preambular precepts of justice, liberty, equality, and fraternity. None of these principles are an impediment to queer persons entering into a union. To the contrary, they bolster the proposition that queer persons have the right to enter into such a relationship. Finally, the other provisions in Part III (which may also restrict the exercise of the right under Article 25) do not act as a bar to the exercise of the right in the present case. Similar to the preambular values, they give rise to the right to enter into a union.

241. A union may emerge from an abiding, cohabitational relationship of two persons - one in which each chooses the other to impart stability and permanence to their relationship. Such a union encapsulates a sustained companionship. The freedom of all persons (including persons of the queer community) to form a union was recognised by this Court in Navtej (supra):

"167. There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the

vice of deceit, force, coercion and does not result in violation of the fundamental rights of others." Such a union has to be shielded against discrimination based on gender or sexual orientation.

242. In K.S. Puttaswamy (Privacy-9J.) v. Union of India,213 one of us (Dr. DY Chandrachud, J.) held that discrimination against an individual on the basis of sexual orientation is offensive to their dignity and self-worth:

"144. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the "mainstream". Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."

(emphasis supplied)

243. This Court recognized that equality demands that queer persons are not discriminated against. An abiding cohabitational relationship which includes within its fold a union of two individuals cannot be discriminated against on the basis of sexual orientation. Material and expressive entitlements which flow from a union must be available to couples in queer unions. Any form of discrimination has a disparate impact on queer couples who unlike heterosexual couples cannot marry under the current legal regime.

244. As a consequence of the rights codified in Part III of the Constitution, this Court holds that all persons have a right to enter into an abiding union with their life partner. This right, undoubtedly, extends to persons in queer relationships. At this juncture, it is necessary to clarify the difference between relationships and unions of the kind which this Court speaks of, and unions and marriages. Any person may enter into a consensual romantic or sexual relationship with another person.

This may last for a few months or for years. Regardless of the period for which the relationship continues, no legal consequences attach to it, except where provided by law (such as in terms of the DV Act). However, when two persons enter into a union with a person whom they consider to be their life partner, certain legal consequences will follow. For instance, if one of them happens to die, their partner will have the right to access the body of the deceased.

x. Restrictions on the right to enter into a union

a. The right to enter into a union cannot be restricted based on sexual orientation

245. In Navtej (supra), the concurring opinion authored by one of us (Justice DY Chandrachud) noted that Article 15 prohibits discrimination, direct or indirect, which is founded on a stereotypical understanding of the role of sex. It was observed that the usage of the word 'sex' in Article 15(1) encapsulates stereotypes based on gender.

The judgment expanded on this understanding of the provision by holding that sexual orientation is also covered within the meaning of 'sex' in Article 15(1) because (i) non-heterosexual relationships question the male-female binary and gendered roles which are attached to them; and (ii) discrimination based on sexual orientation indirectly discriminates based on gender stereotypes which is prohibited by Article 15.

Thus, a law which, directly or indirectly, discriminates based on sexual orientation is constitutionally suspect. In Navtej (supra), Justice Indu Malhotra observed that Article 15(1) prohibits discrimination based on sexual orientation because it is analogous to the other grounds on which discrimination is prohibited. The learned Judge observed that the common thread which runs through the grounds mentioned in Article 15 is that they impact the personal autonomy of an individual.

246. We find it necessary to supplement the observations of this Court in Navtej (supra) on the impermissibility of discrimination based on sexual orientation. The causal relationship between homophobia and gender stereotypes is not the only constitutional approach to grounding the prohibition of discrimination based on sexual orientation in Article 15. Subsuming the discrimination faced by queer persons into the sex-gender debate runs the risk of being reductionist. Gender theory only captures one part of the complex construction of sexual deviance. Over-emphasizing gender norms as a reason for the discrimination faced by the queer community will be at the cost of reducing their identity.

247. At this juncture, it is important to address the argument of the learned Solicitor General that Article 15 of the Constitution does not include sexual orientation because it is not an 'ascriptive' characteristic since there is a degree of 'choice' in identifying as a queer person. This submission is premised on the erroneous understanding that the common thread which runs through the grounds mentioned in Article 15 is that they are all ascriptive characteristics.

248. Article 15 of the Constitution states that no citizen shall be discriminated against based on "religion, race, sex, place of birth, or any of them." Ascribed

status is described to be "assigned to individuals without reference to their innate differences or abilities" and achieved status is described as "acquiring special qualities" and "open to individual achievement."214

Thus, characteristics attained on birth are termed as ascribed status and characteristics or qualities achieved after birth are termed as achieved status. Before proceeding further, a preliminary point must be made. Status is not a biological phenomenon. It is a social phenomenon.215 The status of a person is identified based on how a person is perceived. It depends on how the society (conditioned by social norms) sees an individual as a part of a group.

249. This Court has in many judgments held that caste is an ascribed status.216 The argument of Dr Abhishek Manu Singhvi that Article 15 prohibits discrimination on the ground of sexual orientation because it is an ascribed characteristic, and the argument of the learned Solicitor General that sexual orientation is not a ascribed characteristic (and is thus, not protected under Article 15) fails to give effect to the full purport of the anti-discrimination principle encompassed in Article 15.

A core difference between ascribed and achieved status is that the former is considered to be irreversible (where a person is born with it) but the latter is reversible.217 The assumption that Article 15 only protects the status that a person is born with and not an identity they choose runs the risk of viewing persons as helpless individuals. It also misses the crucial point that a person who chooses an identity can also be discriminated against.

A few of the grounds stipulated in Article 15 may be reversed by the exercise of choice. For example, persons undergo sexreassignment surgeries to alter their body to align it with their gender. When a person wishes to choose a different label for their gender, they face other forms of discrimination and stigma different from the discrimination that they faced earlier. Merely because a person by exercise of choice changes their sex, it cannot be argued that the protection provided under Article 15 is not available to them.

250. The Court must also be conscious of the fact that a person may face discrimination both due to their chosen identity and imposed identity. For example, even after a person changes their religion, it is possible that they face discrimination due to their new religious identity and their old caste or religious identity. This is not to say that all persons choose to change the characteristics that they are born with. While a few people by exercising their choice (successfully and unsuccessfully) alter what is assumed by the society to be their ascribed status, a few others may not wish to change their trait.

251. The discussion above clearly elucidates that the distinction between ascribed and achieved status is not as clear-cut as it may seem. The understanding of Article 15(1) cannot be premised on the distinction between ascribed and achieved status. Such an understanding does not truly capture the essence of the anti-discrimination principle.

The anti-discrimination principle incorporated in Article 15 identifies grounds on the basis of which a person shall not be discriminated. These grounds are markers of identity. The reason for constitutionally entrenching these five markers of identity (that is, religion, caste, race, sex, and place of birth) is that individuals (and groups) have historically and socially been discriminated against based on these markers of identities. These identities must be read in their historical and social context instead of through the narrow lens of ascription.

252. When Article 15 is read in the broader manner indicated above, the word "sex" in Article 15 of the Constitution takes within its meaning "sexual orientation" not only because of the causal relationship between homophobia and sexism but also because 'sex' is used as a marker of identity. The word 'sex' cannot be read independent of the social and historical context. Thus, 'sex' in Article 15 includes within its fold other markers of identity which are related to sex and gender such as sexual orientation. Thus, a restriction on the right to enter into a union based on sexual orientation would violate Article 15 of the Constitution.

b. Recognizing the right of queer persons to enter into a union will not lead to social chaos

253. The Union of India submitted that if non-heterosexual couples are permitted to enter into a union, then the State will also have to extend the right to incestuous, polygamous, or polyandrous relationships. To answer this question, this Court has to deal with the issue of whether the State has the power to place restrictions on the right to enter into a union and if so, what is the extent of such restrictions.

254. The right to enter into a union like every other fundamental right can be restricted by the State. It is now established that the Courts must use the fourprong proportionality test to assess if the infringement or restriction of a right is justified.218 The courts must use the integrated proportionality standard formulated in Akshay N Patel v. Reserve Bank of India219 to test a violation of the right to enter into a union because the right is traceable to more than one provision of Part III. However, if the State restricts the right or has the effect of

restricting the right (both directly and indirectly) based on any of identities mentioned in Article 15, such a restriction would be unconstitutional.

255. We do not accept the argument of the Union of India that permitting nonheterosexual unions would lead to allowing incestuous, polyandrous, and polygamous unions for all communities (the personal laws of some religious and trial communities currently permit polygamy or polyandry). The restriction on the ground of sexual orientation will violate Article 15 of the Constitution. On the other hand, the restriction on incestuous, polygamous or polyandrous unions would be based on the number of partners and the relationships within the prohibited degree.

The Court in that case will determine if the State's interest in restricting the right based on the number of partners and prohibited relationships is proportionate to the injury caused due to the restriction of choice. In view of the discussion above, a restriction based on a marker of identity protected by Article 15 cannot be equated to a restriction based on the exercise of choice. For this reason, we find that the apprehension of the Union of India is unfounded when tested on constitutional principles.

xi. The right of transgender persons to marry

256. Some petitioners have sought a declaration that the right to marry a person of their choice applies to transgender persons. The Union of India seems to have a mixed response to this claim. On one hand, it asserts that marriage must only be between 'biological' men and 'biological' women.

On the other hand, the written submissions of the learned Attorney General state that "The issues relating to transgender persons arising out of The Transgender Persons (Protection of Rights) Act, 2019 stand on a different footing and can be addressed without reference to the Special Marriage Act." Before addressing the issue, it is necessary to briefly advert to the difference between sex, gender, and sexual orientation, as well as to note the development of the law in relation to transgender persons.

a. Sex, gender, sexual orientation

257. The term 'sex' refers to the reproductive organs and structures that people are born with.220 Intersex persons are those whose sex characteristics do not fit the typical notions of 'male' and 'female.'221 Sex and gender are not the same. The Yogyakarta Principles describe one's gender identity as:

"each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal

sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."222

The gender of a person may not correspond to the sex they were assigned at birth. A transgender person is one whose gender identity does not conform with their sex. Transgender people may choose to undergo hormonal therapy or surgery (commonly known as gender affirming surgery or sex reassignment surgery) to alter their bodies to make them conform to their gender. People may be transgendered regardless of whether they choose to or are able to undergo a surgery.

As noted in preceding segments of this judgment, the term 'transgender' does not fully capture the rich variation in gender identities in India. Historically and socio-culturally, Indian persons223 with a genderqueer identity go by different names including hijras, kothis, aravanis, jogappas, thiru nambis, nupi maanbas and nupi maanbis. Persons who are known by these names may identify as male, female, or the 'third gender.' Intersex persons are not the same as transgender persons. They have atypical reproductive characteristics. Intersex people may identify as male, female, or transgender.

258. Sexual orientation differs from both sex and gender. The Yogyakarta Principles describe sexual orientation as:

"each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."224

The sex of a person is determined by their reproductive organs and structure, their gender identity depends on their internal experience of gender, and their sexual orientation is defined by the gender of the people that they are attracted to. The present batch of petitions seeks the recognition of the right of persons to marry regardless of their gender identity or sexual orientation. While previous segments of this judgment dealt with the rights of all persons regardless of gender identity or sexual orientation, this segment deals exclusively with the rights of persons who are transgender or intersex.

b. The judgment of this Court in NALSA and the Transgender Persons Act

259. The judgment of this Court in NALSA (supra) recognized the right of transgender persons to be identified by the gender identity of their choice, as well as their right to full protection under the Constitution, on equal terms with any other citizen of the country. The government was enjoined to recognize what the Court termed the 'third gender.' The Court also noticed the absence of a

suitable legislation dealing with the rights of the transgender community. It issued directions to the Union and State Governments to take steps to ensure that the transgender community was able to realize its rights to the fullest extent.

The judgment in NALSA (supra) was affirmed by this Court in Justice KS Puttaswamy (supra) and again, in Navtej (supra). The judgement in NALSA (supra) was critiqued for generalizing the gender identities of hijras as belonging to the third gender alone.225 The directions at paragraphs 135.1 and 135.2 of NALSA (supra) must be read as recognizing the right of all transgender persons (including hijras and those who are socio-culturally known by other names) to be recognized by a gender of their choice.

260. In 2019, Parliament enacted the Transgender Persons Act to provide for the rights of transgender persons and their welfare. This statute proscribes discrimination against transgender persons,226 provides for a system by which their identity may be recognized,227 prescribes that the appropriate government shall take welfare measures,228 recognizes the right of residence229 and provides for the obligations of various parties with respect to their right to education, social security, and health.230 It also creates a National Council for Transgender Persons.231 A challenge to the constitutional validity of the Transgender Persons Act is pending before a different Bench of this Court. We leave the challenge to the validity of the statute to be decided in that or any other appropriate proceeding.

261. During the course of the hearings, the Solicitor General advanced the argument that the Transgender Persons Act prohibits discrimination against any member of the queer community and that consequently, the queer community in India no longer faces any stigma due to their gender identity or sexual orientation. He argued that the Transgender Persons Act is a broad-based legislation which includes all persons of the queer community within its ambit. This argument does not hold any water. The legislation applies only to persons with a genderqueer or transgender identity and not to persons whose sexual orientation is not heterosexual. This is evident from the definition of a transgender person as:

"a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."232

From the definition, it is clear that the enactment applies to persons whose gender does not match with that assigned to them at birth, which includes:

a. Transgender men and women; b. Intersex persons;

c. Other genderqueer persons; and

d. Persons with socio-cultural identities such as hijras.

The word 'genderqueer' in Section 2(k) does not refer to sexual orientation but to gender identity. As discussed in the preceding paragraphs, gender identity is not the same as sexual orientation. The term 'transgender' is not commonly understood as referring to persons with a sexual orientation other than heterosexual, nor does the Transgender Persons Act use the word 'transgender' to include persons of a different sexuality. The Union of India's argument that the Transgender Persons Act applies to all queer persons including persons who are homosexual, bisexual etc. cannot be accepted. This legislation is clearly applicable only to those people with a gender identity that does not match the one assigned at birth.

262. It is incorrect to state that transgender persons do not face any stigma or discrimination post-2020, when the Transgender Persons Act came into force. Enacting a statute does not have the same effect as waving a magic wand. For instance, the prohibition against discrimination has not resulted in society abstaining from discrimination overnight. The ground reality is that society continues to discriminate against transgender persons in various ways.

Consistent respect for the rights of transgender persons may someday ensure that they are treated as equals (as is their right) but that day is yet to arrive. Hence, the contention of the Union of India that transgender people are no longer stigmatized in view of the enactment of the Transgender Persons Act cannot be accepted. Since the legislation does not apply to homosexual persons or persons of other sexual orientations, there is no question of such persons being free from discrimination or violence as a result of its enactment.

263. Pursuant to the decision in NALSA (supra), Parliament enacted the Transgender Persons Act which aims to give substance to the rights recognized by this Court in its judgment. However, no such statute was forthcoming pursuant to the decision in Navtej (supra). Although the primary issue in Navtej (supra) was whether Section 377 of the IPC was constitutional, the ruling of this Court made it amply clear that sexual orientation cannot be a valid ground for discrimination or hostile treatment.

The decision in Navtej (supra) was a clear indication of the fact that the LBGTQ community is entitled to equal treatment before law. Parliament is yet to enact a law to this effect. This Court is of the opinion that there is an urgent need for a law which inter alia prohibits discrimination on the basis of sexual orientation

and gives full effect to the other civil and social rights of LGBTQ persons. In the absence of such a law, members of the LGBTQ community will be unable to exercise their rights and freedoms to the fullest extent and will have to approach the courts for their enforcement on a case-by-case basis.

This is not a desirable outcome. As in this case, courts are not always equipped to deal with all issues which are brought before them. Even if the courts are institutionally equipped to address the grievances in the case before them, no citizen should have to institute legal proceedings for the enforcement of their rights every time they seek to exercise that right. This would be contrary to the very concept of the guarantee of rights.

c. Transgender persons in heterosexual relationships can marry under existing law

264. We are in agreement with the submission of the Union of India that the issue of whether transgender persons can marry ought to be decided separately from the issues arising under the SMA in relation to homosexual persons or those of a queer sexual orientation. Parliament has recognized the rights of the transgender community by enacting the Transgender Persons Act. This Court is therefore bound to apply this statute while adjudicating the issue of whether transgender persons can marry under existing law.

I. The right against discrimination under the Transgender Persons Act

265. The right of transgender persons to equality under the Constitution and the right against discrimination was recognized by this Court in NALSA (supra). To be equal means to be able to live without discrimination. Section 3 of the Transgender Persons Act codifies the prohibition against discrimination in the following terms:

"3. Prohibition against discrimination. â€”

No person or establishment shall discriminate against a transgender person on any of the following grounds, namely:â€”

(a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;

(b) the unfair treatment in, or in relation to, employment or occupation;

(c) the denial of, or termination from, employment or occupation;

(d) the denial or discontinuation of, or unfair treatment in, healthcare services;

(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;

(f) the denial or discontinuation of, or unfair treatment with regard to the right of movement;

(g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;

(h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and

(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be."

(emphasis supplied)

266. As evident from Clauses (a) to (i), this provision is a catch-all provision which seeks to eliminate discrimination against the transgender community both in public as well as private spaces. It is worded in exceptionally broad terms:

267. The prefatory portion of Section 3 states that "no person or establishment" shall discriminate against a transgender person. 'Establishment' is defined as any body or authority established by or under a Central Act or a State Act or an authority or body owned or controlled or aided by the Government or a local authority or a Government company233 and includes a Department of the Government.234

An establishment also means any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, or institution.235 'Establishment' therefore includes any public or private entity, authority, or body, including any 'body of individuals.' Individuals are, of course, covered by the word 'person.'

268. Clauses (a) to (i) of Section 3 list the spheres in which transgender persons cannot be discriminated against. They include the spheres of education,236 employment,237 healthcare,238 movement,239 property,240 public or private office,241 care and custody.242 It also bars any discrimination with respect to goods, accommodation, service, facility, benefit, privilege, or opportunity which is dedicated to the use of the public or customarily available to the public.243

269. The prefatory portion of Section 3 read with Section 2(b) delineates who the prohibition against discrimination operates against. In other words, it defines the actors who are prohibited from discriminating against transgender persons. The term 'establishment' has been defined in the broadest possible terms to include all manner of undertakings or groups of people. Clauses (a) to (i) of Section 3 set forth the content of the anti-discrimination principle.

They describe the actions which amount to discrimination as well as the sphere in which the discrimination operates. The actions which amount to discrimination vary depending upon the sphere they refer to and they include denial, discontinuation, unfair treatment, termination, and removal. The spheres, too, are broadly defined and extend to practically every aspect of life. In order to establish a violation of Section 3, an aggrieved person would have to demonstrate:

a. That the person against whom they seek a remedy is either an establishment as defined in Section 2(b) or a person;

b. That they have been discriminated against in one of the spheres listed by Section 3; and

c. That the discriminatory action corresponds to that sphere (for example, a person alleging a violation of the right to movement must prove that there has been a denial, discontinuation of, or unfair treatment of that right244).

II. Remedies for the infringement of Section 3

270. While Section 18 of the Transgender Persons Act stipulates that certain actions amount to offences which may attract a penalty between six months and two years as well as a fine, violations of Section 3 attract no such penalty. In fact, the Transgender Persons Act does not expressly provide for a remedy for the infringement of Section 3.

271. Section 8 enjoins the appropriate Government to take steps to secure "full and effective participation of transgender persons and their inclusion in society." Since clauses (a) to (i) of Section 3 are with a view to ensure the full and effective participation of transgender persons in all arenas of life, Section 8, properly understood, tasks the appropriate Government with ensuring that Section 3 is complied with by all whom it governs.

Rule 10(4) of the Transgender Persons (Protection of Rights) Rules 2020245 provides that the appropriate Government shall take adequate steps to prohibit discrimination in any Government or private organisation, or private and public

educational institution under their purview, and ensure equitable access to social and public spaces, including burial grounds.

Rule 11 of these rules requires the appropriate Government to take adequate steps to prohibit discrimination in any Government or private organisation or establishment including in the areas of education, employment, healthcare, public transportation, participation in public life, sports, leisure and recreation, and opportunity to hold public or private office. Under Section 8 read with Rule 10(4) and Rule 11, the appropriate Government has a duty not only to prevent discrimination against transgender persons (by persons and public as well as private establishments) but also to address it where it is found to take place.

272. Sections 10 the Transgender Persons Act inter alia requires establishments to comply with the statute. This provision places a duty on establishments to comply with Section 3 and ensure that they do not discriminate against transgender persons. Section 11 requires establishments to set up a grievance redressal mechanism by designating a person as the complaint officer to deal with complaints relating to the violation of the provisions of the statute. Section 11 is one of the ways in which a person who alleges the violation of the Transgender Persons Act can seek a remedy. However, Section 11 only goes as far as to provide for a mechanism by which the establishment in question can be approached for a remedy.

273. As noticed previously, the prohibition against discrimination operates against public as well as private bodies. If a public body or actor which falls within the definition of 'establishment' in Section 2(b) of the Transgender Persons Act infringes Section 3, it is open to the aggrieved person to invoke the extraordinary jurisdiction of the High Courts under Article 226 of the Constitution. The High Courts are empowered to issue directions, order, or writs to any person or authority for the enforcement of the rights codified by Part III and for any other purpose.

The body which satisfies the definition in Section 2(b) must be a "person or authority" under Article 226. The High Courts may exercise their jurisdiction against a body which is performing a public duty as well.246 While the jurisdiction of this Court under Article 32 is not as expansive as that of the High Courts under Article 226, this Court may rely on Section 3 to guide its interpretation of the law, to enforce the rights recognized by Part III of the Constitution.

274. Aggrieved persons may also approach the High Court under Article 226 for the issuance of a direction, order, or writ against the appropriate Government directing it to fulfil the mandate of Section 8 of the Transgender Persons Act. As

discussed in the preceding paragraphs, Section 8 obligates the appropriate Government to prevent and address discrimination inter alia by private bodies. The High Court may direct the appropriate Government to perform its duties vis-Ã -vis private bodies. This is no doubt an imperfect remedy and there is a need for the Transgender Persons Act to provide for a remedy for its enforcement, especially Section 3.

III. Harmonious interpretation of the laws governing marriage and the Transgender Persons Act

275. Section 3 of the Transgender Persons Act prohibits the state from discriminating against transgender persons. Section 20 of the Transgender Persons Act indicates that the statute is in addition to, and not in derogation from any other law for the time being in force. Parliament was no doubt cognizant of the statutes governing marriage when it enacted the Transgender Persons Act and Section 3(e) in particular.

276. The laws which govern marriage in the country specify conditions which the bride and the bridegroom must satisfy for their marriage to be recognized. This is true of personal laws247 as well as the SMA.248 The structure of these enactments also regulates marriage between a husband and a wife.249 They use the words "bride" and "bridegroom," "wife" and "husband," "male" and "female," or "man" and "woman."

These legislations regulate heterosexual marriages in India. Laws which are incidental to marriage such as the DV Act, the Dowry Prohibition Act 1961 or Section 498A of the IPC seek to address the hetero-patriarchal nature of the relationship between a man and a woman.

277. The gender of a person is not the same as their sexuality. A person is a transgender person by virtue of their gender identity. A transgender person may be heterosexual or homosexual or of any other sexuality. If a transgender person is in a heterosexual relationship and wishes to marry their partner (and if each of them meets the other requirements set out in the applicable law), such a marriage would be recognized by the laws governing marriage. This is because one party would be the bride or the wife in the marriage and the other party would be the bridegroom or the husband.

The laws governing marriage are framed in the context of a heterosexual relationship. Since a transgender person can be in a heterosexual relationship like a cis-male or cis-female, a union between a transwoman and a transman, or a transwoman and a cisman, or a transman and a ciswoman can be registered under Marriage laws. The transgender community consists of inter alia

transgender men and transgender women. A transgender man has the right to marry a cisgender woman under the laws governing marriage in the country, including personal laws.

Similarly, a transgender woman has the right to marry a cisgender man. A transgender man and a transgender woman can also marry. Intersex persons who identify as a man or a woman and seek to enter into a heterosexual marriage would also have a right to marry. Any other interpretation of the laws governing marriage would be contrary to Section 3 of the Transgender Persons Act and Article 15 of the Constitution.

278. In Kanailal Sur v. Paramnidhi Sadhu Khan,250 this Court held that the first and primary rule of construction was that the intention of the legislature must be found in the words used by the legislature itself. The terms "bride" and "bridegroom," "wife" and "husband," "male" and "female," and "man" and "woman" in the statutes which regulate marriage cannot be read as governing marriages between cisgender men and cisgender women alone.

Nothing in these statutes indicates that their intended application is solely to cisgender men and cisgender women. The plain meaning of the gendered terms used in these statutes indicates transgender persons in heterosexual relationships fall within their fold. The contention of the Union of India that "biological" men and women alone fall within the ambit of these statutes cannot be accepted. No law or tool of interpretation supports the interpretation proposed by the Union of India.

The provisions on the prohibited degrees of relationship in the laws governing marriage continue to apply. The judgment in NALSA (supra) also recognized the importance of the right of transgender persons to marry. Moreover, State Governments have formulated and implemented schemes which encourage and support transgender persons vis-Ã vis marriage.251

279. In Arunkumar v. Inspector General of Registration,252 the first petitioner was a man and the second petitioner was a woman who happened to be transgender. They married each other at a temple in Tuticorin and sought to have their marriage registered by the state, which refused. They then approached the Madras High Court under its writ jurisdiction. The Court held that:

a. The expression "bride" in the HMA cannot have a static and immutable meaning and that statutes must be interpreted in light of the legal system in its present form; and

b. The fundamental right of the petitioners under Article 25 was infringed. The Court directed the concerned respondent to register the marriage solemnized between the petitioners.

xii. The conditions for the exercise of the rights of LGBTQ persons

a. The right of queer persons under the Mental Healthcare Act

280. The first segment of this judgment detailed how the families or relatives of queer persons compel them to undergo "conversion" therapies (to "convert" their sexual orientation from homosexual to heterosexual) or make them marry a person of the opposite sex to "cure" their homosexuality or for other reasons. Other pseudo-medical treatments are similarly designed to "cure" queerness. Such practices violate the right to health of queer persons as also their right to autonomy and dignity.

In terms of Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. "Conversion" therapies and other "treatments" which are aimed at altering sexual orientation amount to cruel, inhuman and degrading treatment of queer persons. They have the effect of denying their full humanity. The mental well-being suffers to no end because cruel techniques are used in these so-called treatments. The treatment is by its very nature cruel. It is the duty of the state to ensure that these inhumane practices do not continue.

The deleterious effects of discrimination on the mental health of queer persons was also noticed by this Court in Navtej (supra). Other segments of this judgment discussed instances of queer persons and couples being driven to die by suicide as a result of the discrimination and violence meted out to them. This phenomenon is undoubtedly related to the mental health of queer persons and the state is equally under an obligation to prevent suicides because of one's gender identity or sexual orientation. Section 29 of the Mental Healthcare Act stipulates that:

"(1) The appropriate Government shall have a duty to plan, design and implement programmes for the promotion of mental health and prevention of mental illness in the country.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the appropriate Government shall, in particular, plan, design and implement public health programmes to reduce suicides and attempted suicides in the country."

The programmes for the promotion of mental health (envisaged by Section 29(1)) must include provisions for the mental health of queer persons. Programmes to reduce suicides and attempted suicides (envisaged by Section 29(2)) must include provisions which tackle queer identity and oppression arising from that identity as causes for suicidal tendencies or feelings. We direct the Union Government as well as the State Governments or governments of Union Territories (where they exist) to carry out the mandate of Section 29 in terms of the observations in this paragraph and to include appropriate modules or provisions which address the unique concerns of the queer community.

281. In exercise of the rights to dignity, autonomy, privacy and health an individual (regardless of their gender identity) may choose to enter into a union with a person (who may be of the same sex as them). Once they enter into an relationship as life partners, a couple has the right and the freedom to determine the significance of that relationship as well as its consequences. A denial of this freedom would be a denial of the many facets of Article 21.

b. The right of LGBTQ persons to freedom from coercion from their families, the agencies of the state, and other persons

282. The right to enter into a union would be an illusion without the conditions which permit the unrestricted exercise of that right. Various parts of this judgment have detailed the violence and discrimination meted out to members of the LGBTQ community, either because of their gender identity or because of their sexual orientation.

One form of this violence is that society often attempts to prevent LGBTQ persons from being with their partner, in a short-term relationship, a longterm relationship, a relationship where they choose to live together or any other kind of union. This happens in different ways - the couple may be forcibly separated from one another, their families may file complaints with the police which lead to the registration of FIRs and the consequent harassment of one or both of them, or they may be married off to third parties without their consent. The families of LGBTQ persons as well as the police are the primary actors in such violence.

283. The fundamental rights and freedoms codified by the Constitution demand that the LGBTQ community be left alone so that its members can live their lives as they see fit, in accordance with law. This Court has discussed these rights and freedoms in detail in this judgment. It is the duty of the state machinery (acting through any authority including the police) to protect these rights instead of participating in their violation. Unfortunately, the police often acts in concert

with the parents of LGBTQ persons to prevent the latter from exercising their rights. This Court finds this to be unacceptable.

284. In Mansur Rahman v. Superintendent of Police, Coimbatore District,253 the petitioner was a man who had married a woman who happened to be transgender. He claimed that his parents and some persons who belonged to a political outfit were harassing and threatening him and approached the Madras High Court seeking police protection. The Court allowed the petition and directed the police to ensure that no harm befalls the petitioner and his wife.

285. In Latha v. Commissioner of Police,254 the Madras High Court dismissed a writ petition for the issuance of a habeas corpus filed by the petitioner for the production of her sibling, who happened to be a transgender person. The Court found that the sibling had attained the age of majority and had voluntarily joined other transgender persons.

286. Sushma v. Commissioner of Police255 concerned a lesbian couple whose families opposed their relationship. Both their families filed complaints with the police that they were missing and an FIR was registered. The police visited the couple and interrogated them. The couple then filed a writ petition before the Madras High Court seeking a direction to the police not to harass them as well as for protection from any form of threat or danger to their safety and security from their families.

The Court directed the parties to undergo counselling (and the judge personally underwent counselling to understand queerness). Counsel informed the Court that the FIR would be closed and the parents agreed to let their daughters live their lives as they wished to. The Court also issued directions to ensure the protection of LGBTQ couples.

287. We affirm the approach adopted in these cases, which protects the fundamental rights of LGBTQ persons.

xiii. The right of queer persons to adopt children

a. Challenge to the Adoption Regulations

288. The JJ Act was enacted to consolidate and amend the law catering to the basic needs of children. Chapter VIII (Sections 56 to 73) deals with the provisions relating to adoption. Section 2(49) of the JJ Act defines "prospective adoptive parents" to mean a person or persons eligible to adopt a child according to the provisions of Section 57. Section 57 prescribes the eligibility criteria for prospective adoptive parents:

"57. Eligibility of prospective adoptive parents.â€”

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority."

(emphasis supplied)

289. Section 57(1) prescribes general conditions to do with the physical, mental, and financial well-being of the prospective parents as well as their motivations. Sub-Section (2) states that the consent of both the parties is required if a couple is adopting a child. Sub-Sections (3) and (4) of Section 57 state that single and divorced persons are not precluded from adopting. The only restriction is that a single male cannot adopt a girl child.

290. The Ministry of Women and Child Development notified the Regulations framed by the Central Adoption Resource Authority256 in exercise of the powers conferred under Section 68(c) read with Section 2(3) of the JJ Act. Regulation 5 of the Adoption Regulations prescribes the eligibility criteria for prospective adoptive parents. The relevant portion of the provision is extracted below for reference:

"5. Eligibility criteria for prospective adoptive parents.-

(1)The prospective adoptive parents shall be physically, mentally, emotionally and financially capable, they shall not have any life threatening medical condition and they should not have been convicted in criminal act of any nature or accused in any case of child rights violation.

(2) Any prospective adoptive parent, irrespective of their marital status and whether or not they have biological son or daughter, can adopt a child subject to the following, namely:-

(a) the consent of both the spouses for the adoption shall be required, in case of a married couple;

(b) a single female can adopt a child of any gender;

(c) a single male shall not be eligible to adopt a girl child.

(3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship except in the cases of relative or step-parent adoption."

(emphasis supplied)

291. Clause (1) of Regulation 5 states that prospective adoptive parents must be physically, mentally, emotionally, and financially stable. In addition, they must also not have any life-threatening medical condition or should not have been convicted in a criminal act or should not have been accused in a case concerning a violation of child rights. The general conditions in clause (1) are aimed at securing the best interest of the child. The conditions focus on physical, emotional, and financial stability. Clause (2) stipulates that any person irrespective of their marital status and irrespective of whether they already have a biological child can adopt. To this extent, the provision is expansive.

However, clause 2(a) states that: (a) in case of a married couple, the consent of both the spouses is required; and (b) though a single female can adopt a child of any gender, a single male shall not be eligible to adopt a girl child. Clause (3) prescribes a further restriction on the conditions to be met before someone can adopt. The provision states that a child shall be given in adoption to a couple only if they have at least two years of a stable marital relationship (except in cases of relative or step-parent adoption).

292. Though Regulation 5(2)(a) taken alone does not preclude unmarried couples from being prospective adoptive parents, a combined reading of Regulations 5(2)(a) and 5(3) elucidates that: (a) only married couples can be prospective adoptive parents; and (b) such couples must be in "at least two years of stable marital relationship". A reading of the Adoption Regulations indicates that while a person can in their individual capacity be a prospective adoptive parent, they cannot adopt a child together with their partner if they are not married.

293. The Adoption Regulations are framed in exercise of the power conferred under the JJ Act. Section 57(5) of the JJ Act grants the Authority (which means CARA in terms of Section 2(3) of the JJ Act) the power to specify any other

criteria. Set out below is a table comparing the criteria to be prospective adoptive parents prescribed under the JJ Act and the Adoption Regulations:

JJ Act	**Adoption Regulations**
The prospective adoptive parents must be physically fit, financially sound, mentally alert and highly motivated to provide a good upbringing.	In addition to the criteria prescribed under the JJ Act, the prospective parents should not have been convicted of a criminal act and should not have a life-threatening medical condition.
Couples can adopt. The consent of both spouses is required in case a couple chooses to adopt. Only married couples can adopt.	A married couple should have been in two years of stable marital relationship to be eligible to adopt.
A single male is not eligible to adopt a girl child.	A single male is not eligible to adopt a girl child but a single female is eligible to adopt a child of any gender.

294. The petitioners submitted that the Adoption Regulations are ultra vires the provisions of the JJ Act because they bar unmarried couples from adopting. It was also submitted that the distinction between married and unmarried persons for the purpose of adoption is violative of Article 14 of the Constitution.

295. It is settled law that delegated legislation must be consistent with the parent act and must not exceed the powers granted under the parent Act (JJ Act).257 The rule making authority must exercise the power for the purpose for which it is granted. The provisions of the delegated legislation will be ultra vires if they are repugnant to the parent Act or exceed the authority which is granted by the parent Act.

Section 57(5) delegates to CARA the power to prescribe any other criteria in addition to the criteria prescribed by the provision. However, in view of the line of cases on subordinate law-making, this power cannot be read expansively. CARA's power to prescribe additional criteria is limited by the express provisions and legislative policy of the JJ Act.

296. The Adoption Regulations place two restrictions on a couple who wish to adopt: first, the couple must be married, and second, the couple must have been in a stable marital relationship. We will now determine if the prescription of these two additional conditions is violative of the provisions of the JJ Act and the Constitution.

I. Regulation 5(3) of the Adoption Regulations exceeds the scope of the JJ Act

297. Section 3 of the JJ Act prescribes the general principles to be followed in the administration of the Act. The provision, inter alia, includes the principle of best interest, which stipulates that all the decisions regarding the child shall be based on the best interest of the child which will help the child develop their full potentiall.

298. The provisions of the JJ Act promote the best interest of the child and ensure their development.258 In fact, the eligibility criteria prescribed in Section 57 are an extension of that principle. The legislative intent behind prescribing the conditions of physical and mental fitness is to ensure that the parents are able to prioritise the well-being of the child. Similarly, the condition requiring the consent of both spouses ensures that the child is able to receive the attention and care of both partners.

The intent is not to give a child for adoption to a couple where one of them is unwilling to take up the responsibility of being a parent. Similarly, the criterion prohibiting a single male from adopting a girl child is in the State's interest of preventing child sexual abuse. It can be garnered that the State has prescribed the criteria in Section 57 keeping in mind the welfare of the child.

299. Section 57(2) does not stipulate that only married couples can adopt. It states that "in case of a couple" the consent of both the spouses must be secured. This is a clear indicator that adoption by a married couple is not a statutory requirement. Section 57(2) provides that the consent of both the parties must be received if the prospective adoptive parents are in a married relationship. The usage of the phrase spouse in Section 57(2) does not mean that it excludes unmarried couples from adopting.

300. However, Regulation 5(3) of the Adoption Regulations bars unmarried partners from being prospective adoptive parents. These Regulations only permit persons to adopt in an individual capacity and not jointly as an unmarried couple. Regulation 5(2) states that every person irrespective of whether they are married or unmarried will be able to be prospective adoptive parents. The subsequent criteria in clause (a) (that is, the requirement for the consent of both spouses if they are married) does not exclude an unmarried couple from adopting. It only states that if the couple is married, then the consent of both the parties shall be secured.

However, Regulation 5(3) in express terms excludes unmarried couples from adopting by prescribing the condition that the couple must have been in two

years of a 'stable marital relationship.' As observed in the previous paragraph, the JJ Act does not preclude unmarried couples from adopting. Though Section 57 of the JJ Act grants CARA the power to prescribe additional criteria, the criteria must not exceed the scope of the legislative policy. Neither the general principles guiding the JJ Act nor Section 57 in particular preclude unmarried couples from adopting a child.

In fact, all the other criteria ensure the child's best interests. The Union of India has not proved that precluding unmarried couples from adopting a child (even though the same people are eligible to adopt in their individual capacity) is in the child's best interests. Thus, CARA has exceeded its authority by prescribing an additional condition by way of Regulation 5(3), which is contrary to tenor of the JJ Act and Section 57 in particular.

301. Further, the usage of the phrase 'stable' in Regulation 5(3) is vague. It is unclear if the provision creates a legal fiction that all married relationships which have lasted two years automatically qualify as a stable relationship or if there are specific characteristics in addition to those prescribed in Regulation 5(1) (that is, physical, mental, and emotional wellbeing) which would aid in the characterization of a married relationship as a stable one. Hence, Regulation 5(3) exceeds the scope of the JJ Act.

II. Regulation 5(3) of the Adoption Regulations violates Article 14 of the Constitution

302. Regulation 5(3) of the Adoption Regulations has classified couples into married and unmarried couples for the purpose of adoption. The intent of CARA to identify a stable household for adoption is discernible from Regulation 5(3). However, CARA has proceeded under the assumption that only married couples would be able to provide a stable household for the child. Such an assumption is not backed by data. Although married couples may provide a stable environment, it is not true that all couples who are married will automatically be able to provide a stable home.

Similarly, unmarried relationships cannot be characterized as fleeting relationships which are unstable by their very nature. Marriage is not necessarily the bedrock on which families and households are built. While this is the traditional understanding of a family, we have already elucidated above that this social understanding of a family unit cannot be used to deny the right of other couples who are in domestic partnerships or live-in relationships to found a family.

303. It is now a settled position of law that classification per se is not discriminatory and violative of Article 14. Article 14 only forbids class legislation and not reasonable classification. A classification is reasonable, when the following test is satisfied:259

a. The classification must be based on an intelligible differentia which distinguishes the persons or things that are grouped, from others left out of the group; and

b. The differentia must have a rational nexus to the object sought to be achieved by the statute.

304. The Adoption Regulations use marriage as a yardstick to classify couples. There is an intelligible differentia in using marriage as an indicator to classify couples in the sense that married couples can easily be distinguished from unmarried couples. However, the differentia does not have a rational nexus with the object sought to be achieved by the CARA Regulations which is to ensure that the best interest of the child is protected. Placing a child in a stable family is undoubtedly in pursuance of a child's interest.

However, the respondents have not placed any data on record to support their claim that only married relationships can provide stability. It is true that separating from a married partner is a cumbersome process when compared to separating from a partner with whom a person is in a live-in relationship. This is because separation from a married partner is regulated by the law while live-in relationships are unregulated by law (other than for the limited purpose of domestic violence).

For instance, the law deters a person from securing a divorce immediately by prescribing conditions such as a six-month waiting period after a petition for divorce by mutual consent is filed.260 Merely because a marriage is regulated by the law, it cannot be assumed that marriage alone or that every marriage accords stability to a relationship. Similarly, it can also not be inferred that couples who are not in a married relationships are not 'serious' about the relationship.

The stability of the household depends on various factors such as the effort and involvement of the partners in establishing and running a household, creating a safe space at home, creating a healthy work-life balance, and a household where mental, physical, and emotional violence is not inflicted on one another. There is no single form of a stable household. There is no material on record to prove the claim that only a married heterosexual couple would be able to provide stability

to the child. In fact, this Court has already recognized the pluralistic values of our Constitution which guarantee a right to different forms of association.

305. The Union of India is required to submit cogent material to support its claim that only married partners are able to provide a stable household. However, it has not done so. The Union of India has submitted four studies titled "Child Attention- Deficit Hyperactivity Disorder (ADHD) in same sex parents families in the United States: Prevalence and Comorbidities,"261 "High School graduation rates amongst children of same sex households,"262 "Children in planned lesbian families: stigmatization, psychological adjustment and protective factors,"263 and "Children in three contexts: Family, Education and Social Development."264 The studies submitted by Ms. Aishwarya Bhati, learned ASG conclude that non-heterosexual couples cannot effectively take up the role of parents. The studies neither indicate that only married (and not unmarried) couples can be in a stable relationship nor that only married couples have the ability to effectively parent children.

Thus, the Union of India has not submitted any cogent material to substantiate the claim that unmarried couples cannot be in a stable relationship. The Union of India has not been able to demonstrate that a single parent who adopts a child will provide a more stable environment for a child who is adopted than an unmarried couple. For all these reasons, Regulations 5(2)(a) and 5(3) of the Adoption Regulations are violative of Article 14 of the Constitution.

306. Further, in terms of Section 58(2) of the JJ Act, the Specialised Adoption Agency is required to prepare a home study report of the prospective adoptive parents. It is only when the prospective adoptive parents are found eligible after the home study report that a child is referred to them for adoption. Section 58(5) provides that the progress and wellbeing of the child shall be ascertained after the adoption.

The procedure for adoption provides for the assessment of a couple and their capacity and ability to care for a child. Any areas of concern relating to a couple's capability as a parent would be discernible in the home study. This is true of both heterosexual couples as well as queer couples. The home study must consider the couple's capability without reference to their sexual orientation.

III. Regulation 5(3) of the Adoption Regulations violates Article 15 of the Constitution

307. Ms. Aishwarya Bhati referred to the judgment of this Court in Shabnam Hashmi v. Union of India265 to argue that the fundamental right to adopt is not

recognised under the Constitution and thus, the exclusion of queer persons from the scheme for adoption is not violative of Part III of the Constitution.

In Shabnam Hashmi (supra), a petition was filed under Article 32 of the Constitution seeking a declaration that the Constitution guarantees the right to adopt, and in the alternative, requesting the court to law down guidelines enabling adoption by persons irrespective of religion, caste, and creed. This Court disposed of the petition by observing that the adjudication of the question of whether adoption must be elevated to the status of a fundamental right must await the "dissipation of conflicting thought processes":

"16. [...] While it is correct that the dimensions and perspectives of the meaning and content of the fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a fundamental right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country.

The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution."

308. The observations of this Court in Shabnam Hashmi (supra) that it is not the appropriate time to recognise a right to adopt and to be adopted does not affect the case of the petitioners. The petitioners' challenge to Regulation 5(3) of Adoption Regulations is mounted on the ground that is discriminates against the queer community. The challenge is not on the ground that it violates the right to adopt nor is it the petitioners case that they have a fundamental right to adopt. The crux of the petitioners case is that Regulation 5(3) discriminates against the queer community because it disproportionately affects them.

309. Regulation 5(3), though facially neutral, indirectly discriminates against atypical unions (such the relationship between non-heterosexual partners) which have not been recognised by the State. Queer marriages have not been recognized by the state and queer persons in atypical unions cannot yet enter into a marriage which is recognized by the state. Though the additional criteria prescribed by the Adoption Regulations would also affect a heterosexual person's eligibility to adopt a child, it would disproportionately affect non-heterosexual couples.266

This is because the State has not conferred legal recognition to the unions between queer persons, in the form of marriage. Consequently, an unmarried heterosexual couple who wishes to adopt a child has the option of marrying to meet the eligibility criteria for adoption. However, this option is not available to queer couples. When Regulation 5(3) is understood in light of this position, a queer person who is in a relationship can only adopt in an individual capacity. This exclusion has the effect of reinforcing the disadvantage already faced by the queer community.

310. The National Commission for Protection of Child Rights ('NCPCR') has submitted that excluding queer persons from adopting children is backed by cogent reasons. As stated above, Ms. Aishwarya Bhati submitted four studies to support the claim that permitting non-heterosexual couples to adopt is not in the best interest of the child. The paper titled "Child Attention-Deficit Hyperactivity Disorder (ADHD) in same-sex parent families in the United States: Prevalence and Comorbidities,"267 examines a sample of 1,95,240 children including 512 children with same-sex parents.

The paper concluded that children with same-sex parents in the United States were twice as likely to suffer from ADHD than children with opposite-sex parents. The paper titled "High School graduation rates among children of same-sex households"268 uses the 2006 Canada census to study high school graduation probabilities of children of parents belonging to the queer community. The paper concluded that children living with parents belonging to the queer community perform more poorly in school when compared to children living with married heterosexual parents.

The paper titled "Children in planned lesbian families: stigmatisation, psychological adjustment and protective factors"269 conducted a study to assess the extent to which children between eight and twelve years in planned lesbian families in the Netherlands experience stigmatization. For the purpose of this assessment, data was collected from questionnaires filled out by mothers and by children. It was concluded that higher levels of stigmatization were associated with such children.

Boys were found to be more hyperactive and girls were found to suffer from a lower self-esteem. The paper titled "Children in three contexts: Family, education, and social development"270 collected a sample of 174 primary school children living with married heterosexual couples, cohabiting heterosexual couples, and homosexual couples to explore the relationship between family environment and the behaviour of primary school children.

The study concluded that the children of married couples are more likely to do well at school, in academic and social terms, than children of cohabiting heterosexual and homosexual couples. However, the author cautions that there may be additional factors such as biases which the teachers may have held while assessing the children, based on their cultural beliefs.

311. On the other hand, Dr. Menaka Guruswamy appearing for the intervenor, Delhi Commission for Protection of Child Rights argued that there is no evidence or empirical data to show that non-heterosexual couples are unfit to be parents or that the psychosocial development of children brought up by same-sex couples will be compromised. The learned counsel relied on the paper titled "Lesbian and Gay Parenting" by the American Psychological Association271 in which it was concluded that the home environment provided by non-heterosexual couples is not different from that provided by heterosexual parents.

In another study titled "Same-sex parenting in Brazil and Portugal: An integrative review",272 the authors found that the adoption of children by one of the individuals in a non-heterosexual partnership because of the delay in the recognition of same-sex marriage became a weakness to such families on the issues of health, education, and other responsibilities. In another paper titled, "Academic achievement of children in same and different sex parented families:

A population-level analysis of linked administrative data from the Netherlands",273 it was concluded that the children raised by same-sex couples performed at least as well as children of heterosexual parents in socio-political environments characterised by high levels of legislative or public support, and that the children living in same-sex parented families experience no educational disadvantage relative to children living in heterosexual parented families. The learned counsel also relied on a study which was conducted based on the data derived from Netherlands where same-sex marriages were formalised in 2011.274

The study found that the academic results of children indicated that children raised by non-heterosexual parents outperformed children raised by heterosexual parents by 0.139 standard deviations, and that they are 4.8 percentage points more likely to graduate. The studies which have been submitted by the counsel on either sides support their respective arguments.

The studies submitted by Ms Bhati support the argument that even if Regulation 5(3) discriminates against the queer community, it is justified because the interest of the child would suffer if they are parented by queer partners. On the other hand, the studies submitted by Dr. Menaka Guruswamy support the argument that the interest of the child parented by persons belonging to the queer

community does not suffer, and if it does it is not because persons with queer identity are 'bad' parents but because the State by not recognising queer relationships treats them as second-class citizens.

312. The burden which is required to be discharged by the State for an Article 14 violation and an Article 15 violation vary. While Article 14 prohibits unreasonable classification, Article 15 prohibits discrimination based on identity. The interpretation of Article 15 has evolved over the years to incorporate a more substantial effects-based approach towards the anti-discrimination principle.275 The test is whether the law discriminates against persons in effect, based on the identities covered in Article 15. While the Court is undertaking an exercise to determine if Article 14 is violated, the State is required to submit cogent evidence to support its claim that the classification holds a nexus with the object sought to be achieved.

On the other hand, there is no justification for discrimination based on identities which are protected under Article 15. State interests (even if established which in this case it has not been) cannot be used to justify discrimination once the Court holds that the provision in effect discriminates based on identity. Of course, while the Court is assessing if the provision under challenge discriminates in effect based on identity, it must also evaluate whether the provision in question is a protective provision meant to achieve the guarantee of substantive equality.

313. For example, it cannot be argued that the Transgender Persons Act is violative of Article 15 because it provides special provisions to safeguard the interest of the transgender community in exclusion of cis-gender persons. A classification based on the identities protected by Article 15 does not automatically lead to discrimination.

This Court in State of Kerala v. NM Thomas276 held that protective provisions (such as for reservation) were not an exception to the antidiscrimination law but are in furtherance of the principle of equality (of which antidiscrimination is a facet). The Court examines if the law is discriminatory not based on whether there is a classification based on the identity but whether there is discrimination based on the identity. While doing so it determines if it is a protective provision.

However, once it is established that the law discriminates based on protected identities, it cannot be justified based on state interest. Thus, once it is proved that the law discriminates based on sexual orientation as in this case (because it disproportionately affects queer persons), no amount of evidence or material submitted by the State that such discrimination is based on state's interest can be used as a justification.

314. We are of the opinion that if the children of persons from the queer community suffer it is because of the lack of recognition (at a legal and social plane) to same-sex unions. In fact, one of the studies submitted by Ms. Aishwarya Bhati highlights this aspect.277 The stigmatization (if any) faced by the children parented by persons of the queer community is because of the inherent biases that the society holds against the queer community, and in this context, biases about their fitness to be parents. Thus, it is in the interest of children that the State endeavours to take steps to sensitise the society about queer relationships.

315. In fact, the Indian Psychiatric Society which consists of 7000 mental health professionals in India released a statement stating that children brought up by nonheterosexual parents may face stigmatization and that it is important that the civic society is adequately sensitized:

"The Indian Psychiatric Society is very cognizant that a child adopted into a same gendered family may face challenges, stigma and/or discrimination along the way. It is imperative that, once legalized, such parents of the LGBTQA spectrum bring up the children in a gender neutral, unbiased environment. It is also of utmost importance, that the family, community, school and society in general are sensitized to protect and promote the development of such a child, and prevent stigma and discrimination at any cost."

316. The law cannot make an assumption about good and bad parenting based on the sexuality of individuals. Such an assumption perpetuates a stereotype based on sexuality (that only heterosexuals are good parents and all other parents are bad parents) which is prohibited by Article 15 of the Constitution. This assumption is not different from the assumption that individuals of a certain class or caste or religion are 'better' parents. In view of the above observations, the Adoption Regulation is violative of Article 15 for discriminating against the queer community.

317. In view of the observations above, Regulation 5(3) is ultra vires the parent Act for exceeding the scope of delegation and for violating Articles 14 and 15 of the Constitution. It is settled that courts have the power to read down a provision to save it from being declared ultra vires.278 Regulation 5(3) is read down to exclude the word "marital". It is clarified that the reference to a 'couple' in Regulation 5 includes both married and unmarried couples including queer couples.

In bringing the regulations in conformity with this judgment, CARA is at liberty to ensure that the conditions which it prescribes for a valid adoption subserve the best interest and welfare of the child. The welfare of the child is of paramount

importance. Hence, the authorities would be at liberty to ensure that the familial circumstances provide a safe, stable, and conducive environment to protect the material wellbeing and emotional sustenance of the child.

Moreover, CARA may insist on conditions which would ensure that the interest of the child would be protected even if the relationship of the adoptive parents were to come to an end in the future. Those indicators must not discriminate against any couple based on sexual orientation. The criteria prescribed must be in tune with constitutional values. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried or queer couples who seek to jointly adopt a child.

318. The forms in Schedules II (child study report), III (medical examination report and classification of special needs of a child), VI (online registration form) and VII (home study report) use the phrases "male applicant" and "female applicant". We have already concluded above that both married and unmarried couples can adopt under Regulation 5 of the Adoption Regulations. After the judgments of this Court Navtej (supra) and NALSA (supra) recognising non-binary identity and their freedom to choose a partner irrespective of the sexual identity, reference to a 'couple' cannot be restricted to heterosexual relationships. It will include all forms of queer relationships.

The phrases "male applicant" and "female applicant (in case of applicant couples)" in Schedules II, III, VI and VII of the Adoption Regulations limit reference to only heterosexual couples and have the effect of precluding persons in queer relationships from adopting, violating the anti-discrimination principle in Article 15(1). Thus, the phrases "male applicant" and "female applicant (in case of applicant couples)" in Schedules II, III, VI and VII of the Adoption Regulations are substituted with the phrases "prospective adoptive parent 1" and "prospective adoptive parent 2 (in case of applicant couples)."

b. Challenge to the CARA Circular

319. In 2022, CARA issued an Office Memorandum stipulating that a single prospective adoptive parent in a live-in relationship will be ineligible to adopt a child. The Office Memorandum further provides that this decision is taken in line with Regulation 5(3) of the Adoption Regulations which stipulates that a child can only be placed with a stable family and that a single applicant in a live-in relationship cannot be considered to be a part of a stable family. The relevant portion of the Office Memorandum is extracted below:

"It has been noticed from Home study Reports (HSRs) that some single PAPs registered with CARA for the adoption process are in relationship with their live-in partner.

2. The cases of single PAPs engaged in live-in relationship have been discussed in the Steering Committee of Central Adoption Resource Authority (CARA) during its 31st Meeting held on 18th April, 2022. It has been decided to go with the earlier decision of 14th Steering Committee Meeting held on 10th May, 2018 that the cases of single PAP in a live-in relationship with a partner will not be considered eligible to adopt a child and their registration from concerned agencies/authorities will not be considered for approval.

3. The decision has been taken in line with Regulation 5(3) of the Adoption regulations 2017. The authority would like the children to be placed only with the stable family and single applicant in a live-in relationship cannot be considered as stable family."

(emphasis supplied)

320. CARA in its 31st meeting held on 18 April 2022 in terms of the decision taken in the Steering Committee Meeting held on 10 May 2018 resolved that an application received by a prospective adoptive parent who is in a live-in relationship may not be considered on the basis of Regulation 5(3) of the Adoption Regulations. The resolution is extracted below:

"14. Reference is drawn to Steering Committee Meeting, held on 10th May 2019 wherein the Steering Committee had not approved adoption to prospective adoptive parents staying in Live-in relationship. However, NOC section has received three cases of children reserved from Special Need portal and on examination of the HSR it has been observed that the parents have been in live-in relationship.

15. In this regard the NOC committee had not approved intercountry cases of the children on the basis of Reg. 5(3) which states that no child shall be given in adoption to a couple unless they have atleast two years of stable marital relationship. Since the matter involves cases of special needs children, the issue may be kindly be discussed in the Steering Committee.

Decision: It was decided to go with the earlier decision of the Steering committee and the same rule should be applicable as that of the domestic PAPs. Any application received from live in PAPs may not be considered on the basis of Reg. 5(3) of the Adoption Regulations."

321. The CARA Circular prescribes a condition in addition to the conditions prescribed in the Adoption Regulations. While the Adoption Regulations exclude unmarried couples from jointly adopting a child, the CARA Circular restricts the ability of a person who is in a live-in relationship to adopt in their individual capacity. The CARA Circular stipulates that the decision is in pursuance of Regulation 5(3) of the Adoption Regulations which requires couples to be in a 'stable' relationship.

322. Regulation 5(1) of the Adoption Regulations prescribes a general criteria (in the form of a guiding principle) for prospective adoptive parents which is that they must be physically, mentally, and emotionally fit, they must not be convicted of a criminal act, and they must not have a life-threatening disease. These criteria are equally applicable to couples and persons who wish to adopt in their individual capacity.

All the other subsequent provisions in Regulation 5 are specific to couples (that is, the requirement of a stable relationship and the consent of both parties) and individuals (that is, that a male cannot adopt a girl child). Hence, the additional criterion prescribed by the CARA circular for a person to adopt in an individual capacity must be traceable to the principles in Regulations 5(1) and 5(2)(c). The condition imposed by CARA circular is neither traceable to the principles in Regulations 5(1) and 5(2)(c) nor is it traceable to any of the provisions of the JJ Act. The CARA Circular has exceeded the scope of the Adoption Guidelines and the JJ Act.

323. According to the Adoption Regulations, unmarried couples cannot jointly adopt a child. Though the additional criteria prescribed by the CARA Circular would also affect a heterosexual person's eligibility to adopt a child, it would disproportionately affect279 non-heterosexual couples since the State has not conferred legal recognition in the form of marriage to the union between nonheterosexual persons.

When the CARA Circular is read in light of this legal position, a person of the queer community would be forced to choose between their wish to be an adoptive parent and their desire to enter into a partnership with a person they feel love and affinity with. This exclusion has the effect of reinforcing the disadvantage already faced by the queer community. For these reasons and the reasons recorded in Section D (xiii)(a)(III), the CARA Circular is violative of Article 15 of the Constitution.

E. Response to the opinion of Justice Ravindra Bhat

324. In the opinion authored by him, my learned brother, Justice Ravindra Bhat states that unenumerated rights are recognised by Courts in response to State action "that threaten the freedom or right directly or indirectly." With due respect, such a narrow understanding of fundamental rights turns back the clock on the rich jurisprudence that the Indian courts have developed on Part III of the Constitution. This Court has held in numerous cases held that the rights of persons are infringed not merely by overt actions but also by inaction on the part of the State. Some of these precedents are referred to below.

325. In NALSA (supra), this Court held that the State by rendering the transgender community invisible and failing to recognize their gender identity deprived them of social and cultural rights. This Court recognised the duty of the State to enable the exercise of rights by the transgender community and issued a slew of directions to enforce this duty. Justice AK Sikri in his opinion issued the following declarations and directions:

"129. We, therefore, declare:

1. Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

2. Transgender persons' right to decide their selfidentified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

3. We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

4. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.

5. Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

6. Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

7. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

8. Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

9. Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life."

326. In Union of India v. Association of Democratic Reforms280, proceedings under Article 136 were initiated against the judgment of the High Court of Delhi which recognised the rights of citizens to receive information regarding criminal activities of a candidate to the legislative assembly. The High Court directed the Election Commission to inter alia secure information on whether the candidate is accused of any offence and the assets possessed by a candidate. A three-Judge Bench of this Court dismissed the appeal and held that it is imperative that the electorate possesses sufficient information to enable them to exercise their right to vote. The observations are extracted below:

"34. From the afore quoted paragraph, it can be deduced that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.

45. Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets â€" immovable, movable and valuable articles â€" it would have its own effect."

327. While the precedents on the subject are not multiplied in the text of the judgment, some of the judgments on this point are footnoted.281 In view of the discussion above, the observation of Justice Bhat that an overt action of the State is necessary for the court to direct the State to create enabling conditions has no jurisprudential basis. Neither the provisions of the Constitution nor the earlier decisions of this Court create such a distinction. In fact, as I have discussed in detail, Article 32 of the Constitution states that the Supreme Court shall have the power to issue directions for the enforcement of rights conferred by Part III without making any distinction between action and inaction by the State.

328. I also disagree with the observations of Bhat J that in the absence of a legal regime, the power of this Court to issue directions to enable the facilitation of rights is limited. In Sheela Barse v. Union of India282, the petitioner, a social activist brought to the attention of this court that the State of West Bengal jailed persons with mental disabilities who are not suspected, accused, charged of, or convicted for, committing any offence but only for the reason that they are mentally ill. The decision to jail them was made based on an instant assessment of their mental health.

This Court held that the admission of such mentally ill persons to jails was illegal and unconstitutional. This Court also directed that hospitals shall be immediately upgraded, psychiatric services shall be set up in all teaching and district hospitals, including filling posts for psychiatrists, and integrating mental health care with the primary health care system. In PUCL v. Union of India283, the petitioner submitted that the right to livelihood implies that the State has a duty to provide food to people. In a series of orders, this Court identified government schemes which constituted legal entitlements of the right to food and outlined the manner of implementing these schemes.

329. My learned brother relies on the example of Article 19(1)(d) to buttress his point. He states that in the absence of a law which casts a duty on the State to provide transportation through roads, a citizen cannot approach the court and seek the construction of a road to enforce the right to move freely. The opinion of my learned brother fails to have noted the judgment of a three-Judge Bench of this Court in State of Himachal Pradesh v. Umed Ram Sharma284.

In this case, a letter petition was written to the High Court claiming that the construction of a road which would benefit the residents of the village and in particular, the members of the Dalit community was stopped by the State. The High Court directed the Superintending Engineer of the Public Works Department to complete the construction of the road. This Court dismissed the appeal against the judgment of the High Court observing that the Constitution

places a duty on the State to provide roads for residents of hilly areas because access to roads is encompassed in their right to secure a quality life.

This Court recognised that the right under Article 21 of the Constitution is violated if the State does not build roads for effective communication and transportation. Thus, even in the absence of a law which requires the State to build roads, such a duty was imposed on the State on an interpretation of Part III of the Constitution. Moreover, in the precent case, the petitioners are demanding equal access to something which does exist (i.e., the entitlements which flow from the right to form an abiding cohabitational union). In fact, my learned brother himself recognizes this when he holds that the actions of the state have the effect of discriminating against queer couples. The example under Article 19(1)(a) is unconvincing for similar reasons.

330. Bhat, J. holds that: (i) the legal dimension of marriage in USA is different from the legal dimension of marriage in India; (ii) the legality of a marriage in USA is solely dependent on a validly obtained license; (iii) in India, the legal status of a marriage stems from personal law and customs; and (iv) the terms of marriage are set, to a large extent, independently of the state.

While there is no doubt that marriage predates the state and the existence of what we now consider 'law', I am unable to agree with the conclusion of my learned brother that the status of a marriage in India stems only from personal law and customs and that the terms of marriage are largely set independently of the state, for two reasons: First, the legal status of a married couple stems from statute. Once the state began regulating marriage, the validity (and consequently, the 'status') of marriage is traceable to law. While law may provide that a marriage is valid if it was performed in accordance with custom, it is beyond cavil that the only reason that a custom is relevant (for the purposes of law) is because of law itself.

Therefore, it is law (through statutes) that accords significance to personal law and customs and it is statutes that may (and often do) deviate from personal law and customs. Second, the number of legislations which govern marriage as well as the detailed framework which they set out makes it immediately evident that the terms of marriage are not set independently of the state, but by the state itself. From divorce to custody to maintenance to domestic violence and offences, almost every aspect of marriage is regulated by the state.

I have discussed the manner in which marriage has evolved (through state regulation) in detail in Section D(iii)(b) of my judgment. Thus, marriage as an institution cannot anymore be viewed as solely traceable to customs and traditions after the State's interference to regulate the institution. The State's

reformation of the institution has slowly but evidently changed the nature of the institution itself. Under the Constitution, the state is empowered to reform social institutions including marriage in line with constitutional values.

331. Contrary to what is stated in the judgment of Bhat, J., the directions in my judgment do not require the state to create social or legal status, or a social institution. The directions are with a view to recognizing the choice that a person makes for themselves when they choose another to be their partner for life. The directions seek to make that choice a meaningful one.

Nowhere do they create an institution of any kind. Rather, they give effect to the fundamental rights in Part III of the Constitution. This is the mandate of this Court under Article 32 - "The Supreme Court shall have power to issue directions or orders or writs ... for the enforcement of any of the rights conferred by this Part." No response is forthcoming to my detailed exposition of the scope of the powers of this Court under Article 32 in Section D(i) of my judgment. In fact, Bhat, J. himself recognizes that courts often enable and oblige the state to take measures.

My learned brother also arrives at the conclusion that the state is indirectly discriminating against the queer community but fails to exercise the power vested in this Court by Article 32 to alleviate this discrimination in any way. This Court is not through judicial diktat creating a legal regime exclusively for persons of the queer community but merely recognising the duty of the State to recognise the entitlements flowing from exercising the right to choose a life partner.

332. Bhat, J. states that no one has contended that two queer persons have the right of a sustained partnership which is traceable to Articles 19(1)(a), (c), (d) and the right to conscience under Article 25. This is not true, as demonstrated by the segment of this judgment on the submissions made by the petitioners.285

333. Bhat, J. has held that:

a. The classification in a legislation is to be discerned by gathering the object sought to be achieved by the enactment. The object of the SMA was to enable inter-faith heterosexual marriage. The classification is therefore between same-faith heterosexual couples and inter-faith heterosexual couples. It does not discriminate against queer persons; and

b. The test for discrimination is not the object of the statute but its effect and impact. The effect of the state regulating marriage only for heterosexual couples is that it "adversely impacts" them, "results in their exclusion," "results in denial of entitlements / benefits," and that "this injustice and inequity results in

discrimination." The state must address "this deprivation" and take "remedial action."

My learned brother contradicts himself when he holds that the SMA is not discriminatory by relying on its object, on the one hand, and that the state has indirectly discriminated against the queer community because it is the effect and not the object which is relevant, on the other. My learned brother discusses in detail the deprivation, exclusion, and discrimination faced by the queer community. In effect, he: (i) recognizes that they have a right not to be discriminated against; and (ii) holds that the actions of the state have the effect of discriminating against them.

However, he does not take the step which logically follows from such a ruling which is to pass directions to obviate such discrimination and ensure the realization of the rights of the queer community. I cannot bring myself to agree with this approach. The realization of a right is effectuated when there is a remedy available to enforce it. The principle of ubi jus ibi remedium (that is, an infringement of a right has a remedy) which has been applied in the context of civil law for centuries cannot be ignored in the constitutional context. Absent the grant of remedies, the formulation of doctrines is no more than judicial platitude.

334. Bhat, J highlights that the central question which arises for the consideration of this Court is whether the absence of law or a regulatory framework, or the failure of the State to enact law, amounts to discrimination that is protected under Article 15. He states that "there is no known jurisprudence or case law (yet) pointing to the absence of law being considered as discrimination as understood under Article 15." Here, I would like to sound a note of caution (which, though obvious, bears repetition) - the manner in an issue is framed impacts the analysis of the issue.

In fact, Bhat, J's reasoning deviates from the jurisprudence that this Court has developed on the interpretation of Article 15. Bhat, J's reasoning assesses the 'objective' of a law instead of its 'effect. This is best understood with the help of an example. Suppose the state were to enact a law which enabled only citizens of a particular caste to avail the services of a particular government hospital but which did not expressly prohibit members of other castes from availing its services.

This law contains various conditions which must be satisfied before services of the hospital can be availed (such as a list of diseases which it treats or how advanced a particular disease is). This law can be understood as being an "enabling law" or a law which "regulates" or it can be understood (in its true sense) as a law which has the effect of excluding certain groups on the basis of

prohibited markers of identity. This remains true not only of a hospital but of any service or scheme or institution that one can imagine. Hence, what is framed as the "absence of a law" or an "enabling law" can have the same restrictive effect as a law which expressly bars or prohibits certain actions or excludes certain groups.

335. I disagree with the observations of my learned brother that the State has a positive obligation under Article 21 but such an obligation cannot be read into other fundamental rights other than Article 21. I reiterate the observations made in Section D(ix)(a). 336. Bhat, J. distinguishes the judgments in Vishaka (supra), Common Cause (supra) and NALSA (supra) from the present case by holding that in each of these cases, directions were passed because the "inadequacies ... were acute and intolerable" and faced by "entire groups."

However, he does not explain why the inadequacies faced by the queer community in this case are mild or tolerable. There is neither a test nor standard known to law by which discrimination, or the violation of a fundamental right, must reach a level of intolerability for this Court to exercise its jurisdiction. Regardless of the severity of the violation, it is the duty of this Court to protect the exercise of the right in question. Further, in this case too, the rights of an "entire group" (being the queer community) are at issue.

337. The opinion of Bhat, J. highlights that the reading of the Adoption Regulations to permit unmarried couples to adopt would have 'disastrous outcomes' because the law, as it stands today, does not guarantee the protection of the child of unmarried parents adopting jointly. A reading of the numerous laws relating to the rights of children qua parents indicates that the law does not create any distinction between children of married and unmarried couples so long as they are validly adopted.

Section 12 of the Hindu Adoptions and Maintenance Act 1956 states that an adopted child shall be deemed to be the child of their adopted parents for all purposes from the date of adoption. Similarly, Section 63 of the JJ Act also creates a deeming fiction. The provision states that a child in respect of whom an adoption order is issued shall become the child of the adoptive parents and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, including for the purposes of intestacy.

338. In view of the deeming fiction created by Section 12 of the Hindu Adoptions and Maintenance Act 1956 and Section 63 of the JJ Act, an adopted child is a legitimate child of the adopting couple. The manner of determination of legitimacy prescribed by Section 112 of the Indian Evidence Act 1872286 shall not apply in view of the deeming fiction created by Section 12 of the Hindu

Adoptions and Maintenance Act 1956 and Section 63 of the JJ Act. Thus, all the benefits which are available under the law to a legitimate child (who has been validly adopted) of a married couple will equally be available to the legitimate child of an unmarried couple.

For example, Section 20 of the Hindu Adoptions and Maintenance Act 1956 which provides that a Hindu is to maintain their children does not make any distinction between a legitimate child of a married and an unmarried couple. Similarly, succession law in India does not differentiate between the child of a married and an unmarried couple if the child has been adopted by following the due process of law. Further, the breakdown of the relationship of an unmarried couple will not lead to a change in applicable law because the child will continue to be a legitimate child even after the breakdown of the relationship.

It is therefore unclear what the 'disastrous outcomes' referred to, are. My learned brother has also failed to address whether Regulation 5(3) is discriminatory for distinguishing between married and unmarried couples for the purpose of adoption and for the disproportionate impact that it has on the members of the queer community while simultaneously holding that "the State cannot, on any account, make regulations that are facially or indirectly discriminatory on the ground of sexual orientation."

F. Directions to obviate discrimination

339. Counsel for the petitioners and some counsel for the respondents advanced extensive submissions on the various forms of violence and discrimination that society and the state machinery inflict upon the queer community, and especially queer couples. This has been discussed in detail in the prefatory part of the judgment. Counsel sought directions to obviate such violence and discrimination.

a. The Union Government, State Governments, and Governments of Union Territories are directed to:

i. Ensure that the queer community is not discriminated against because of their gender identity or sexual orientation;

ii. Ensure that there is no discrimination in access to goods and services to the queer community, which are available to the public;

iii. Take steps to sensitise the public about queer identity, including that it is natural and not a mental disorder;

iv. Establish hotline numbers that the queer community can contact when they face harassment and violence in any form;

v. Establish and publicise the availability of 'safe houses' or Garima Grehs in all districts to provide shelter to members of the queer community who are facing violence or discrimination;

vi. Ensure that "treatments" offered by doctors or other persons, which aim to change gender identity or sexual orientation are ceased with immediate effect;

vii. Ensure that inter-sex children are not forced to undergo operations with regard only to their sex, especially at an age at which they are unable to fully comprehend and consent to such operations;

viii. Recognize the self-identified gender of all persons including transgender persons, hijras, and others with sociocultural identities in India, as male, female, or third gender. No person shall be forced to undergo hormonal therapy or sterilisation or any other medical procedure either as a condition or prerequisite to grant legal recognition to their gender identity or otherwise;

b. The appropriate Government under the Mental Healthcare Act must formulate modules covering the mental health of queer persons in their programmes under Section 29(1). Programmes to reduce suicides and attempted suicides (envisaged by Section 29(2)) must include provisions which tackle queer identity;

c. The following directions are issued to the police machinery:

i. There shall be no harassment of queer couples by summoning them to the police station or visiting their places of residence solely to interrogate them about their gender identity or sexual orientation;

ii. They shall not force queer persons to return to their natal families if they do not wish to return to them;

iii. When a police complaint is filed by queer persons alleging that their family is restraining their freedom of movement, they shall on verifying the genuineness of the complaint ensure that their freedom is not curtailed;

iv. When a police complaint is filed apprehending violence from the family for the reason that the complainant is queer or is in a queer relationship, they shall on verifying the genuineness of the complaint ensure due protection; and

v. Before registering an FIR against a queer couple or one of the parties in a queer relationship (where the FIR is sought to be registered in relation to their

relationship), they shall conduct a preliminary investigation in terms of Lalita Kumari v. Government of U.P287, to ensure that the complaint discloses a cognizable offence. The police must first determine if the person is an adult. If the person is an adult and is in a consensual relationship with another person of the same or different gender or has left their natal home of their own volition, the police shall close the complaint after recording a statement to that effect.

G. Conclusions and orders of enforcement

340. In view of the discussion above, the following are our conclusions:

a. This Court is vested with the authority to hear this case. Under Article 32, this Court has the power to issue directions, orders, or writs for the enforcement of the rights in Part III;

b. Queerness is a natural phenomenon known to India since ancient times. It is not urban or elite;

c. There is no universal conception of the institution of marriage, nor is it static. Under Articles 245 and 246 of the Constitution read with Entry 5 of List III to the Seventh Schedule, it lies within the domain of Parliament and the state legislatures to enact laws recognizing and regulating queer marriage;

d. Marriage has attained significance as a legal institution largely because of regulation by the state. By recognizing a relationship in the form of marriage, the state grants material benefits exclusive to marriage;

e. The State has an interest in regulating the 'intimate zone' to democratize personal relationships;

f. The issue of whether the Constitution recognizes the right to marry did not arise before this Court in Justice KS Puttaswamy (9J) (supra), Shafin Jahan (supra), and Shakti Vahini (supra);

g. The Constitution does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law. However, several facets of the marital relationship are reflections of constitutional values including the right to human dignity and the right to life and personal liberty;

h. This Court cannot either strike down the constitutional validity of SMA or read words into the SMA because of its institutional limitations. This Court cannot read words into the provisions of the SMA and provisions of other allied laws such as the ISA and the HSA because that would amount to judicial

legislation. The Court in the exercise of the power of judicial review must steer clear of matters, particularly those impinging on policy, which fall in the legislative domain;

i. The freedom of all persons including queer couples to enter into a union is protected by Part III of the Constitution. The failure of the state to recognise the bouquet of entitlements which flow from a union would result in a disparate impact on queer couples who cannot marry under the current legal regime. The state has an obligation to recognize such unions and grant them benefit under law;

j. In Article 15(1), the word 'sex' must be read to include 'sexual orientation' not only because of the causal relationship between homophobia and sexism but also because the word 'sex' is used as a marker of identity which cannot be read independent of the social and historical context;

k. The right to enter into a union cannot be restricted based on sexual orientation. Such a restriction will be violative of Article 15. Thus, this freedom is available to all persons regardless of gender identity or sexual orientation;

l. The decisions in Navtej (supra) and Justice KS Puttaswamy (9J) (supra) recognize the right of queer couples to exercise the choice to enter into a union. This relationship is protected from external threat. Discrimination on the basis of sexual orientation will violate Article 15;

m. Transgender persons in heterosexual relationships have the right to marry under existing law including personal laws which regulate marriage;

n. Intersex persons who identify as either male or female have the right to marry under existing law including personal laws which regulate marriage;

o. The state must enable the LGBTQ community to exercise its rights under the Constitution. Queer persons have the right to freedom from coercion from their natal families, agencies of the state including the police, and other persons;

p. Unmarried couples (including queer couples) can jointly adopt a child. Regulation 5(3) of the Adoption Regulations is ultra vires the JJ Act, Articles 14, and 15. Regulation 5(3) is read down to exclude the word "marital". The reference to a 'couple' in Regulation 5 includes both married and unmarried couples as well as queer couples. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried couples who seek to jointly adopt a child. However, while framing regulations, the state may impose conditions

which will subserve the best interest and welfare of the child in terms of the exposition in the judgment;

q. The CARA Circular disproportionately impacts the queer community and is violative of Article 15;

r. The Union Government, State Governments, and Governments of Union Territories shall not discriminate against the freedom of queer persons to enter into union with benefits under law; and

s. We record the assurance of the Solicitor General that the Union Government will constitute a Committee chaired by the Cabinet Secretary for the purpose of defining and elucidating the scope of the entitlements of queer couples who are in unions. The Committee shall include experts with domain knowledge and experience in dealing with the social, psychological, and emotional needs of persons belonging to the queer community as well as members of the queer community. The Committee shall before finalizing its decisions conduct wide stakeholder consultation amongst persons belonging to the queer community, including persons belonging to marginalized groups and with the governments of the States and Union Territories.

The Committee shall in terms of the exposition in this judgment consider the following:

i. Enabling partners in a queer relationship (i) to be treated as a part of the same family for the purposes of a ration card; and (ii) to have the facility of a joint bank account with the option to name the partner as a nominee, in case of death;

ii. In terms of the decision in Common Cause v. Union of India288, as modified by Common Cause v. Union of India289, medical practitioners have a duty to consult family or next of kin or next friend, in the event patients who are terminally ill have not executed an Advance Directive. Parties in a union may be considered 'family' for this purpose;

iii. Jail visitation rights and the right to access the body of the deceased partner and arrange the last rites; and

iv. Legal consequences such as succession rights, maintenance, financial benefits such as under the Income Tax Act 1961, rights flowing from employment such as gratuity and family pension and insurance. The report of the Committee chaired by the Cabinet Secretary shall be implemented at the administrative level by the Union Government and the governments of the States and Union Territories.

341. The petitions in these proceedings are disposed of in terms of this judgment.

342. Pending applications (if any) are disposed of.

.....CJI. [Dr. Dhananjaya Y. Chandrachud]

New Delhi;

October 17, 2023

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127 798 N.E.2d 941 (Mass. 20003)

128 Section 25 of the Hindu Marriage Act 1955; Section 37 of Special Marriage Act 1954 stipulates that the court can direct the husband to pay maintenance to his wife; Section 40 of the Parsi Marriage and Divorce Act 1936; Section 37 of the Divorce Act 1869 where the District Court is conferred with the power to secure maintenance to the wife from the husband.

129 Section 125 of CrPC

130 Section 57 of the Juvenile Justice (Care and Protection of Children) Act 2015 prescribes eligibility criteria for the adoption of children. The provision stipulates that if a couple wants to adopt, then the consent of both the spouses are required. However, the sub-section (5) of the provision states that any other criteria specified in the adoption regulations frame Authority shall be followed. Clause 5(3) of the Adoption Regulations dated 23.9.2022 (G.S.R. 726(E)) notified by the Ministry of Women and Child Development in exercise of powers conferred under Section 68(c) read with Section 2(3) of the Juvenile Justice (Care and Protection of Children) Act 2014 prescribes that a child shall be given in adoption only if they have been in a stable two year marital relationship.

131 Section 2(e) of the Assisted Reproductive Technology (Regulation) Act 2021 defines a commissioning couple as an infertile married couple who

approach an assisted reproductive technology clinic or bank for services; Section 4(c)(II) of the Surrogacy (Regulation) Act 2021 stipulates that the eligibility condition for an intending couple to avail the services of surrogacy is that the intending couple must be married and between the age of 23 to 50 years in case of female and 26 to 55 in case of a male.

132 Hindu Succession Act 1956 and the Indian Succession Act 1925.

133 Section 55 of the Code of Social Security 2020 provides that each employee who has completed one year of service shall nominate from his family for the payment of gratuity. Section 55(3) states that any nomination made by the employee in favour of a person who is not a member of his family shall be void.

134 Section 32 of the Code of Social Security 2020 stipulates that the eldest surviving member of the family (which has been defined to include spouse) of an insured person shall receive payment towards the expenditure on the funeral.

135 Sections 32 and 39 of the Code of Social Security 2020

136 Section 2(c) of the Provident Funds Act 1925 defines a dependent to include a wife or a husband. Section 3 of the Act stipulates that the sum standing to the credit of any subscriber shall be paid to any dependent.

137 Section 122 of the Indian Evidence Act 1872 states that no person who is or has been married shall be compelled to disclose any communication made during marriage.

138 Section 5 of the Citizenship Act 1955 states that citizenship can be acquired through naturalization by a person who is married to a citizen of India and is ordinarily resident in India for seven years. Section 7A stipulates a foreign origin person whose spouse is a Indian citizen or overseas citizen of India shall apply for OCI if their marriage is registered and they have lived in India for a continuous period of two years.

139 Section 2(i) of the Act defines "near relative" to include a spouse.

140 Martha C. Nussbam, A right to marry₹ (2010) California Law Review Vol 98(3)

141 State of Kerala v. NM Thomas, 1976 SCR (1) 906

142 Olega Tellis v. Bombay Municipal Corporation, 1985 SCC (3) 545

143 Hussainara Khatoon v. Home Secretary, (1980) 1 SCC81

144 Unnikrishnan v. State of AP, (1993) 1 SCC 645

145 Also see Mohd. Hanif Qureshi v. State of AP, 1959 SCR 629

146 (1993) 1 SCC 645

147 AIR 1980 C 1789

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149 Plurality opinion authored by Justice DY Chandrachud (paragraph 158)

150 Martha C Nussbaum, Capabilities as fundamental entitlements: Sen and Social Justice, (2003) Feminist Economics 9 (203) 33

151 (1970) 1 SCC 248

152 Gary Jeffrey Jacobson, Rights and American Constitutional identity, (2011) Vol. 43 (4) 409

153 ibid

154 Opinion of Justice Chelameshwar

155 Opinion of Justice DY Chandrachud

156 Opinion of Justice Bobde

157 Opinions of Justice RF Nariman and Justice Sapre

158 Bert-Jaap Koops et al., "A Typology of Privacy", (2017) University of Pennsylvania Journal of International Law (2017), Vol. 38(2) 566

159 Paragraphs 90 and 157 and conclusion (F) of Justice DY Chandrachud's opinion; paragraph 46 of Justice RF Nariman's opinion; paragraph 78 of Justice SK Kaul opinion 8

160 Article 41 of the Irish Constitution stipulates that the State pledges to guard with special care the institution of marriage on which the family is founded.

161 Tammy R Pettinato, "Transforming Marriage: The Transformation of Intimacy and the Democratizing Potential of Love" JL & Fam. Stud. 9, 101

162 ibid

163 Frances Olsen, "Constitutional law: Feminist Critique of the public/private distinction" Vol. 10 (1993), Constitutional Commentary, p. 319 (1990)

164 See Deepak Gulati v. State of Haryana, (2013) 7 SCC 675

165 Paragraph 45 of the judgment.

166 Section 1 to the Fourteenth Amendment to the US Constitution states that no State shall deprive any person of life, liberty, or property without due process of law and equal protection of the laws.

167 In Loving v. Virginia, 388 U.S 1, 12 (1967), the US Supreme Court invalidated bans on inter-racial unions holding that marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men; In Turner v. Safley, 482 U.S. 78, 95(1987) the US Supreme Court held that the right to marry was abridged by regulations limiting the privilege of prison inmates to marry.

168 Skinner v. Oklahoma, 316 U.S 535

169 Zablocki v. Redhail, 434 U.S 374

170 Loving v. Virginia, 388 US 1

171 Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass.2003)

172 "South African Marriage Act"

173 "Rent Act"

174 "ECHR"

175 "Human Rights Act"

176 By a majority of 4-1.

177 Opinion of Lord Nicholls of Birkenhead, Ghaidan (supra).

178 Principles of interpretation which are well accepted in India must guide this Court's decision. For example, when two constructions of a provision are possible, courts ought to prefer the construction which gives effect to the provision rather than the one which renders it inoperative. M. Pentiah v. Veeramallappa Muddal, 1961 (2) SCR 295; Tinsukhia Electric Supply Co. Ltd. v. State of Assam, (1989) 3 SCC 709

179 Article 13 of the Constitution

180 Chapter II, FMA

181 Chapter III, FMA

182 Section 4, FMA; Section 17(2), FMA

183 Margaret Trawick, Notes on Love in a Tamil Family (University of California Press 1992)

184 MC Mehta v. Union of India, (2019) 17 SCC 490

185 State of Himachal Pradesh v. Umed Ram Sharma, (1986) 2 SCC 68

186Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520

187 D.C Saxena v. Hon'ble Chief Justice of India, (1996) 5 SCC 216

188 Articles 23 and 24 of the Constitution

189 Articles 15 and 16 of the Constitution

190 Article 21A of the Constitution

191 Articles 25 to 28 of the Constitution

192 Martha (n 150)

193 The other capabilities listed by Martha C. Nussbaum include 'life', 'bodily health', 'bodily integrity', 'senses, imagination and thought', 'practical reason', 'other species', and 'play'.

194 The Preamble of the United Nations Convention on the Rights of the Child recognizes the importance of the family in the following terms:

"Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."

195 468 U.S 609 (1984)

196 The right to form an intimate association has been expanded upon by the Supreme Court of US in Lawrence v. Texas, 539 U.S 558 (2003) by which the sodomy laws were held unconstitutional.

197 Kenneth L Karst, The freedom of intimate association, (1980) The Yale Law Journal, Vol. 89 (4) 624-692

198 ibid

199 Evan Gerstmann, Same-sex marriage and the Constitution, (Cambridge University Press 2017)

200 (1978) 1 SCC 248

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202 Purayil (n 96)

203 Purayil (n 96)

204 See generally, Kath Weston, Families We Choose: Lesbians, Gays, Kinship (Columbia University Press 1997)

205 Reddy (n 81)

206 "Yogyakarta Principles"

207 NALSA (supra); Navtej Singh Johar (supra)

208 Common Cause v. Union of India, (2018) 5 SCC 1; Union of India v. Moolchand Kharaiti Ram Trust, (2018) 8 SCC 321

209 "Mental Healthcare Act"

210 Indian Young Lawyers Assn. v. State of Kerala & Ors. (2019) 11 SCC 1

211 Black's Law Dictionary (5th edn.; 1979)

212 (2019) 11 SCC 1

213 (2017) 10 SCC 1

214 Ralph Linton, The Study of Man: An introduction (1936)

215 Irving S. Falodare, A Clarification of "Ascribed Status" and "Achieved Status", The Sociological Quarterly, Vol. 10, No. 1 (Winter, 1969), pp 53-61

216 See Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125; Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1; Indian Medical Assn. v. Union of India, (2011) 7 SCC 179; Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217

217 Ibid.

218 See Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 4 SCC 346; Puttaswamy (9J) (supra)

219 Civil Appeal No. 6522 of 2021

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221 'Intersex people,' Office of the United Nations High Commissioner for Human Rights <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people>

222 Introduction to the Yogyakarta Principles, Yogyakarta Principles

223 As also persons in other South Asian countries

224 Ibid

225 H.R. Vasujith Ram, 'Combatting Exclusions through Law: Rights of Transgender People in India', in Zoya Hasan, and others (eds), The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US (Delhi, 2018; online edn., OUP 2019)

226 Chapter II, Section 9

227 Chapter III

228 Chapter IV

229 Section 12

230 Chapter VI

231 Chapter VII

232 Section 2(k), Transgender Persons Act

233 As defined in Section 2 of the Companies Act, 2013.

234 Section 2(b)(i), Transgender Persons Act

235 Section 2(b)(ii), Transgender Persons Act

236 Section 3(a), Transgender Persons Act

237 Section 3(b), 3(c), Transgender Persons Act

238 Section 3(d), Transgender Persons Act

239 Section 3(f), Transgender Persons Act

240 Section 3(g), Transgender Persons Act

241 Section 3(h), Transgender Persons Act

242 Section 3(i), Transgender Persons Act

243 Section 3(e), Transgender Persons Act

244 Section 3(f), Transgender Persons Act

245 "Transgender Persons Rules"

246 Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691; Praga Tools Corpn. v. C.A. Imanual, (1969) 1 SCC 585

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248 Section 4, SMA

249 See, for instance, Section 2, Dissolution of Muslim Marriages Act 1939

250 AIR 1957 SC 907

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281 In the context of the right to speedy trial, see SC Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441 (paragraph 505-507) and State of Punjab v. Ajaib Singh, (1995) 2 SCC 486 (paragraph 6); in the context of the right to environment, see MC Mehta v. Union of India, (2004) 6 SCC 588 (paragraphs 40 and 42); in the context of the right to freedom from noise pollution, see Noise Pollution (I), in re (2005) 5 SCC 727; in the context of the right to legal aid, see State of Maharashtra v. Manubhai Pragji Vashi, (1995) 5 SCC 730

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285 Illustratively, see the submissions of (i) Dr Abhishek Manu Singhvi (at paragraph 21(d) of this judgment); (ii) Mr. Raju Ramachandran (at paragraph 22(a) of this judgment); (iii) Mr KV Vishwanathan (at paragraph 23(f) of this judgment); (iv) Mr. Anand Grover (at paragraph 25(e) of this judgment); (v) Dr. Menaka Guruswamy (at paragraph 27(d) of this judgment); (vi) Ms. Anitha Shenoy (at paragraph 31(a) of this judgment).

286 The provision confers legitimacy on a child born during the continuance of a valid marriage or within two eighty days since the dissolution of marriage.

287 (2014) 2 SCC 1

288 (2018) 5 SCC 1

289 2023 SCC OnLine SC 99

IN THE SUPREME COURT OF INDIA

Supriyo @ Supriya Chakraborty & Anr.
Vs.
Union of India

[Writ Petition (Civil) No. 1011 of 2022]
[Writ Petition (Civil) No. 93 of 2023]
[Transferred Case (Civil) No. 5 of 2023]
[Transferred Case (Civil) No. 8 of 2023]
[Transferred Case (Civil) No. 9 of 2023]
[Transferred Case (Civil) No. 11 of 2023]
[Transferred Case (Civil) No. 12 of 2023]
[Writ Petition (Civil) No. 1020 of 2022]
[Writ Petition (Civil) No. 1105 of 2022]
[Writ Petition (Civil) No. 1141 of 2022]
[Writ Petition (Civil) No. 1142 of 2022]
[Writ Petition (Civil) No. 1150 of 2022]
[Writ Petition (Civil) No. 159 of 2023]
[Writ Petition (Civil) No. 129 of 2023]
[Writ Petition (Civil) No. 260 of 2023]
[Transferred Case (Civil) No. 6 of 2023]
[Writ Petition (Civil) No. 319 of 2023]
[Transferred Case (Civil) No. 7 of 2023]
[Transferred Case (Civil) No. 10 of 2023]
[Transferred Case (Civil) No. 13 of 2023]
[Writ Petition (Civil) No. 478 of 2023]

JUDGMENT

Sanjay Kishan Kaul, J.

1. This case presents a new path and a new journey in providing legal recognition to non-heterosexual relationships.

2. I have had the benefit of the exhaustive and erudite judgment of the Hon'ble Chief Justice Dr. D.Y. Chandrachud; which enumerates the prevalence of these relationships in history, the Constitutional recognition of the right to form unions (in other words 'civil unions'), and the necessity of laying down guidelines to protect non-heterosexual unions. In a way, this is a step forward from the decriminalisation of private consensual sexual activities by the LGBTQ+ community in Navtej Singh Johar & Ors. vs. Union of India, Through Secretary, Ministry of Law & Justice.1

3. The judgment penned down by the Hon'ble Chief Justice considers all aspects of the challenge. However, the subject matter itself persuades me to pen down a few words while broadly agreeing with his judgment.

Historical prevalence of non-heterosexual unions

4. In their submissions, the Respondents raised doubts about the social acceptability of non-heterosexual relationships. Before we address the same, it is no longer res integra that the duty of a constitutional Court is to uphold the rights enshrined in the Constitution and to not be swayed by majoritarian tendencies or popular perceptions. This Court has always been guided by constitutional morality and not by social morality.2

5. A pluralistic social fabric has been an integral part of Indian culture and the cornerstone of our constitutional democracy.3 Non-heterosexual unions are well-known to ancient Indian civilisation as attested by various texts, practices, and depictions of art. These markers of discourse reflect that such unions are an inevitable presence across human experience. Hindu deities were multidimensional and multi-faceted and could appear in different forms. One of the earliest illustrations is from the Rig Veda itself. Agni, one of the most important deities, has been repeatedly described as the "child of two births" (dvijanman), "child of two mothers" (dvimatri), and occasionally, "child of three mothers" (the three worlds).4

6. In Somdatta's Kathasaritsagara, same-sex love is justified in the context of rebirth. Somaprabha falls in love with Princess Kalingasena and claims that she loved her in her previous birth as well.5 Hindu mythology is replete with several such examples. We need not be detained in an effort to capture each of them. The significant aspect is that same-sex unions were recognised in antiquity, not simply as unions that facilitate sexual activity, but as relationships that foster love, emotional support, and mutual care.6

7. Even in the Sufi tradition, devotion is often constructed around the idea of love as expressed through music and poetry. In several instances, the human relationship with the divine was expressed by mystics through the metaphor of same-sex love.7 Love across genders is also reflected in the Rekhti tradition of Lucknow. This tradition is centred around the practice of male poets writing in a female voice and is characterised by its homoeroticism. Significantly, the depictions of same-sex relationships are charged with affects such as love, friendship, and companionship.8

8. Marriage as an institution developed historically and served various social functions. It was only later in its long history that it came to be legally

recognized and codified.9 However, these laws regulated only one type of socio-historical union, i.e., the heterosexual union.

9. It would thus be misconceived to claim that non-heterosexual unions are only a facet of the modern social milieu. The objective of penning down this section is to provide perspective on the existence of non-heterosexual unions, despite continued efforts towards their erasure by the heteronormative majority.

10. Non-heterosexual unions are entitled to protection under our Constitutional schema. In Maqbool Fida Husain, I had observed:

"Our Constitution by way of Article 19(1) which provides for freedom of thought and expression underpins a free and harmonious society. It helps to cultivate the virtue of tolerance. It is said that the freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom. It is the wellspring of civilization and without it liberty of thought would shrivel."10

The necessity of recognizing civil unions

11. The judgment of the Hon'ble Chief Justice notes that the right to form unions is a feature of Articles 19 and 21 of the Constitution. Therefore, the principle of equality enumerated under Articles 14 and 15 demands that this right be available to all, regardless of sexual orientation and gender. Having recognized this right, this Court has taken on board the statement of the Learned Solicitor General to constitute a Committee to set out the scope of benefits available to such unions. I agree with the Hon'ble Chief Justice.

12. The Petitioners' submissions demand that the Special Marriage Act, 187211 be tested on the touchstone of Part III of the Constitution, i.e., whether they are discriminatory on the basis of sex and thus violative of Articles 14 and 15 of the Constitution. It is now settled law that Article 14 contemplates a twopronged test: (i) whether the classification made by the SMA is based on intelligible differentia; and (ii) whether the classification has a reasonable nexus to the objective sought to be achieved by the State.12 The first prong, i.e., intelligible differentia implies that the differentia should be clear and not vague.

Section 4 of the SMA is clear in so far as it contemplates a marriage between a male who has completed the age of twenty-one years and a female at the age of eighteen years. In defining the degrees of prohibited relationships, Section 2(b) of the SMA exclusively applies to a relationship between a man and a woman. Thus, by explicitly referring to marriage in heterosexual relationships, the SMA by implication creates two distinct and intelligible classes - i.e., heterosexual partners who are eligible to marry and non-heterosexual partners who are ineligible.

13. Under the second prong, the Court examines whether the classification is in pursuit of a State objective. The SMA's Statement of Objects and Reasons assists us in determining the objective. It is reproduced hereunder:

"Statement of Objects and Reasons. â€" This Bill revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess.

The parties may observe any ceremonies for the solemnisation of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officers. For the benefit of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnising and registering marriages between citizens, of India in a foreign country.

2. Provision is also sought to be made for permitting persons who are already married under other forms of marriage to register their marriages under this Act and thereby avail themselves of these provisions.

3. The bill is drafted generally on the lines of the existing Special Marriage Act of 1872 and the notes on clauses attached hereto explain some of the changes made in the Bill in greater detail."

(Emphasis supplied).

14. From the above, we see that the SMA postulates a 'special form of marriage' available to any person in India irrespective of faith. Therefore, the SMA provides a secular framework for solemnization and registration of marriage. Here, I respectfully disagree with my brother Justice Ravindra Bhat, that the sole intention of the SMA was to enable marriage of heterosexual couples exclusively. To my mind, the stated objective of the SMA was not to regulate marriages on the basis of sexual orientation.

This cannot be so as it would amount to conflating the differentia with the object of the statute. Although substantive provisions of the SMA confer benefits only on heterosexual relationships, this does not automatically reflect the object of the statute. For as we are all aware, we often act in ways that do not necessarily correspond to our intent. Therefore, we cannot look at singular provisions to determine substantive intent of the statute. Doing so would be missing the wood for the trees.

15. If the intent of the SMA is to facilitate inter-faith marriages, then there would be no rational nexus with the classification it makes, i.e., excluding nonheterosexual relationships.

16. In any event, regulating only heterosexual marriages would not be a legitimate State objective. It is settled law that the Court can also examine the normative legitimacy and importance of the State objective,13 more so in a case such as this where sex (and thereby sexual orientation) is an ex-facie protected category under Article 15(1) of the Constitution. An objective to exclude nonheterosexual relationships would be unconstitutional, especially after this Court in Navtej has elaborately proscribed discrimination on the basis of sexual orientation.14 Therefore, the SMA is violative of Article 14.

17. However, I recognize that there are multifarious interpretive difficulties in reading down the SMA to include marriages between non-heterosexual relationships. These have been enumerated in significant detail in the opinions of both the Hon'ble Chief Justice and Hon'ble Justice Bhat. I also agree that the entitlements devolving from marriage are spread out across a proverbial 'spider's web' of legislations and regulations. As rightly pointed out by the Learned Solicitor General, tinkering with the scope of marriage under the SMA can have a cascading effect across these disparate laws.

18. In fact, the presence of this web of statutes shows that discrimination under the SMA is but one example of a larger, more deeper form of social discrimination against non-heterosexual people that is pervasive and structural in nature. Ordinarily, such an intensive form of discrimination should require keener and more intensive judicial scrutiny. However, due to limited institutional capacity, this Court does not possess an adequate form of remedy to address such a violation.

As pointed out in the judgment of Hon'ble the Chief Justice, substantially reading into the statute is beyond the powers of judicial review and would be under the legislative domain. It would also not be prudent to suspend or strike down the SMA, given that it is a beneficial legislation and is regularly and routinely used by heterosexual partners desirous of getting married. For this reason, this particular methodology of recognizing the right of non-heterosexual partners to enter into a civil union, as opposed to striking down provisions of the SMA, ought to be considered as necessarily exceptional in nature. It should not restrict the Courts while assessing such deep-seated forms of discrimination in the future.

19. Non-heterosexual unions and heterosexual unions/marriages ought to be considered as two sides of the same coin, both in terms of recognition and

consequential benefits. The only deficiency at present is the absence of a suitable regulatory framework for such unions. This Court in Navtej noted that: "history owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries." I believe that this moment presents an opportunity of reckoning with this historical injustice and casts a collective duty upon all constitutional institutions to take affirmative steps to remedy the discrimination.

20. Thus, the next step in due course, would be to create an edifice of governance that would give meaningful realization to the right to enter into a union, whether termed as marriage or a union.

Charting a course: Interpreting statutes using Constitutional principles

21. As noted above, the benefits pertaining to marriage are spread out across several incidental legislations and regulations. These statutes presently do not explicitly extend to civil unions. However, now that we have recognized the right to enter into civil unions; such statutes must be read in a manner to give effect to this right, together with the principle of equality and nondiscrimination under Articles 14 and 15. In other words, statutory interpretation must be in consonance with constitutional principles that are enumerated by this Court. Needless to say, this should not detract from the Committee's task of ironing out the nitty-gritties of the entitlements of civil unions.

22. This exercise is necessary to foster greater coherence within the legal system as a whole, both inter se statutes and between statutes and the Constitution. Reading statutes in this manner will facilitate 'interconnectedness' by allowing constitutional values to link statutes within the larger legal system. Constitutional values emanate from a living document and thus are constantly evolving.

Applying constitutional values to interpret statutes helps update statutes over time to reflect changes since the statute's enactment. Ordinarily, constitutional principles come in contact with statutes when the validity of such statutes is being tested. However, constitutional values should play a more consistent role, which can be through the everyday task of statutory interpretation.15

23. This interpretive technique has gained currency across jurisdictions. In the famous LÃ¼th case, the Federal Constitutional Court of Germany recognized that the constitutional right of freedom of expression as enumerated under the German Basic Law also 'radiates' into the statutory law of defamation. The Court noted that:

"But far from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision."16

24. We may note that the Constitution of South Africa has an explicit provision which directs that the interpretation of statutory law shall be in 'due regard to the spirit, purport and objects' of the chapter on fundamental rights.17 The Constitutional Court of South Africa in Du Plessis v. De Klerk succinctly observed the objective and scope of this provision:

"The common law is not to be trapped within the limitations of its past. It needs not to be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalized with the spirit of the constitutional values defined in Chapter 3 of the Constitution and with full regard to the purport and objects of that Chapter."18

25. Although no such provision exists in the Indian Constitution, our Courts are no stranger to interpreting statutory laws through fundamental rights. In Central Inland Water Transport Corpn. v Brojo Nath Ganguly, the Supreme Court was concerned with the interpretation of 'public policy' under Section 23 of the Indian Contract Act, 1872.19 In this context, this Court observed:

"It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

26. This technique of reading in Constitutional values should be used harmoniously with other canons of statutory interpretation. In this context, legislations that confer benefits on the basis of marriage should be construed to include civil unions as well, where applicable.

The need for an anti-discrimination law

27. I am wholeheartedly in agreement with the opinion of the Hon'ble Chief Justice that there is a need for a separate anti-discrimination law which inter alia prohibits discrimination on the basis of sexual orientation. Presently, there are several laws that have an anti-discrimination aspect to them. However, they are fragmented and may fail to capture the multitudinous forms of discrimination. Another compelling reason for a law that places a horizontal duty of anti-discrimination is provided by the spirit of Article 15, which prohibits discrimination by both the State and private actors.

Presently, although the Court assumes its role as the 'sentinel on the qui vive', the only method to enforce this Constitutional right under Article 15 would be through its writ jurisdiction. There are significant challenges for marginalized communities to access this remedy. Therefore, the proliferation of remedies through an anti-discrimination statute can be a fitting solution. Such legislation would also be in furtherance of the positive duty of the State to secure social order and to promote justice and social welfare under Article 38 of the Constitution.

28. My suggestions for an anti-discrimination law are as follows. First, such a law should recognize discrimination in an intersectional manner. That is to say, in assessing any instance of discrimination, the Court cannot confine itself to a singular form of discrimination. Instead, discrimination must be looked at as a confluence of factors - as identities and individual instances of oppression that 'intersect' and create a distinct form of disadvantage.20 Discrimination laws can only be effective if they address the types of inequality that have developed in the given society.

This principle has already been recognized by this Court in Navtej.21 Second, the duties under an anti-discrimination law can be proportionately distributed between different actors depending on factors such as the nature of functions discharged, their control over access to basic resources, and the impact on their negative liberty.22 Third, an antidiscrimination statute must also enumerate methods to redress existing discrimination and bridge the advantage gap. This could be through policies that distribute benefits to disadvantaged groups.23

Equal rights to equal love

29. The principle of equality mandates that non-heterosexual unions are not excluded from the mainstream socio-political framework. However, the next step would be to examine the framework itself, which cannot be said to be neutral. On the contrary, it is inherently value-laden. One particularly pernicious

value is patriarchy, which manifests in various oppressive ways. Gendered stereotypes and sex-based violence are lived realities of many. This is something both society and law recognize.

30. I believe that the legal recognition of non-heterosexual unions can challenge culturally ordained gender roles even in heterosexual relationships. For a long period of time, marriage has been viewed in gendered terms. That is to say, one's status as husband or wife determines their duties and obligations towards each other, their family, and society. Marriage enforces and reinforces the linkage of gender with power by husband/wife categories, which are synonymous with social power imbalances between men and women.24

This is notwithstanding the fact that there has been progressive awareness of these issues. Non-heterosexual unions can make an important contribution towards dismantling this imbalance while emphasizing alternative norms. As Eskridge puts it:

"In a man-man marriage where tasks are divided up along traditional lines, a man will be doing the accustomed female role of keeping house. It is this symbolism that represents the deeper challenge to traditional gender roles. The symbolism can be expressed in the argot of normalization. Once femalefemale and male-male couples can marry, the wife-housekeeper/husbandbreadwinner model for the family would immediately become less normal, and perhaps even abnormal over time. The wife as someone who derives independent satisfaction from her job outside the home would immediately become a little bit more normal."25

31. In a non-heterosexual union, duties and obligations are not primarily dictated by culturally ordained gender norms. In other words, both partners are not limited by extant gender norms to shape their relationship, including the division of labour. For instance, studies have found that partners in nonheterosexual relationships share unpaid labour more equally than those in heterosexual relationships.26 This is not to suggest that other imbalances of power do not exist within non-heterosexual unions. Nevertheless, nonheterosexual unions are not limited by the legally and socially sanctioned gendered power dynamic that can be present in heterosexual unions.27

32. Legal recognition aids social acceptance, which in turn increases queer participation in public spaces. Through the medium of legal recognition, queer persons will have a greater opportunity to be 'seen' and 'heard' in ways not previously possible. Queer expression will help facilitate an expansive social dialogue, cutting across communities and generations. This dialogue will help us

reimagine all our relationships in a manner that emphasizes values such as mutual respect, companionship, and empathy.

Conclusion

33. Is this the end where we have arrived₹ The answer must be an emphatic 'no'. Legal recognition of non-heterosexual unions represents a step forward towards marriage equality. At the same time, marriage is not an end in itself. Our Constitution contemplates a holistic understanding of equality, which applies to all spheres of life. The practice of equality necessitates acceptance and protection of individual choices.

The capacity of non-heterosexual couples for love, commitment and responsibility is no less worthy of regard than heterosexual couples. Let us preserve this autonomy, so long as it does not infringe on the rights of others. After all, "it's my life."28

.....J. [Sanjay Kishan Kaul]

New Delhi.

October 17, 2023.

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2 Navtej (Supra).

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28 'Its my life', a song by Bon Jovi.
"It's my life
It's now or never
But I ain't gonna live forever
I just want to live while I'm alive".

IN THE SUPREME COURT OF INDIA

Supriyo @ Supriya Chakraborty & Anr.
Vs.
Union of India

[Writ Petition (Civil) No. 1011 of 2022]
[Writ Petition (Civil) No. 93 of 2023]
[Transferred Case (Civil) No. 5 of 2023]
[Transferred Case (Civil) No. 8 of 2023]
[Transferred Case (Civil) No. 9 of 2023]
[Transferred Case (Civil) No. 11 of 2023]
[Transferred Case (Civil) No. 12 of 2023]
[Writ Petition (Civil) No. 1020 of 2022]
[Writ Petition (Civil) No. 1105 of 2022]
[Writ Petition (Civil) No. 1141 of 2022]
[Writ Petition (Civil) No. 1142 of 2022]
[Writ Petition (Civil) No. 1150 of 2022]
[Writ Petition (Civil) No. 159 of 2023]
[Writ Petition (Civil) No. 129 of 2023]
[Writ Petition (Civil) No. 260 of 2023]
[Transferred Case (Civil) No. 6 of 2023]
[Writ Petition (Civil) No. 319 of 2023]
[Transferred Case (Civil) No. 7 of 2023]
[Transferred Case (Civil) No. 10 of 2023]
[Transferred Case (Civil) No. 13 of 2023]
[Writ Petition (Civil) No. 478 of 2023]

JUDGMENT

S. Ravindra Bhat, J.

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1. At the centre of the dispute, lies the definition and the content of two willing individuals' right to marry. On the one hand the petitioners assert that marriage is an evolving social institution, capable of embracing the union of two willing non-heterosexual, queer or LGBTQ+ (used interchangeably) individuals and necessitating state recognition; on the other, the respondents assert that the institution of marriage rests on certain constant and unchanging premises, the most prominent of which is that it is a heterosexual union. The task of this Court lies in determining how the Constitution speaks on the issue.

2. Having had the benefit of reading the draft and revised opinions circulated by the learned Chief Justice, Dr. Chandrachud, we find it necessary to pen our reasoning and conclusions in this separate judgment. The learned Chief Justice has recorded in detail the submissions made by counsel, and claims made; they consequently do not require reiteration.

Similarly, the sections addressing the Union Government's preliminary objections - i.e., the discussion on the court's authority to hear the case [Section D(i)], and that queerness is a natural phenomenon that is neither urban or elite [Section D(ii)], are parts we have no hesitation in agreeing with. However, we do not agree with the conclusions arrived at by the learned Chief Justice and the directions issued. We do agree with certain premises and conclusions that he has recorded - they are:

(a) that there exists no fundamental right to marry under the Constitution;

(b) that the Special Marriage Act, 1956 (hereafter "SMA"), is neither unconstitutional nor can it be interpreted in such a manner so as to enable marriage between queer persons; and that

(c) transgender persons in heterosexual relationships, have the right to solemnize marriage under existing legal frameworks. We have briefly highlighted our main points of agreement, and reasoned in more detail those aspects with which, respectfully, we cannot persuade ourselves to concur. We had the benefit of perusing the concurring opinion of Narasimha, J. We endorse those observations and conclusions fully; the reasoning and conclusions shall be read as supplementing that of the present judgment.

3. The common ground on which the batch of petitions claim relief is that LGBTQ+ persons are entitled to solemnize and register their marriage - in other words, they claim a right to legal recognition of their unions within the marriage fold. The petitioners rely on fundamental rights to equality and nondiscrimination, of dignity and autonomy and of expression and association, and specifically, most petitioners focus on Section 4(c) of the SMA as well as the first and second schedules thereof, to state that particular references to "husband" or "wife" in its provisions are to be read "down", and a neutral expression needs to substituted, instead.

A few petitioners also claims that Section 4(c) and 17 of the Foreign Marriage Act, 1969 (hereafter "FMA") need to be similarly read down. Some of the prayers also relate to the right of such couples to adopt under existing laws in India. Some of the prayers specifically challenged Chapter II of the SMA- relating to notice and objections procedure prescribed. However, during the

course of hearing, the court indicated that this was not a question of law that necessitated a 5 judge-bench ruling, and hence this issue was to be left for consideration by a numerically smaller bench.

I. Nature of marriage as a social institution

4. Marriage, as a social institution predates all rights, forms of political thought and laws. The institution of family has no known origin in the sense that, there has been no stage of human existence, in which family was absent leading to another time in which it emerged. Marriage, however, has been regarded - for the longest time, as a relationship of man to woman which is recognized by custom, and thereafter law; it involves certain rights and duties in the case of both persons entering the union.

It is considered to be one of the most important relationships, as it is not solely the individuals' happiness and well-being but that of others too, that is affected by their conduct in it. It has long been regarded as the reason for society's continuance on the one hand, and its building block on the other. What is marriage and the conceptualisation of its role in society, has undergone change over the time; it has engaged the attention of philosophers, from Plato to Hegel, Kant and John Stuart Mill and of religious leaders, like St. Augustine.

5. Different traditions view marriage as sacraments, and indissoluble unions (Hindus and Catholic Christians); Islam regards marriage as both contractual and sacred; Parsis regard it as both a sacrament and contractual. Most - if not all, place importance on procreation, creation of family, co-habitation, shared values as the important markers; at the same time, these traditions also recognize - in varying degrees, importance of companionship, spiritual union, friendship and togetherness of the spouses, in every way.

6. The respondents are right, in one sense in underlining that all conceptions of what constitutes marriage, all traditions and societies, have by and large, historically understood marriage as between heterosexual couples. The contexts of culture, social understanding of what constitutes marriage, in every social order are undoubtedly very important. At the same time, for the purpose of determining the claims in these petitions, it is also necessary to mark the progression of what were deemed constitutive and essential constituents, and essential boundaries within which marriages were accepted.

7. Marriages have not always been dictated by voluntary choice. In medieval European societies, when a girl was physically able to consummate marriage, she was eligible for matrimony. Among the nobility and landed gentry, the principal consideration for marriage was exchange of property- in the form of

dowry. Thus, it was not uncommon that among the "upper classes" marriages were loveless and unhappy. The sole reason for marriage was touted to be procreation, which the church dictated; thus, consummation of marriage and physical sexual relations were considered the most important features of every marriage, since this meant the establishment of family.

Among Hindus, barriers of other kinds, such as ban on sagotra and sapinda marriages, and impermissibility of non-endogamous marriages, was widely prevalent, for the longest time. Although amongst Muslims, marriage is both sacramental and contractual, and requires exercise of free will, nevertheless, it is premised on the agreement of mehar, or the amount the groom would offer, for the bride. Muslim are permitted to marry others of the same faith, or from the "People of the Book" (known as Kitabiyas), such as Jews, Sabians and Christians.

No marriage with polytheists is permitted. Similarly, widow re-marriage amongst Hindus was prohibited. Likewise, injunctions against inter-caste marriages were widely prevalent. Child marriages were widely prevalent too. Inter-religious marriages were impossible. In the USA, various laws had, in the past, prohibited interracial marriages. Arranged marriages were very common throughout the world until the 18th century.

8. It is, therefore, evident that for long periods, in many societies, the choice of a matrimonial partner was not free; it was bounded by social constraints. Much of the time, marriage was seen as an institution meant for procreation, and sexual union of the spouses. In most societies marriage had cast "roles" for the spouses; they were fairly inflexible, with men controlling most decisions, and women placed in subordinate positions, with little or no voice, and, for the longest time, no legal authority, autonomy or agency. For millennia, custom, tradition, and law subordinated wives to husbands. Notions of equality of partners or their roles, were uncommon, if not totally unheard of. All these underwent radical change.

9. The greater part of history shows that choice of a spouse, based on love or choice played almost no role at all. Enlightenment, and Western thinkers of the eighteenth century established that pursuit of happiness was important to life. They advocated marrying for love, instead of status, or wealth or other considerations. The Industrial Revolution gave impetus to this thought. Marriages were solemnized and celebrated with increasing frequency, in Western cultures, based on choice, voluntary consent, and without parental approval.

This movement increased tremendously - as women's-rights movement expanded and gained impetus in the nineteenth and twentieth centuries, wives started being regarded as their husbands' equals, not their property. Couples were also enabled to choose whether to have, and if so, how many children to have. If they were unhappy with each other, they could divorce - a choice exercised by a large number of couples.

Marriage became primarily a personal contract between two equals seeking love, stability, and happiness. Therefore, although social mores prevailed in relation to marriage, traditions and legal regimes were not static; the changes that society underwent or the forces that brought change, also carried winds that breathed new content, new contexts and new values, into the institution of marriage.

10. Law's progress stresses upon individual's rights for equality. The form of marriage, or the legally prescribed procedures assume a secondary role - they are matters of belief and practice. They cannot be regarded as the essential content of marriage. Tying thali is necessary in South India among many Hindu communities; and in some parts the exchange of rings, garlands and some rituals is necessary in North India. Many Hindu marriage customs and traditions insist on the saptapadi; amongst Muslims, the nikah ceremony, witnessed by invitees, and other customary rituals and practices, is generally followed; Christian customs emphasize on solemnization by the couples taking marriage vows.

The rich diversity of this country and its pluralism is reflected in customary practices surrounding marriage solemnization, all - if not most of which involve the couple, the members of their family, and the larger community. Ritualistic celebration of marriage is considered by some as essential, while many in other sections may deem that the factum of marriage sufficient. For relationships that did not have customary practice dating back in history, the State enacted law - much like the petitioners, seek.

11. Therefore, legislations governing inter-caste and inter faith marriages, and adoption, are two important social relations relating to the family, through which secularism finds its base for an egalitarian social order under the Constitution. The enactment of laws to facilitate this aspect is testimony of the right of individuals to personal choice and autonomy. For instance, enactment of the Hindu Marriage (Removal of Disabilities) Act, 1946 enabled persons from the same gotra or pravara to marry. Likewise, the bar to Hindu widows' remarriage, was removed by enacting the Hindu Widows Remarriage Act, 1856. Inter-caste and inter-faith marriages became a possibility under the SMA after 1954.

12. The 'legal' dimension of marriage, in the US - the jurisprudence of which the petitioners relied on, is markedly different from the nature of marriage in India,

and its evolution. This contextual difference, is of great relevance, when considering a constitutional question of this kind. Marriage in countries like the US, was earlier a sacramental institution that flowed from the Church and its divine authority. However, in modern times, it flows from the State; which created a 'license regime' for marriage.

The result is that marriages may be performed and celebrated with religious traditions or rituals, that have great meaning personally for the individuals - but the legality of the marriage, is solely dependent on a validly obtained license. This regime has since been extended to queer couples as well in the US. The law relating to marriage in India, however, has had a different trajectory. A deeply religious affair, it gained its legitimacy and legal status from personal law and customs, that govern this aspect of life - for members belonging to all faiths.

The matrimonial laws that have been enacted- were a result of the codification project (in the 19th and 20th century), which expressly recognise these social practices, while continuing to offer space to unwritten customary practices as well (barring aspects like marriageable age, etc. which are regulated by law). As mentioned, the SMA is the only avenue for a form of secular/non-religious 'civil marriage' - which too still ties into personal law for succession, and other aspects. The Indian context, is elaborated in the following Part II.

II. State interest in regulating social practices, through legislation

13. Before undertaking a study on whether there is a fundamental right to marry, and an obligation on the State to create such an avenue, it is necessary to traverse the brief history of state intervention in social practices including in relation to marriage. These laws were enacted in relation to different subject areas. However, a pattern certainly emerges, on the limited scope of interference.

14. The social practices resulting in stigma and exclusion of large sections of society, impelled the Constitution framers to frame specific provisions like Article 15(1) and (2), Articles 17, 23 and 24, which was left to the Parliament to flesh out through specific legislation. This resulted in statutes such as the Protection of Civil Rights Act, 1955, Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Bonded Labour System (Abolition) Act, 1976, Immoral Traffic (Prevention) Act, 1956, the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, and their respective amendments. The laws removing barriers which prevented large sections of society from entering into temples and places of public worship, is another example.

15. In a somewhat similar vein, legislative activity, as aimed at bringing about gender parity through prohibiting prevailing practices that further inequality and sometimes even criminalizing certain customs, resulted in legislations such as the Equal Remuneration Act, 1976 (which guaranteed equal pay for equal work regardless of the sex of the worker), the Dowry Prohibition Act, 1961 as amended subsequently, introduction of provisions in criminal law which gave teeth to such provisions [Sections 498A and 304B of the Indian Penal Code, 1860 ("IPC"), and Section 113A and 113B of the Evidence Act, 1872 which enabled courts to raise presumptions in the trial of such offences].

16. Other practices aimed at realization of social goals and furthering the mandate of Article 15(3) in respect of children such as the right to free universal education under Article 21A of the Constitution, and the Right to Free Education Act, 2009; The Child Labour (Prohibition and Regulation) Act, 1986; Protection of Children from Sexual Offences Act, 2012, the Juvenile Justice (Care and Protection) Act 2016 (hereafter, "JJ Act"), etc. In all these, the Parliament or the concerned legislatures donned the role of reformers, and furthered the express provisions of the Constitution, enjoining State action, in furtherance of Articles 15(2), 15(3), 17, 23 and 24.

17. Marriage has historically been a union solemnized as per customs, or personal law tracing its origin to religious texts. Legislative activity, in the personal law field, so far has been largely, though not wholly, to codify prevailing customs and traditions, and regulating them, only where needed.

The instances that stand out, are the enactment of the Indian Succession Act, 1925, Hindu Women's Right to Property Act, 1937, Hindu Marriage Act, 1955, the Hindu Adoptions and Maintenance Act, 1956, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, the Indian Divorce Act, 1869 (as amended in 2001), the Muslim Personal Law (Shariat) Application Act, 1937; and the Anand Marriage Act, 1909 (as amended). These laws mostly codified traditions and customs, which existed, and to an extent, regulated marriages and succession laws.

These laws also sought to introduce reforms: for the first time, monogamy was enacted as a norm applicable to all Hindus; likewise, the option of divorce was enacted, together with grounds on which or other remedies (like judicial separation) could be sought. Further, the minimum age of marriage was also enacted, through provisions in various personal laws, and enforced through the Prohibition of Child Marriage Act, 2006 (which repealed the pre-existing Child Marriage Restraint Act, 1929) - this law applies to all sections of societies.

18. Existing conditions of women, especially in respect of issues such as maintenance, were considered inadequate even before the Constitution was brought into force. The earliest reform introduced was through the Bengal Sati Regulation, 18291 (by the colonial rulers). This was later followed by the Hindu Widow Remarriage Act, 1856 which enabled re-marriage of Hindu widows.

These enactments pre-date the Constitution, and can be seen as reforms, meant to outlaw abhorrent practices viewed as evil, and needing prohibition, to protect women's lives; in the case of widow remarriage, it was to enable child and young widows an opportunity to lead lives. Given the diversity of Hindu traditions and the differing approaches in various schools of law, which prevailed in different parts of the country, it was considered necessary to enact the Hindu Women's Right to Property Act, 19372 (later with the enactment of the Hindu Succession Act, 1956, some rights were expanded through its provisions3).

For a long time, daughters were treated unequally in regard to succession to the estate of their deceased father; this changed with the enactment of the Hindu Succession Amendment Act, 2005, and the substitution of Section 6, daughters (who were hitherto excluded from succession to any coparcenary properties) became entitled to claim the share that a son was entitled to, in the case of death of a coparcener in relation to ancestral property.

19. The right to maintenance (pendente lite, as well as alimony) was given statutory force under the Hindu Marriage Act 1955 as well as the Hindu Maintenance and Guardianship Act 1956, for Hindus. All married women and children of their marriage, regardless of their religious or social backgrounds, were enabled to claim maintenance, by virtue of Section 488 of the Criminal Procedure Code, 1898. This provision was re-enacted, and progressively amended through section 125 of the Code of Criminal Procedure, 1973.

This court, in its five-judge decision in Mohd. Ahmad Khan v. Shah Bano Begum (hereafter, "Shah Bano")4 upheld the right of Muslim women, including divorced Muslim women to claim maintenance. However, soon after that decision, Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986, which diluted the ruling in Shah Bano (supra) and restricted the right of Muslim divorcÃ©es to alimony from their former husbands for only 90 days after the divorce (the period of iddat in Islamic law).

The restriction imposed was however interpreted narrowly, and this court through a Constitution Bench, in Danial Latifi v. Union of India5 held that "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".

20. The Age of Consent Act in 1891, raised the age of marriage from 10 to 12 years. The Child Marriage Restraint Act of 1929 addressed this by prescribing the minimum age of marriage for females to 14 years and for boys to 18 years. The Child Marriage Restraint Act of 1929 (also known as the Sarda Act), was enacted as a result of prolonged pressure from social reform organisations and concerned people who fought against the negative repercussions of child marriage. The age limitations were later raised to 18 and 21 years old, under the Prohibition of Child Marriage Act, 2006. The practise of marrying off children young, which prevailed before these enactments, was thus, interdicted by legislation.

21. Similarly, even while exercising personal choice in marriage, these choices are regulated by law - prohibition of marriage of persons related by blood (consanguineous marriages)6. Other restrictions such as the requirement to be of "sound mind" to give valid consent or not to be "unfit for marriage and the procreation of children".7 If a spouse is "incurably of unsound mind" or on the ground of unsoundness, the other spouse can secure divorce8. Bigamy among Hindus was abolished by enactment of the HMA, in 1955.

Reform has been the underlying theme, impelling the state to intervene. The legislative trajectory, and indeed some of the debates that preceded enactment of measures like monogamy and divorce, showed a division of opinion. The first President, Rajendra Prasad, expressed strong sentiments against adopting such "foreign" concepts which were opposed to Hindu society. There were other voices, most prominently, women in public life, who supported the need to empower women.

22. It can thus, be seen that two kinds of legislations have regulated marriage: the first, like SMA, HMA, the Hindu Disabilities Removal Act, and the Hindu Widows Remarriage Act, removed barriers, and enabled exercise of meaningful choice, specifically to women.

The second kind of legislation are those which enacted restrictive regulations, essentially to further an orderly society and/or protect women: prohibit bigamy; define minimum age for marriage; child marriage restraint; marriage of individuals within prohibited degrees of relationships, etc. Whereas some restrictions, in a sense codified and recognized existing customs - such as by enacting prohibited degrees of relationships, rule against insanity, rules enabling declaration of nullity or divorce on ground of impotence, etc., - others were

meant to further interests of women and children and also enable exercise of choice.

23. Such reforming and codification, however, did not cover the entire field. For instance, in the field of succession and inheritance, the Hindu Succession Act, 1956 only enacts certain broad features, leaving untouched the rights of various communities and sections of Hindus, to work out their rights in succession to joint family, Hindu Undivided Family and coparcenary property- and this unwritten, uncodified law, (in many cases based on customs and local traditions) is enforced not only in regard to inheritance, but also in the field of taxation.

Likewise, the law accommodates and accords primacy to custom [e.g., Section 2 (d) which states that persons other than Hindus- including Jews, Muslims and Christians who may be following Hindu customs, would continue to do so9; Section 7 which spells out the ceremonies of Hindu marriage, also states that they shall be based on "customary rites and ceremonies of either party thereto"; and similarly, customary divorce amongst Hindus is accorded primacy, by Section 29 (2)10].

Neither the Hindu Marriage Act, nor the Hindu Succession Act, apply to members of the Scheduled Tribe communities; the Hindu Adoptions and Maintenance Act, applies to them in a nuanced manner.11 The Hindu Minority and Guardianship Act, 1956, on the other hand, has a provision similar to the one under the Hindu Minority and Maintenance Act as well as one which excludes members of the scheduled tribe communities12.

In the latest three judge bench decision of this court, in Revanasiddappa v. Mallikarjuna13, this court clarified that with the enactment of Section 16 of the HMA, the legitimacy conferred upon children born of void or voidable marriages would be that they are "entitled only to a share in their parent's property but cannot claim it of their own right as a consequence of which they cannot seek partition during the life-time of their parents". The court also held that they cannot claim any rights other than what was expressly provided for. Thus, uncodified law and custom was upheld.

24. Legislative action initiated at different points in time thus were reformatory or meant to effectuate certain fundamental rights. Practices and customs which had resulted in the degradation or diminution of individuals, seen as inconsistent and abhorrent to democratic society, were sought to be eliminated by these laws. When codification attempts resulted in residual discrimination, the courts stepped in to eliminate and enforce the fundamental rights [Independent Thought v. Union of India & Anr., (hereafter, "Independent Thought")14; Shayara Bano v. Union of India & Anr.15, etc.].

25. The only legislations which come to one's mind which in fact created social status or facilitated the status of individuals in private fields are the Special Marriage Act, 1954, the Protection of Women from Domestic Violence Act, 2005 ("DV Act"), and Section 41 of the Juvenile Justice (Care and Protection of Children) Act (which enables adoption amongst members of all faiths and communities). The latter, i.e., the provision enabling adoption was preceded by certain guidelines which facilitated inter-country adoptions. These guidelines, initially pioneered in the judgment of this court in Laxmi Kant Pandey v. UOI16 - were accepted.

Executive instructions filled in the vacuum to some extent assimilating the guidelines of the court but at the same time the limitation in law that prevented adoption of children from different faiths and backgrounds, persisted. These limitations were finally overridden through the enactment of the Juvenile Justice Act, 2016. The Protection of Women from Domestic Violence Act, 2005 which was for the purpose of more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family.

For the first time, a legal status was given to unmarried couples, which enabled women, subjected to domestic violence, to the right to residence (quite apart from remedies through its provisions). The culture of the Constitution, thus, has impelled the removal of barriers which hitherto existed. Traditional barriers - such as those based on social practice, and stereotypes such as gender roles, have, through express constitutional provisions like Articles 14, 15 and 16 which shaped legislation (and where this fell short, through judicial intervention), been overcome and in some cases eliminated.

26. The role of the legislature has been to act as codifier, and in many instances, not enact or codify existing customs or practices, and, wherever necessary, intervene, and in furtherance of Article 14 and 15(3) enact laws. Parliament, has intervened and facilitated creation of social status (marriage) through SMA, and enabled the creation of the institution of adoption, which was available amongst only certain communities. These, and other legislative interventions, are a result of state interest in reforms or furthering the interests of given communities or persons.

For these reasons, we do not particularly subscribe to the characterisation of 'democratizing intimate zones' as discussed in the learned chief justice's draft opinion. These outcomes were driven by enacted law; furthermore, there was state interest, which impelled regulation of such relationships, as for instance, in ensuring that the minimum age for marriage of girls. Likewise, there is state

interest in regulating what kind of relationships, i.e. prohibited degrees of relationship, should be enacted as disqualifications to marriage.

Marital "offences" such as desertion, or "cruelty" [not confined to physical violence or cruelty] are also grounds afforded to spouses, to seek matrimonial remedies. The absence of such legislation would have meant that children of any age, would continue to have been married off, much to the peril of the girl child's health and life; likewise, the codification and enactment of prohibited degrees of relationships, were meant to further certain public health interests.

III. Tracing the rights enjoyed by queer persons

A. The trinity - autonomous choice, dignity and non-discrimination

i. Importance of personal choice under the Constitution

27. The journey of our constitutional progression, and our understanding of the personal liberties, especially right to life (Article 21) and equality (Article 14) has peeled and laid bare, so to say, multiple layers of prejudice, insensitivity and indifference of the social order or other collectives, in regard to a person's freedom to exercise her volition, and free will, in several matters.

For instance, a woman's choice and bodily autonomy in regard to exercise of her reproductive rights has been acknowledged as a fundamental right- integral to the right to life, in Suchita Srivastava & Ors. v. Chandigarh Administration17 reiterated in Devika Biswas v. Union of India18; X v. Principal Secretary, Health and Family Welfare Department (hereafter, "X v. Principal Secretary")19; Independent Thought (supra) and other decisions.

28. A person's autonomy to choose a spouse or life partner, has been declared as integral to one's fundamental right to live: in Asha Ranjan v. State of Bihar20, this choice of a "partner in life" was held to be "a legitimate constitutional right" that is "founded on individual choice" and the court decried the concept of "class honour" or "group thinking" which acted as barriers from the exercise of free choice.

Similarly, In re [Gang-Rape Ordered by Village Kangaroo Court in W.B.,21 echoed the same idea and said that the state is "duty-bound" to protect the fundamental rights "and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage." Shafin Jahan v. Asokan K.M & Ors., (hereafter, "Shafin Jahan")22, brought home that expressing choice is in "accord with the law" and is "acceptance of individual identity."23

29. The nine-judge decision in K.S. Puttaswamy v. Union of India (hereafter, "K.S. Puttaswamy")24 through Dr. Chandrachud J writing for himself and five other judges, in several places, explored the various nuances of the right to privacy, and observed that "personal choices governing a way of life are intrinsic to privacy".

30. The choice of a woman to seek employment, was upheld in Anuj Garg v. Hotel Association of India25 where gender and age barriers were held unconstitutional; the choice of an individual patient has been held to exercising his (or her) legal right to euthanasia (or to his relations in certain circumstances, particularly when the patient is unconscious or incapacitated to take a decision), in Common Cause (A Regd. Society) v. Union of India (UOI) & Ors (hereafter, "Common Cause")26. Traditional barriers to temple entry based on gender was the subject matter of this court's ruling in Indian Young Lawyers Association & Ors. v. the State of Kerala & Ors.27).

ii. Dignity as a dimension of equality and all our liberties

31. The promise of the Preamble to the Constitution is of 'fraternity' "assuring power, conflicts, and oppression, denial of participation. Quite naturally, these occupied centre-stage in our struggle for Swaraj. We did not strive merely for freedom from the shackles of a foreign power; our founders realized that millennia old practices of marginalization, oppression and exclusion produced humiliation, resulting in dehumanization of the human "self". The relation of self to other self, the dominant or powerful self to the oppressed self, ventures on the concept of equality. It thus tries to eliminate untouchability, sex and caste-based discrimination, and ensure dignity.

32. Dignity is understood to mean the intrinsic worth of a person or the inherent value of a human being which entitles one to respect. The crucial aspect of substantive dignity lies in the state's role in providing basic conditions of life which enable individuals to fully realise the potential of intrinsic dignity by living, what is called, a 'dignified life'.

33. In the Indian context the idea of equality and dignity is to reach its constitutional commitment to be a republic, based on democracy. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi28, this court said that the "right to life includes the right to live with human dignity". Prem Shankar Shukla v. Delhi Admn29 voiced the same idea, i.e. that the Preamble set the "humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual." The court went on to hold that Article 21 "is the sanctuary of human values, prescribes fair procedure and forbids barbarities, punitive or procedural".

34. This court, in Jeeja Ghosh v. Union of India30, spoke about human dignity as a "core value" and that the "right to life is given a purposeful meaning by this Court to include right to live with dignity". The court quoted from Aharon Barak31 that human dignity has a "central normative role" and that as a constitutional value it is "the factor that unites the human rights into one whole. It ensures the normative unity of human rights" expressed in different ways i.e., normatively as a basis for constitutional rights; an interpretive principle for determining the scope of constitutional rights and that dignity has "an important role in determining the proportionality of a statute limiting a constitutional right."

In Kesavananda Bharati v. State of Kerala (hereafter, "Kesavananda Bharti")32 too the value of dignity was underlined: "the basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living". This view has been adopted in several other decisions. It would be to borrow the words of Justice K.K. Mathew "an idle parade of familiar learning to review the multitudinous cases"33 underpinning this aspect.

35. This court in K.S. Puttaswamy (supra) too, recognized the value of dignity34. The judgment of this court in National Legal Services Authority v. Union of India & Ors., (hereafter, "NALSA")35 is significant; it underlines how dignity can be said to form the basis of enjoyment of fundamental freedoms.

36. The constitutional emphasis on dignity is not without a reason. Ambedkar, and several of our constitution framers, meticulously sought to carve out of the remnants of a socially repressive, hierarchical, and unequal society a modern constitution, reflecting the aspirations of a confident people, in a vibrant democracy.

The society which our constitution created was to emerge out of darkness of caste and other forms of social prejudice and oppression, into the light of the rule of law, social justice, and egalitarianism. To Ambedkar and other constitution makers, political freedom (swaraj) meant precisely the freedom to make the self, to make choices with dignity, to break from historical suffering and humiliation. The drafting history of the equality code (Articles 14, 15, 16, 17 and 18) bear poignant testimony to this aspect.

37. Dignity has both an internal and external aspect. In its internal context, dignity and privacy are intrinsically twined. In its external context, dignity is multidimensional: it is a right to be treated as a fellow human, with all attributes of a human personality, which is, the right and expectation to be accorded due respect, treated with dignity and equal worth. Denial of these, has a

disproportionate impact on the individual: they are diminished in their own eyes, and the rest of the world, resulting in a loss of one's self worth and moral worth. This is the vision of equality, social justice, welfare and dignity which our Constitution articulates.

iii. Equality, non-discrimination and non-exclusion

38. The equality code - Articles 14, 15, 16, and 17 (and Articles 23 and 24), so referred to in various previous decisions of this Court - for instance as the constitution's "identity" in M. Nagaraj v. Union of India (hereafter, "M. Nagaraj")36 is not a "wooden" equality before law and equal protection of law. It contains specific injunctions prohibiting the state from discriminating on specifically forbidden grounds [such as caste, race, sex, place of birth, religion, or any of them, in Article 15; and caste, sex, religion, place of residence, descent, place of birth, or any of them, in Article 16].

The rooting of such explicit issues - commanding the state against discriminating on such specific heads, is therefore, as much a part of the equality code, as the principle of equality indorsed in Article 14. The inclusion of Article 17 enjoins the state to forbear caste discrimination, overtly, or through classification, and looms large as a part of the equality code and indeed the entire framework of the Constitution. The protected attribute of 'sex' has been held to include 'sexual orientation' and 'gender expression' by this court in NALSA (supra) and Navtej Johar & Ors. v. Union of India (hereafter, "Navtej Johar")37.

39. The rationale for enacting proscribed grounds under Article 15 or 16 (or both) is the awareness of Constitution makers that courts could use these markersor pointers of distinction, to determine if reasonable classification were permissible. Hence, absent the prohibited ground of sex, gender could have been a plausible basis for an intelligible differentia. To prevent such classifications specific proscribed grounds were enacted as injunctions against State action.

The provisions, and the equality code, are consequently not only about the declaratory sweep of equality: but also about the total prohibition against exclusion from participation in specified, enumerated activities, through entrenched provisions. A closer look at Article 15, especially Article 15(2), would further show that likewise most of the proscribed grounds in Article 15(1) were engrafted to ensure that access to public resources - in some cases not even maintained by the state, but available to the public generally, could not be barred.

This provision was made to right a historical wrong, i.e., denial of access to the most deprived sections of society of the most basic resources, such as water, food, etc. The aim of the Constitution was to act as the ultimate leveller, ensuring that equality in practice, and substance, became the constitutional culture of this great nation.

Together with the affirmative action provisions - Articles 15(3) & (4), 16(4) & 16(5) was intended to guarantee that not mere facial discrimination was forbidden but that existing inequalities were ultimately eradicated. Flowing from these, this court has, time and again, emphasized that non-discrimination is essential for enjoyment of all rights and freedoms of citizens of our country, to realize their worth and potential.38

40. In the context of the present debate, in NALSA (supra), this court took note of the Yogyakarta Principles and principle on right to equality and nondiscrimination enshrined therein which reads as:

"2. The rights to equality and non-discrimination - Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination."

In this backdrop, the declaration of law, in Navtej Johar (supra) has provided impetus, so far as LGBTQ+ persons are concerned. Consensual queer relationships are not criminalized; their right to live their lives, and exercise choice of sexual partners has been recognised. They are no longer to be treated as "sub-par humans" by law. Yet, that ipso facto, the petitioners allege, is not sufficient, because the fact that they are allowed to be by themselves, "let alone" in the privacy of where they live, is not adequate. Discrimination and prejudice faced by the queer community has been acknowledged, and discussed at length by this court in NALSA (supra) and Navtej Johar (supra). The draft opinion of the Chief Justice, also highlights these aspects, so is only briefly touched upon in the following section, for the sake of completeness.

B. Rights flowing from previous decisions of this court relating to the queer community

41. The Constitution assures dignity; also, various fundamental rights guarantee a panoply of rights (to equality, non-discrimination on enumerated grounds, to freedom of speech, expression, of association, of right to travel freely, of right to

reside, of the right to trade, commerce and business, to personal liberty, freedom to profess one's religion, all being important ones). Various rights not expressly stated or enumerated, have been declared as facets of the right to life - of livelihood, access to healthcare, right to shelter, right to a clean environment, etc.

42. Sexual relation between persons of the same sex was outlawed, by virtue of Section 377 of the IPC. It characterized such acts as "unnatural sex", enacted an offence, and prescribed sentence. This provision was read down by a Division Bench ruling of the Delhi High Court in Naz Foundation v. State (NCT of Delhi) (hereafter, "Naz Foundation")39, which de-criminalized consensual sex between persons of the same sex.

However, Naz Foundation (supra) was over turned, and its holding disapproved by this Court in Suresh Kumar Kushal v. Naz Foundation40 that became the final word for a time so to say, resulting in the criminalization of physical intimacy between same sex consenting adults. Implicit in this was the chilling effect on the exercise of other freedoms by such couples particularly in exhibiting even bare, decent expressions of affection - which was a position that prevailed till the later five-judge bench decision in Navtej Johar (supra).

43. NALSA (supra) was a significant ruling regarding the rights of transgender persons. It was held that "discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India".41 This court, for the first time, recognized what now is obvious but was not perceived to be till then, i.e., that the transgender persons have the same rights and have to be treated as full citizens, entitled to their self-expression of gender identity.

In other words, every human being's right to assert what their gender is, not limited by what has been ascribed to them based on their sex at the time of birth. The court unequivocally declared that the right of transgender persons to non-discrimination is equally contained and resonates in the same manner as it does with other citizens. The court also acknowledged the right to self-determination of one's gender as intrinsic to Article 21 of the Constitution.

The court further declared that necessarily, to realize such persons' fundamental right to live with dignity under Article 21, extends to the right of equal access to all facilities to achieve full potential as human beings, such as education, social assimilation, access to public spaces and employment opportunities. The court also expressly alluded to their rights under Articles 15 and 16 of the Constitution of India. The court was cognizant of the acutest form of discrimination of such persons, resulting in their degradation.

This declaration of the entitlement of the transgender persons sensitized the society to take measures for addressing their concerns, eventually paving the way for the enactment of the Transgender Persons (Protection of Rights) Act, 2019 which aims to entrench the principle of non-discrimination and entitles transgender persons to a range of statutory rights, which they can enforce.

44. The court's intervention in the oft cited decisions on behalf of the petitioners has been to protect the citizens or those approaching the courts against threats of violence or creation of barriers in the exercise of free choice [Shakti Vahini v. Union of India (hereafter, "Shakti Vahini")42, Lata Singh v. State of U.P (hereafter, "Lata Singh"), Shafin Jahan (supra), Laxmibai Chandaragi. v. State of Karnataka43 respectively]. These decisions were based on the state's duty to protect citizens and enable the exercise of their individual choice, in the face of external threats.

Other decisions, such as Joseph Shine v. Union of India44, Navtej Johar (supra) and Independent Thought (supra) were instances where specific provisions that criminalized or made exceptions to criminal behaviour, were struck down or read down in the enforcement of the fundamental rights, i.e. Articles 14, 15(3) and 21. Along the way, K.S. Puttuswamy (supra) articulated the broadest right to privacy which embraces within its fold the right to exercise ones choice of a life partner and to lead their life free from external barriers.

C. Is there a fundamental right to marry₹

45. This court has recognized that marriage is a social institution.45 As elaborated in Part I, marriage existed and exists, historically and chronologically in all of the senses - because people married before the rise of the state as a concept. Therefore, marriage as an institution is prior to the state, i.e., it precedes it. The status is still, not one that is conferred by the state (unlike the license regime in the US).

This implies that the marriage structure exists, regardless of the state, which the latter can utilise or accommodate, but cannot be abolished as a concept. Under this view terms of marriage are set, to a large extent, independently of the state. Its source is external to the state. That source defines the boundaries of marriage. This implies that state power to regulate marriage does not sit easy with the idea of marriage as a fundamental right.

In attempting to analyse the claim to a fundamental right to marry, there are primarily two competing claims about the nature of marriage: one being that the state should exercise more control over marriage to support and protect "traditional purposes and perceptions" and the other, that each individual should

have the right to define marriage for themselves and state involvement in marriage should be minimal.

46. If indeed there is a right to marry unless it is elevated to a right akin to Articles 17, 23, and 24, [which apply to both state and nonstate agencies and actors], it cannot be operationalized. These provisions, most emphatically create positive obligations; likewise Articles 15 (3), 15 (4) - and 15 (6), as well as Articles 16 (4), 16 (6) highlight state interest in creating conditions to further the goal of non-discrimination.

Yet, the previous decisions of this court have carefully held such provisions to enable the state, and in a sense oblige it to take measures; but ruled out court mandated policies and laws.46 In our considered opinion, this is not however, one such case where the court can make a departure from such rule, and require the state to create social or legal status.

47. What is being asked for by the petitioners is state intervention in enabling marriage between queer or non-heterosexual couples. Civil marriage or recognition of any such relationship, with such status, cannot exist in the absence of statute. The demand, hence, is that of a right of access to a publicly created and administered institution. There is a paradox here or a contradiction, which runs to the root of the issue and weighs on this court's mind, heavily - in that the creation of the institution, here depends on state action, which is sought to be compelled through the agency of this court.

48. Most of the precedents cited contain discussions on how the institution of marriage involves issues of basic importance. Many decisions, including Obergefell v. Hodges (hereafter, "Obergefell")47, recall tradition, to underline that marriage is of utmost significance, and that it underlines the importance of commitment of two individuals towards each other and that it is a foundational relationship of society.

Traditions of marriage per se may not support the basis of recognition of marital relationship between non-heterosexual couples. Many decisions by the US courts, have underlined the rationale for declaring the right to marry a fundamental right as being essential to the orderly pursuit of Happiness (as it appears in their Declaration of Independence) by free persons. This strand of reasoning is apparent from Loving48 to Obergefell (supra).

49. This with respect is not sound - at least as applied to state licensing of marriage (as in the US), which is what civil marriage is. The fundamental importance of marriage remains that it is based on personal preference and confers social status. Importance of something to an individual does not per se

justify considering it a fundamental right, even if that preference enjoys popular acceptance or support.

Some may consider education to be fundamentally important in that they consider nothing less than a postgraduate degree is fundamental; there may be a large section of the people, who consider that access to internet is a fundamental right, and yet others, who may wish that access to essential medication is a fundamental right. All these cannot be enforceable rights, which the courts can compel the state or governance institutions to provide. These cannot result in demand for creation of a social institution, and in turn creation of status, through a statute. This result - i.e. recognition, can be achieved only by enacted law.

50. All decisions relied on by the petitioners - K.S. Puttaswamy (supra), Navtej Johar (supra), Shakti Vahini (supra) and Deepika Singh v. Central Administrative Tribunal49, contain broad observations with respect to individuals' choice of their partner as also a reference as to non-conventional relationships. Some broad observations are undoubtedly to be found in these judgments they cannot be referenced to hold that a right to marry automatically flows in the manner from the provisions of Part III which the petitioner asserts.

There cannot, for the above reasons, be a per se assertion that there exists an unqualified right to marry which requires treatment as a fundamental freedom; we agree on this conclusion arrived at by the learned Chief Justice, and his analysis of Shakti Vahini (supra), Shafin Jahan (supra), Navtej Johar (supra), K.S. Puttaswamy (supra), and NALSA (supra) that the constitution does not expressly recognize a right to marry.

D. Right to 'union', or abiding relationship

51. The conclusion arrived at by the learned Chief Justice is that while there is no express fundamental right to marry, there is a right or freedom to enter into a union [spelt out in Navtej Johar (supra), K.S. Puttaswamy (supra), NALSA (supra), Shakti Vahini (supra), Shafin Jahan (supra), etc.] and that having regard to our constitutional values, which entail respect to the choice of a person whether or when to enter into marriage and the right to choose a marital partner. The learned Chief Justice also traces this right to enter into an abiding cohabitational relationship to express provisions of Article 19(1)(a), (c), and (e), Article 21, and Article 25.

52. While we agree, that there is a right - which we will characterise as a 'right to relationship' to avoid confusion - we squarely recognise it to fall within Article 2150, as already recognised in the afore-cited cases. The right to relationship here, includes the right to choose a partner, cohabit and enjoy physical intimacy

with them, to live the way they wish to, and other rights that flow from the right to privacy, autonomy and dignity.

They are, like all citizens, entitled to live freely, and express this choice, undisturbed in society. Whenever their right to enjoyment of such relationship is under threat of violence, the state is bound to extend necessary protection. This is a natural consequence of this court's judgments in Navtej Johar (supra), K.S. Puttuswamy (supra), Shafin Jahan (supra) and Shakti Vahini (supra).

53. The learned Chief Justice in a detailed discussion of the 'goal of selfdevelopment', rights under Article 19 (including the right to freedom of speech and expression, and to form 'intimate' associations, to settle in any part of India), Article 21, and Article 25, arrives at the conclusion that the right to union (or right to enter into an abiding cohabitational relationship) can be traced to these express provisions, which in turn enrich this right. Thereafter, having traced this right to union, it is propounded that the 'positive' postulate of fundamental rights (as explained in an earlier section of the draft opinion), necessitates or places a positive obligation on the State to accord recognition to such relationships/unions.

This, in our considered opinion, is not necessary. Further, our point of disagreement is deepened by the discussion in Part D(v) and (vi) in the learned Chief Justice's draft opinion, prior to the section on 'the right to enter into a union'- which lays down a theory on the 'positive postulates' of fundamental rights and the consequential obligation on the State. For the reasoning elaborated in Part IV of our opinion, we cannot agree to this characterisation of the entitlement, or any corresponding state obligation to create a status through statute.

54. If it is agreed that marriage is a social institution with which the State is unconcerned except the limited state interest in regulating some aspects of it, does it follow that any section of the society (leaving aside the issue of rights of nonheterosexual couples) - which wishes for creation of a like social institution, or even an entry into a zone which is not popular or otherwise does not fall within the institution of marriage - can seek relief of its creation by court intervention₹

IV. Positive obligations in furtherance of fundamental rights

55. The conception of fundamental rights - in terms of their negative, and positive content - is a formulation that requires no citation. However, the extent to which this positive obligation may reach to, is where our reasoning arrives at the metaphorical fork in the road. Every fundamental right, is not enjoyed by an

individual, to the same degree of absoluteness - for instance: Article 19 has a clear stipulation of reasonable restrictions for each freedom; Article 15 and 16 have a clear negative injunction on the State against discrimination, within which substantive equality is baked in and requiring the State to step in or facilitate; Article 25, is subject to other fundamental rights and freedoms under Part III, etc.

There are restrictions, to the content of these rights. A discussion of Article 21 elucidates this point. However, even while tracing these numerous 'unenumerated' rights - the right to a clean environment, right to shelter, etc. - the courts have been (necessarily so) circumspect in how these can be enforced. Often, these rights have come to be enumerated in response to State action that threatened the freedom, or right directly or indirectly, thus compelling the litigant to invoke the jurisdiction of this court, to remind the State of the negative injunction that impedes its interference, and must guides its actions.

Does this, however, mean that a litigant could knock on the doors of this court, seeking to enforce each of these unenumerated rights₹ A simple example would offer some clarity - consider a poet who wishes to share their work, with the public at large. Now provided that there is no direct restriction, or those in the nature of having a chilling effect, the State's role in enabling or facilitating this freedom enjoyed by the poet, is limited. This court cannot direct that the State must create a platform for this purpose; this would be a stretch, in the absence of any overt or inert threat.

56. In the draft circulated by the Chief Justice, the reasoning that there is no fundamental right to marry and thereafter, nevertheless, to proceed to delineate the facets or features which unions other than marriage, are deprived of; merits a closer look. The summation of various rights which such a couple is said to be deprived of, is used to delineate the contours of the right to enter into a union, and justify a positive obligation. There cannot be any doubt that the individuals have the choice of their life partners and the right to live the lives they wish to, undisturbed. This is the essence of what the jurisprudence of this Court has been so far, i.e., an explanation of the right to life and the other rights enumerated or discovered by interpretive process - privacy, choice, dignity etc.

57. Repeatedly, decisions of this court have emphasized on the nondiscriminatory and positive content of certain fundamental rights (Articles 14, 15, 16, 17, 23 and 24). In fact, the court has underlined the obligations of the state to create conditions conducive to the exercise of the right to equality (i.e., substantive equality), and to realize fraternity [Refer: decisions in N.M. Thomas51 and Indra Sawhney52 which expanded the understanding of

substantive equality, though without making enabling provisions enforceable by court].

This court has also in some decisions, accepted the argument that given the nature of fundamental rights, and its evolving content, in many circumstances, it might be necessary for the state to intervene and protect the fundamental right concerned thus creating an atmosphere conducive for the enjoyment of such right. Lata Singh (supra) dealt with honour killings of couples involved in inter-caste, interreligious marriages; in Arumugam Servai v. State of Tamil Nadu53, where the issue was virulent caste slurs and violence, which were crimes, the court required administrative and police officials "to take strong measures to prevent such atrocious acts".

In Shakti Vahini (supra), which dealt with threats by khap panchayats, this court held that the state "is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage". The court issued directions requiring the state to take punitive and remedial measures, and that the state has a positive obligation to protect the life and liberty of persons.

58. In several decisions it has been recognised that the reason for entrenching Part III Rights - as for instance, in M. Nagaraj (supra) was 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. Fundamental right is a limitation on the power of the State". Rustom Cavasjee Cooper v. Union of India (hereafter, "R.C. Cooper")54 is salient, for the observations it made about the common thread that runs through Part III rights, which again, sets out distinct enforceable rights:

"it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 & 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action-legislative or executive-Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g., Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 & 24.

The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those

rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights."

59. The right to freedom of speech, is distinct, because it - unlike others in Article 19, is preceded by the word "freedom" of speech and expression whereas the others are rights. Whilst this judgment does not call for elaboration on this distinction, yet the common element, in respect of all the rights spelt out in Article 19 is the assertion of the right, which is a curb or restraint, on state action, whose limits can only be through laws, made by the state, to promote some state concern, such as sovereignty and integrity of the state, etc. reasonably restricting speech in the interests of inter alia, "public order, decency or morality".

The same pattern is followed in relation to freedom to associate by Article 19(4). In relation to the right under Article 19(1)(g) a broader state interest, inter alia, i.e., "in the interests of the general public". These expressions are common grounds on which reasonable restrictions can be enacted, validly by law. Kharak Singh v. State of UP55, Bijoe Emmanuel v. State of Kerala56, and Union of India (UOI) v. Naveen Jindal & Ors.57 are all authorities for the proposition that regulating the exercise of rights guaranteed under Article 19(1)(a) to (e) and (g) - through reasonable restrictions, can be only through a law.

60. The judgment of the learned Chief Justice, propounded a theory of a unified thread of rights, entitlements flowing from it, and how lack of recognition, results in deprivation of specified rights under Articles 19 and 25 (in addition to Article 21). To the extent, that assertion of sexual or gender identity, in exercise of free speech, association, through express manifestations in whatever form (whether through speech, art, participation in processions, etc.), are concerned, one cannot join issue. Equally, if one has by some state process, measure or conduct been barred from expressing one's choice, publicly, the reasonableness of that prohibition or order, can be tested on grounds enumerated in Article 19(2), if such barriers are through a valid law, or orders, traceable to law.

61. However, when the law is silent, and leaves the parties to express choice, Article 19(1)(a) does not oblige the state to enact a law, or frame a regulation, which enables the facilitation of that expression. All judgments, from Sakal Papers58, to Bennet Coleman59 and Express Newspapers60, etc. were based on the effect of laws or policies, based on statutory provisions.

Equally, in the absence of a legal framework enabling citizens to form a particular kind of association (as for instance recognition of a limited liability

partnership, which was not recognized any legal status till recently)61 the court could not have validly created a regime enabling recognition or regulating such associations. Similarly, in the absence of any enacted law which obliges meaningful facilitation of transport such as roads, it is hard to visualize that a citizen can approach the Court and seek the construction of a road to enforce the right to travel [Article 19(1)(d)], or seek court's intervention to create a network of roads or other modes of transportation.

Likewise in the absence of a basic housing scheme again the court if approached for enforcement of Article 19(1)(e), would not call upon the State to create one either by framing a general legislative policy or through law. Furthermore, this Court has also recognized that, there can even be reasonable restrictions, in the acquisition and enjoyment of certain types of properties in many States.

Given the nature of rights under Articles 19 and 21 the enjoyment of which are limited to the extent reasonable laws within the bounds of the specified provisions, enact in the legitimate jurisdiction of this court, it would be difficult to translate the positive obligations (or postulates) as articulated in the learned chief justice's opinion.

62. History or traditions may not be the only methods to trace constitutional values which can arguably be the result of an evolving society. Yet the court cannot stray too far from the express provisions and the manner in which they are cast. In the case of free speech and expression, right to association and the other rights spelt out in Article 19 and the rights spelt out in Article 25, the core content of these are hard fought freedoms and rights primarily directed against state action and its tendency to curb them. To the question whether it is possible to locate an entitlement to lead to positive obligation and to facilitate the exercise of free speech, generally by mandating a horizontally applicable parliamentary law or legal regime, the answer would be a self-evident negative.

63. There is no difficulty about the right of two consenting persons to decide to live together, to co-habit with each other, and create their unique idea of a home, unconstrained by what others may say. That is the natural sequitur to K.S. Puttaswamy (supra) and Navtej Johar (supra). Conduct hitherto criminalised, is now permissible.

The liberative effect of Section 377 being read down is that two individuals, regardless of their sexual orientation are enabled to live together, with dignity, and also protected from any kind of violence, for living and existing together. Therefore, the right to be left alone, the right to exercise choice, the right to dignity, and to live one's life, with the person of one's choice, is an intrinsic and essential feature of Article 21 of the Constitution.

64. The idea that one right can lead to other rights, emanating from it, has been conclusively rejected by this court by seven judges, in All India Bank Employees Association v. National Industrial Tribunal62. That decision was quoted with approval in Maneka Gandhi v. Union of India (UOI) & Ors. , (hereafter, "Maneka Gandhi")63:

"This theory has been firmly rejected in the All India Bank Employees Association's case and we cannot countenance any attempt to revive it, as that would completely upset the scheme of Article 19(1) and to quote the words of Rajagopala Ayyanger, J., speaking on behalf of the Court in All India Bank Employees Association's case "by a series of ever expending concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grostesque result". So also, for the same reasons, the right to go abroad cannot be treated as part of the right to carry on trade, business, profession or calling guaranteed under Article 19(1)(g). The right to go abroad is clearly not a guaranteed right under any clause of Article 19(1)"

65. As the two 7-judge bench decisions have affirmed whilst there is no dispute that there is an interconnectedness of various fundamental rights, their manifestations in different forms especially under Article 19 and the distinct grounds on which they can be circumscribed, sets each freedom and right apart. While the right to free speech and expression may be exercised in conjunction with the right to association and even the right to assemble and move, nevertheless the extent of the assertion of these rights, collectively, would depend on the circumstances of the case and the nature of the curbs imposed (by law).

Thus, for instance, the right to protest in the form of a procession is subjected to the laws reasonably restricting movement in the larger interests of the public. It is questionable whether the imposition of valid restrictions and curbs in such circumstances can be successfully impugned only on the ground that their right to free speech and assembly are violated. In the case of both, if the restriction is valid for one fundamental right, it is equally valid for the others on an application of the test laid down in Maneka Gandhi (supra).

Rather it is the test of reasonableness and the proximity to the disturbance of public order, when such restriction is imposed, that becomes the focal point of debate. Therefore, in the abstract every right enumerated in Article 19, and other Article 25, can be exercised freely without hindrance by all. However, it is the assertion of the right, in the face of some threat by state action or despite state protection, which becomes the subject of court scrutiny. The extent of right to free speech is subject to reasonable restrictions, to further inter alia, "public order" or "decency" and "morality".

The right to association is hedged by reasonable restrictions inter alia, in furtherance of "public order or morality". The right to travel and settle in any part of the country, is subject to reasonable restrictions in the "interests of the general public" or "for the interests of any scheduled tribe". Likewise, the freedom of conscience is both internal, and external. As long as an individual exercises it, from within, and in privacy, there can be ordinarily no inroads into it; its external manifestation, may call for scrutiny, at given points in time.

66. The right to freedom of conscience is also subject to other provisions of Part III, and any measure, in the interests of public order or morality. It is thus, open to all to exhibit and propagate their beliefs and ideas through overt "for the edification of others", regardless if the propagation is made by a person in his individual capacity or on behalf of any church or institution exhibition of such "belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals"64 This broad understanding and enunciation of the freedom of conscience has remained unchanged. The state on occasions has intervened to promote social welfare and reforms; this court has intervened when state action was based on a practise found inconsistent with the right to equality and dignity.

67. We do not therefore, agree with the learned Chief Justice who has underlined that the positive postulate of various rights, leads to the conclusion that all persons (including two consenting adult queer persons) have an entitlement to enter into a union, or an abiding cohabitational relationship which the state is under an obligation to recognize, "to give real meaning" to the right. There is no recorded instance nor was one pointed out where the court was asked to facilitate the creation of a social institution like in the present case.

68. There are observations from the judgment of the (then Justice Chandrachud and) now Chief Justice) Justice D.Y. Chandrachud, in Navtej Johar (supra), of how social institutions must be arranged: "Social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships. The law provides the legitimacy for social institutions. In a democratic framework governed by the Rule of law, the law must be consistent with the constitutional values of liberty, dignity and autonomy."

These observations underscored the need to respect and give worth to the choice of queer couples. The observations were in the context of criminalization of consensual sexual conduct between queer couples. The observations, however, have tended to point to the direction that there should be some social ordering of institutions, which not merely accommodate such choice, but facilitate its

meaningful exercise beyond the confines of their right to privacy and to live together.

While the decision's decriminalising impact is undoubted, and not contested, yet the broader observations obliging social institutions to accommodate and facilitate exercise of choice fully were not necessary. In one sense, they travelled beyond the scope of the court's remit and have to be viewed as obiter dicta. That the State should or ought to order such social institutions, is different from a direction issued by this court, which they must carry out; the latter is what we take exception to, and place our reservations against.

69. Therefore, even if we were to, for argument sake, recognise an entitlement under the Constitution to enter into an abiding cohabitational relationship or union- in our opinion, it cannot follow to a claim for an institution. There are almost intractable difficulties in creating, through judicial diktat, a civil right to marry or a civil union, no less, of the kind that is sought by the petitioners in these proceedings. "Ordering a social institution" or re-arranging existing social structures, by creating an entirely new kind of parallel framework for nonheterosexual couples, would require conception of an entirely different code, and a new universe of rights and obligations.

This would entail fashioning a regime of state registration, of marriage between non-heterosexual couples; the conditions for a valid matrimonial relationship amongst them, spelling out eligibility conditions, such as minimum age, relationships which fall within "prohibited degrees"; grounds for divorce, right to maintenance, alimony, etc.

70. As a result, with due respect, we are unable to agree with the conclusions of the learned Chief Justice, with respect to tracing the right to enter into or form unions from the right to freedom of speech and expression [Article 19(1)(a)], the right to form associations [Article 19 (1)(c)], along with Article 21 and any corresponding positive obligation. It is reiterated that all queer persons have the right to relationship and choice of partner, co-habit and live together, as an integral part of choice, which is linked to their privacy and dignity.

Any further discussion on the rights which consenting partners may exercise, is unnecessary. No one has contested that two queer partners have the rights enumerated under Article 19 (1)(a); (c), and (d), or even the right to conscience under Article 25. The elaboration of these rights, to say that exercise of choice to such relationships renders these rights meaningful, and that the state is obliged to "recognise a bouquet of entitlements which flow from such an abiding relationship of this kind" is not called for. We therefore, respectfully disagree

with that part of the learned Chief Justice's reasoning, which forms the basis for some of the final conclusions and directions recorded in his draft judgment.

V. Inapplicability of the Special Marriage Act

A. Challenge to the SMA on the ground of impermissible classification

71. The petitioners complained that provisions of the SMA, inasmuch as they excluded, or do not provide for marriage of non-heterosexual couples, is discriminatory, because the classification made in its various provisions are heteronormative, thus discriminating against non-heterosexual couples. This exclusion, is the basis of their challenge.

72. Hostile classification, which results in exclusion from benefits of a statute or policy, is based on the understanding that where "equals are treated differently, without any reasonable basis" as held in D.S. Nakara v. Union of India65:

"The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question. There ought to be causal connection between the basis of classification and the object of the statute. An executive action could be sustained only if the twin tests of reasonable classification and the rational principle co-related to the object sought to be achieved are satisfied."

73. What is an "intelligible differentia" on which the classification is to be drawn distinguishing objects or persons, or conditions, for the purpose of legislative or executive policy₹ The premise of classification is to discriminate. The theory of permissible classification rests, therefore, on the basis for differentiation, and its relation to the object of the measure or the law. Permissible classification, therefore, should result in valid differentiation; but it crosses the line when it has a discriminatory effect, of excluding persons, objects or things which otherwise form part of the included group. Kedar Nath Bajoria v. State of West Bengal66 explained that Article 14 cannot mean that

"all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain."

74. After a fairly detailed examination of previous precedents, recently, in Chandan Banerjee v. Krishna Prasad Ghosh67, this court explained the principles applicable to determine whether classification by any law or policy can be upheld:

"27. The principles which emerge from the above line of precedents can be summarised as follows:

(i) Classification between persons must not produce artificial inequalities. The classification must be founded on a reasonable basis and must bear nexus to the object and purpose sought to be achieved to pass the muster of Articles 14 and 16;

(ii) Judicial review in matters of classification is limited to a determination of whether the classification is reasonable and bears a nexus to the object sought to be achieved. Courts cannot indulge in a mathematical evaluation of the basis of classification or replace the wisdom of the legislature or its delegate with their own; [..]"

This court, in Transport & Dock Workers Union v. Mumbai Port Trust68 explained how differential treatment may not always result in discrimination and "it violates Article 14 only when there is no conceivable reasonable basis for the differentiation."

75. The differentiation or classification has to be based on the object or end sought to be achieved: a facet highlighted in Union of India v. M.V. Valliappan69, where the court held that if there is a differentiation, having rational nexus with the "object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution". In fact, earlier, this court in State of J&K v. Triloki Nath Khosa70 ruled that "the object to be achieved" ought not to be "a mere pretence for an indiscriminate imposition of inequalities and the classification" should not be "characterized as arbitrary or absurd".

76. The discussion on equality and the limits of permissive classification were conveniently summarized by the seven-judge bench in In Re the Special Courts Bill, 1978 (hereafter, "Re Special Court's Bill")71. Some of the propositions were stated as follows:

"[..] (2).The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3). The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4). The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon person arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.

(11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that

class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality." The differentiation, therefore, is to be discerned from gathering of the object sought to be achieved by the enactment.

77. For a moment, if it is assumed (as the petitioners argue) that the classification is suspect, because non-heterosexual couples are not provided the facility of marriage, yet such "under classification" is not per se discriminatory. This aspect was highlighted by this court in Ambica Mills72:

"Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate â€" difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape â€" and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration"

78. In an earlier decision, this court upheld the tax imposed upon joint families, in Kerala, based on Marumakkattayam law. The law imposed expenditure tax upon those professing the Marumakkattayam unit and defined it in such a manner that it omitted to include Mapillas (non-Hindus) who also followed that system. This court held that such under inclusion did not attract the vice of discrimination, in N. Venugopala Ravi Varma Rajah v. Union of India73 and observed: "the mere fact that the law could have been extended to another class of persons who have certain characteristics similar to a section of the Hindus but have not been so included is not a ground for striking down the law."

79. The question of some categories being left out, when a new legislation is introduced, was the subject matter of the decision in Ajoy Kumar Banerjee & Ors. v. Union of India & Ors.74 where it was held that:

"[...] Article 14 does not prevent legislature from introducing a reform i.e. by applying the legislation to some institutions or objects or areas only according to the exigency of the situation and further classification of selection can be sustained on historical reasons or reasons of administrative exigency or piecemeal method of introducing reforms. The law need not apply to all the persons in the sense of having a universal application to all persons. A law can be sustained if it deals equally with the people of well-defined classemployees of insurance companies as such and such a law is not open to the charge of denial of equal protection on the ground that it had no application to other persons."

These judgments have underlined that exclusion or under inclusion, per se, cannot be characterised as discriminatory, unless the excluded category of persons, things or matters, which are the subject matter of the law (or policy) belong to the same class (the included class).

80. The statement of objects and reasons of the SMA read as follows:

"Statement of Objects and Reasons:

1. This Bill revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The parties may observe any ceremonies for the solemnisation of their marriage, but certain formalities are prescribed before the marriage can be registered by the marriage officers.

For the benefit of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnising and registering marriages between citizens of India in a foreign country. Provision is also sought to be made for permitting persons who are already married under other forms of marriage to register their marriages under this Act and thereby avail themselves of these provisions. The Bill is drafted generally on the lines of the existing Special Marriage Act of 1872 and the notes on clauses attached thereto explain some of the changes made in the Bill in greater detail."

81. The Statement of Objects and Reasons of SMA clearly suggests that the sole reason for the enactment of the Act was to replace the earlier colonial era law and provide for certain new provisions; it does not refer to any specific object sought to be achieved or the reasons that necessitated the enactment of the new Act other than that it was meant to facilitate marriage between persons professing different faiths.

82. If one looks at the enacted provisions, especially Sections 19-21 and 21A, Sections 24, 25, 27, 31, 37 and 38, of SMA, there can be no doubt that the sole intention was to enable marriage (as it was understood then, i.e., for heterosexual couples) of persons professing or belonging to different faiths, an option hitherto available, subject to various limitations. There was no idea to exclude nonheterosexual couples, because at that time, even consensual physical intimacy of such persons, was outlawed by Section 377 IPC.

So, while the Act sought to provide an avenue for those marriages that did not enjoy support in society, or did not have the benefit of custom to solemnise, it would be quite a stretch to say that this included same sex marriages. Therefore, the challenge to the constitutionality of the statute, must fail. It is settled by

decisions of the court that as long as an objective is clearly discernible, it cannot be attacked merely because it does not make a better classification. The need for a law or a legal regime that provides or facilitates matrimony of queer couples is similar, to the need to facilitate interfaith marriages which is what drove the Parliament to enact the SMA.

83. The next question urged is that the passage of time, has rendered the exclusion of queer couples, the benefit of SMA, discriminatory. This line of argument, is based on this court's reasoning that with passage of time, a classification which was once valid, could become irrelevant, and insupportable, thus discriminatory.

The first of such decisions was Motor and General Traders v. State of AP75 wherein a provision of the state rent control legislation (which exempted premises constructed after 26.08.195776) was under challenge. The idea was to provide impetus to construction of houses; however, the long passage of time resulted in two classes of tenants, i.e., those residing in older premises, who were covered by the law, and those who lived in premises constructed later. This court held that the continued operation of such exemption, rendered it unconstitutional:

"There being no justification for the continuance of the benefit to a class of persons without any rational basis whatsoever, the evil effects flowing from the impugned exemption have caused more harm to the society than one could anticipate. What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century. The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad."

84. Almost identically, in Rattan Arya v. State of T.N.77 the validity of Section 30(ii) of the Tamil Nadu Buildings (Lease and Rent) Control Act, 1960 was under challenge, this court held that the provision which exempted tenants of "residential buildings" paying monthly rent of more than Rs 400 from the protection of the said Rent Control Act, whereas no such restriction was imposed in respect of tenants of "non-residential buildings" under the said Act.

This court upheld the challenge, and held that "a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14." The judgment cited by the petitioners, that is Satyawati Sharma v. Union of India78 too dealt with rent legislation which differentiated between non- residential and residential

buildings, in respect of the remedy of eviction, on ground of bona fide requirement.

85. In all the judgments cited by petitioners, the court was able to discern or find that a classification, made at an earlier point in time, had lost its relevance, and operated in a discriminatory manner. In some circumstances, rather than declaring the entire law void, this court "read down" the relevant provision to the extent the statute could be so read. In the present case, the petitioner's arguments with respect to "reading down" provisions of the SMA are insubstantial. The original rationale for SMA was to facilitate inter-faith marriages.

That reason is as valid today as it was at the time of birthing that law. It cannot be condemned on the ground of irrelevance, due to passage of time. It would be useful to recall principle (9)79 of the opinion in Re Special Court's Bill (supra). The classification was primarily not between heterosexual and non-heterosexual couples, but heterosexual couples of differing faiths.

All its provisions are geared to and provide for a framework to govern the solemnisation, or registration, of the marital relationship, which replicates the status that different personal laws bestow. Since there was no one law, which could apply for couples professing differing religions, the SMA created the governing norms- such as procedure, minimum age, prohibited degree of relationship and forbidden relationships for the male and female spouses respectively (through different schedules); the grounds of divorce, etc.

The relevance of SMA has gained more ground, because of increasing awareness and increasing exercise of choice by intending spouses belonging to different faiths. It cannot be said, by any stretch of the imagination that the exclusion of non-heterosexual couples from the fold of SMA has resulted in its ceasing to have any rationale, and thus becoming discriminatory in operation. Without a finding of that kind, it would not be open to the court to invoke the doctrine of "reading down".

86. We, therefore, agree with the reasoning elaborated by the Chief Justice, Dr. Chandrachud, J that the challenge to the SMA fails.

B. Interpretation of provisions of SMA

87. The provisions of SMA are incapable of being "reading down", or interpreted by "reading up" in the manner suggested by the petitioners. We have supplemented the Chief Justice's conclusions, with further reasoning briefly below.

88. The petitioners' efforts have been aimed at persuading this court to interpret the provisions of SMA in a manner, that accommodates nonheterosexual couples and facilitates this marriage. Their arguments were centred around reading its specific provisions - [Section 2 (b) read with Part I (for a male) and Part II (for a female) (degrees of prohibited relationships), Section 4 (c), Section 12, 15, 22, 23, 27(1); 27(1A) (special ground of divorce for wife), 31(1)(iiia) and (2) (special provision for jurisdiction in case of proceeding for the wife), 36 and 37 (alimony for the wife), 44 (bigamy)] - which present a dominant underlying heteronormative content. They argue that this court should adopt a purposive construction of the provisions of SMA, and interpret it in light of this court's previous decisions in Dharani Sugars and Chemicals Ltd v. Union of India (hereafter, "Dharani Sugars")80 and X v. Principal Secretary (supra).

89. In Dharani Sugars, the challenge was against a new policy introduced by the Reserve Bank of India (RBI). The petitioners contented that there was no authorization under the RBI Act to frame the impugned policy. Although the court acknowledged that new facts can influence the interpretation of existing law, it ultimately upheld the policy based on existing provisions that empowered the RBI to issue such policies.

A careful examination of this judgment would reveal that even though discussion on the interpretation that "unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them" indeed occurred81; but, the court also noticed that "this doctrine does not however mean that one can construe the language of an old statute to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended"82.

90. This court, in X v. Principal Secretary (supra) while reading down the exclusion of unmarried women from the benefit of the Medial Termination of Pregnancy Act, 1971 (MTP Act), also relied on Dharani Sugars (supra) to invoke the principle that a statute "always speaks". Noting that the Act, and more so its amendment, was to enable women to terminate unwanted pregnancies, the reasons for which could be manifold, the court held that such exclusion was arbitrary and discriminatory.

Further, the court relied on Badshah v. Sou. Urmila Badshah Godse83 which held that "change in law precedes societal change and is even intended to stimulate it" and that "just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law". Similarly, in All Kerala Online Lottery Dealers Association v. State of Kerala & Ors.,84 this court referred to decision of court in State v. SJ Choudhary85 wherein it was

observed that "in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law."86

91. Furthermore, the petitioners relied on the interpretation of this court, in Githa Hariharan v. Union of India87, wherein the court construed the word 'after' in Section 6(a) of the Hindu Minority and Guardianship Act, 1956 as meaning "in the absence of - be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise" - thus, saving it from the vice of discrimination.

Reliance was also placed on Association of Old Settlers of Sikkim & Ors. v. Union of India88 where an exemption provision89 discriminated against Sikkimese women who may have had their names registered in the Register of Sikkim subjects, married non-Sikkimese on or after 1st April, 2008, and excluded them from the benefit.

This court held such discrimination to be violative of equality under Article 14 of the Constitution of India. In Independent Thought (supra), this court invalidated as discriminatory a provision90 which permitted sex between a man, and a young woman married to him, above the age of 15 years. The resultant classification was that sex with any woman below 18 years, irrespective of consent was defined as rape.91

92. The principle of purposive interpretation was relied upon by the petitioners to urge that a gender neutral interpretation or use of words which include nonheterosexual couples should be resorted to. This court, in S.R. Chaudhuri v. State of Punjab & Ors92 remarked that "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."

93. Ahron Barrack93 in his treatise94 stated as follows:

"Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language."

94. This court has also held that there can be occasions when words may be read in a particular manner, if it is sure that the draftsman would have wished it to be so, given the nature of the expressions, and, at the same time, indicated the limits

for that principle, while quoting from the treatise Principles of Statutory Interpretation by G.P. Singh95, in Ebix Singapore Private Limited and Ors. v. Committee of Creditors of Educomp Solutions Ltd & Ors.96:

"A departure from the Rule of literal construction may be legitimate so as to avoid any part of the statute becoming meaningless. Words may also be read to give effect to the intention of the Legislature which is apparent from the Act read as a whole. Application of the mischief Rule or purposive construction may also enable reading of words by implication when there is no doubt about the purpose which the Parliament intended to achieve. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these or similar words would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."

Other decisions too have endorsed this line of reasoning.97

95. The objects of a statute, acquire primacy while interpreting its provisions, if the need so arises. Therefore, in interpretation of any statute or provision, this court, long ago, in Workmen of Dimakuchi Estate v. Management of Dimakuchi Tea Estate98 underlined that where there are doubts about the meaning of a provision, they "are to be understood in the sense in which they best harmonise with the subject of the enactment" and that popular meanings, or strict grammatical import, may yield to "the subject or the occasion on which they are used, and the object to be attained". This object-based interpretation was adopted in several decisions.99

96. This court emphasised in Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors.100 that:

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

97. In Bank of India v. Vijay Transport & Ors.101, the court dealt with the plea that a literal interpretation is not always the only interpretation of a provision in a statute and that the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words used which control the literal meaning of such words.102

98. The five-judge decision of this court in Central Bank of India v. Ravindra103 held:

"[...] Ordinarily, a word or expression used at several places in one enactment should be assigned the same meaning so as to avoid "a head-on clash" between two meanings assigned to the same word or expression occurring at two places in the same enactment. It should not be lightly assumed that "Parliament had given with one hand what it took away with the other" (see Principles of Statutory Interpretation, Justice G.P. Singh, 7th Edn. 1999, p. 113). That construction is to be rejected which will introduce uncertainty, friction or confusion into the working of the system (ibid, p. 119).

While embarking upon interpretation of words and expressions used in a statute it is possible to find a situation when the same word or expression may have somewhat different meaning at different places depending on the subject or context. This is however an exception which can be resorted to only in the event of repugnancy in the subject or context being spelled out. It has been the consistent view of the Supreme Court that when the legislature used same word or expression in different parts of the same section or statute, there is a presumption that the word is used in the same sense throughout (ibid, p. 263).

More correct statement of the rule is, as held by the House of Lords in Farrell v. Alexander All ER at p. 736b, "where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning". The court having accepted invitation to embark upon interpretative expedition shall identify on its radar the contextual use of the word or expression and then determine its direction avoiding collision with icebergs of inconsistency and repugnancy."

99. The objects that a statute seeks to achieve, are to thus be gleaned not merely from a few expressions, in the statement of objects and reasons (for the statute) but also from the enacted provisions. The provisions and the objects of the SMA (as discussed in the earlier section on discrimination) clearly point to the circumstance that Parliament intended only one kind of couples, i.e., heterosexual couples belonging to different faiths, to be given the facility of a civil marriage.

100. The petitioners' argued that the purpose of the SMA was to provide a framework for civil marriages not based on personal law includes same-sex marriages. Yet, structurally, Section 4 (conditions relating to solemnization of special marriages), contemplates marriages between a man and a woman. To read SMA in any other manner would be contrary to established principles of statutory interpretation as discussed in preceding paragraphs. It is also not permissible for the court to 'read up' and substitute the words "any two persons" to refer to a marriage between non-heterosexual couples.

101. Gender neutral interpretation, much like many seemingly progressive aspirations, may not really be equitable at times and can result in women being exposed to unintended vulnerability, especially when genuine attempts are made to achieve a balance, in a social order that traditionally was tipped in favour of cis-heterosexual men. The purpose of terms like 'wife', 'husband,' 'man,' and 'woman' in marriage laws (and other laws on sexual violence and harassment as well) is to protect a socially marginalised demographic of individuals. For instance, women facing violence by their partner have a right to seek recourse under the Domestic Violence Act, which assures- and is meant to assure that they (the victims) are safeguarded and provided relief against such injustice.

In fact, provisions in SMA, for alimony, and maintenance (Section 36 and 37) confer rights to women; likewise certain grounds of divorce (conviction of husband for bigamy, rape) entitle the wife additional grounds (Section 27) to seek divorce. Other provisions such as: Section 2 (b) read with Part I (for a male) and Part II (for a female) enact separate degrees of prohibited relationships; Section 4 (c), uses the terms "husband" and "wife"; Section 12, 15, 22, 23, 27(1), Section 31(1) (iiia) and (2) (special provision for jurisdiction in case of proceeding for the wife), Sections 36 and 37 provide for maintenance and alimony for the wife), Section 44 (Punishment of bigamy).

The general pattern of these provisions - including the specific provisions, enabling or entitling women, certain benefits and the effect of Sections 19, 20, 21 and 21A of SMA is that even if for arguments' sake, it were accepted that Section 4 of SMA could be read in gender neutral terms, the interplay of other provisions- which could apply to such non-heterosexual couples in such cases, would lead to anomalous results, rendering the SMA unworkable.

102. Furthermore, if provisions of SMA are to be construed as gender neutral (such as persons or spouses, in substitution of wife and husband) as the petitioners propose, it would be possible for a cis-woman's husband to file a case or create a narrative to manipulate the situation. Gender neutral interpretation of existing laws, therefore, would complicate an already exhausting path to justice for women and leave room for the perpetrator to victimise them. A law is not merely meant to look good on paper; but is an effective tool to remedy a perceived injustice, addressed after due evaluation about its necessity. A law which was consciously created and fought for, by women cannot, therefore, by an interpretive sleight be diluted.

103. In fact, it would do well to remind ourselves what this court had stated, in Delhi Transport Corporation v. DTC Mazdoor Congress (hereafter, "Delhi Transport Corporation")104:

"when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it."

Similarly, in Cellular Operators Association of India v. Telecom Regulatory Authority of India105, the court applied the rule of Delhi Transport Corporation (supra) and held that the construction suggested would lead the court "to add something to the provision which does not exist, which would be nothing short of the court itself legislating" and therefore, impermissible.106

104. Lastly, there is no known rule by which a word or group of words, in one provision, can have two different meanings. The effect of the petitioner's argument would be to say that generally, provisions of SMA should be read in a gender neutral manner (spouse for wife and husband; persons instead of the male and female, etc).

Whilst it could in theory be possible to read such provisions in the manner suggested, their impact on specific provisions such as the separate lists for wives and husbands for purposes of age, determining prohibited degrees of relationships, and remedies such as divorce and maintenance, leads to unworkable results. Most importantly, the court, in its anxiety to grant relief, would be ignoring provisions that deal with and refer to personal laws of succession that are, Sections 19, 20, 21 and 21A. This court cannot look at a text containing words with two optional meanings in the same provision.

105. Likewise, with regard to the FMA, the petitioners' sought that certain conditions and provisions be read in gender neutral terms, to enable same-sex marriage. FMA too, is a secular legislation wherein Section 4107 states that a marriage between "parties" may be solemnized under this Act, provided that at least one of the two parties is a citizen of India. However, "bride" and "bridegroom" are used in Section 4 (relating to the age of the parties at time of solemnization), the Third and Fourth Schedule (which prescribe the declarations by both parties and certification of marriage).

In our view, the conditions for such marriages, under Section 4(1)(c) of FMA specifically require the parties to be a 'bride' and a 'bridegroom', i.e., it is gendered in nature. Furthermore, the terms "husband" and "wife" are used in Section 13 and 18 in relation to the solemnisation of marriage and provisions where matrimonial reliefs (as under the SMA) are available under the FMA. The Petitioners' prayer therefore, that this Court read the references to "husband" or

"wife" or "spouse" with "or spouse" in the same manner as discussed in relation to the SMA above, is unsustainable.

106. As far as the petitioners' reliance on Ghaidan108; Fourie109; and precedents from other foreign jurisdictions are concerned, we agree with the reasoning given by Chief Justice that our courts should exercise caution when relying on the law in other jurisdictions. We should be mindful of distinct contextual framework within which those decisions have been given.

107. As discussed earlier, the words of the statutes have to be read, taking into account the fabric of concepts, rights, obligations and remedies which it creates. Removing or decontextualizing provisions, from their setting and "purposively" construing some of them cannot be resorted to, even in the case of SMA as well as FMA.

VI. Discriminatory impact on queer couples

108. I do not wish to revisit the history of how this court evolved the test of considering the effect or impact of laws on Fundamental Rights; it would be appropriate to say that the object-based test favored and applied in A.K. Gopalan110 was discarded decisively by the 11 judge Bench in R.C. Cooper (supra). The true test was spelt out in the following manner:

"it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights."

This line of reasoning was applied and commended in Maneka Gandhi (supra); it is now an intrinsic part of the constitutional lore.

109. In recent times, this court has applied, in relation to claims of discrimination, the test of indirect discrimination. This dimension was explained in Lt. Col Nitisha v. Union of India111:

"First, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognize how existing structures/institutions, and ways of doing things, have the

consequence of freezing an unjust status quo. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited.

In Navtej Johar (supra) too, earlier, the concurring judgment of the present Chief Justice, had relied on the directive of European Parliament which defines indirect discriminatory impact as: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."

Interestingly, an earlier decision of this court, had relied on the concept and application of indirect discrimination test in Om Kumar and Ors v. Union of India112 - in the context of discussing the principle of proportionality:

"If indirect discrimination were established, the Government would have to show 'very weighty reasons' by way of objective justification, bearing in mind that derogations from fundamental rights must be construed strictly and in accordance with the principle of proportionality"

Later judgments (S.K. Nausad Rahaman & Ors. v. Union of India (UOI) & Ors113and Ravinder Kumar Dhariwal v. Union of India114) also applied the indirect discrimination test to judge the validity of the measure in question.

110. The common feature of the "effect of the law and of the action upon the right" in R.C. Cooper (supra) and the decisions which applied the indirect discrimination lens, is that the objects (of the legislation or the policy involved) are irrelevant. It is their impact, or the effect, on the individual, which is the focus of the court's inquiry. In one sense, the development of the indirect discrimination test, is a culmination, or fruition of the methods which this court adopted, in judging the discriminatory impact of any law or measure, on an individual.

111. This court in the previous sections of this judgment, has discussed and concluded how the claim for reading a fundamental right to marry, into the Constitution, cannot be granted. However, the court cannot be oblivious of the various intersections which the existing law and regulations impact to queer couples.

112. The constitution exists, and speaks for all, not the many or some. The felt indignities of persons belonging to the LGBTQIA+ community need no proof, of the forensic kind; it does have to meet a quantifiable threshold, this court has outlined them in Navtej Johar (supra). The refusal to acknowledge choice, by

society, is because it is statedly based on long tradition (dating back to the times when the constitution did not exist). In such cases, the issue is does the state's silence come in the way of this court recognizing whether the petitioners have been denied the right to choose their partner₹

113. It is important to recognize, that while the state ipso facto may have no role in the choice of two free willed individuals to marry, its characterizing marriage for various collateral and intersectional purposes, as a permanent and binding legal relationship, recognized as such between heterosexual couples only (and no others) impacts queer couples adversely. The intention of the state, in framing the regulations or laws, is to confer on benefits to families, or individuals, who are married.

This has the result of adversely impacting to exclude queer couples. By recognizing heterosexual couples' unions and cohabitation as marriages in various laws and regulations such as: in employment (nominations in pension, provident fund, gratuity, life and personal accident insurance policies); for credit (particularly joint loans to both spouses, based on their total earning capacity); for purposes of receiving compensation in the event of fatal accidents, to name some such instances, and not providing for non-heterosexual couples such recognition, results in their exclusion.

114. The individual earned benefits (by each partner or both collectively), which would be available to family members (such as employee state insurance benefits, in the event of injury of the earning partner, provident fund, compensation, medical benefits, insurance benefits, in the event of death of such earning partner) are examples of what the injured or deceased partner by dint of her or his work, becomes entitled to, or the members of her family become entitled to.

The denial of these benefits and inability of the earning partner in a queer relationship, therefore has an adverse discriminatory impact. The state may not intend the discrimination, or exclusion in the conferment of such benefits or social welfare measures. Yet, the framework of such policies or regulations, expressed in favour of those in matrimonial relationships, results in denial of entitlements/benefits, despite the professional abilities and contributions which such individuals might to society.

115. The objective of many of these laws or schemes is to confer or provide entitlements based on individual earning and contribution. For example, provident fund is payable due to the employee's personal contribution and their status as an employee, directly flowing from the functions discharged. Similarly, the objective of entitlement of benefits under the Employee State Insurance Act,

and other such insurance related schemes or welfare measures (such as the Workman's Compensation Act), flow from the individual status, work, and effort of the concerned employee.

Major part of these benefits, or all of them, flow in the event of certain eventualities such as fatal accident, or death. The design of these statutes and schemes, is to enable both the concerned subscriber or employee (in the event of infirmity or termination of employment) to receive them, or in an unforeseen event such as death, for his dependents to receive them. The restrictive way in which 'dependent' or 'nominee(s)' are defined ('spouse', or members of the family in a heteronormative manner) exclude their enjoyment to the intended beneficiary.

116. This deprivation has to be addressed. That these can be magnified, can be illustrated by a few examples. For instance, a queer couple might live together as spouses (without legal recognition)- even for two decades. If one of them passes away in a motor vehicle accident, the surviving partner would not only be unable to get any share of the deceased partner's estate, but also any portion of the compensation.

In case the union was not with approval of their respective families, who might have ostracised or broken relationship with them, the result would be injustice, because the surviving spouse, who shared life and cared for the deceased partner, especially during hard times, would be completely excluded from enjoying any benefits - all of which would go to the family members of the deceased (who may have even boycotted them). The same result would occur, in the event of death of one partner; family pension and death benefits would be denied to the queer partner. This injustice and inequity results in discrimination, unless remedial action is taken by the state and central governments.

117. It is relevant to record a note of caution at this juncture. While the right to marry or have a legally recognised marriage is only statutory, the right to cohabit and live in a relationship in the privacy of one's home is fundamental, and enjoyed by all. This is not to say that the latter, is unqualified or without restriction. Rather, that the latter, is a right afforded to all, irrespective of the State's recognition of the relationship or status, as in the case of 'married' couples.

The discriminatory impact recognised in the above paragraphs, however, is to highlight the effect of a legislative vacuum - specifically on long term queer couples, who do not have the avenue of marriage, to entitle them to earned benefits. Could this same logic then be extended to heterosexual couples that choose to not get married, despite having the avenue₹

With respect, this would require further consideration by the State, and was an aspect that was neither argued, nor were we called upon to decide, in the present petitions. Therefore, it is pointed out that State must remain cognizant of such an unwitting consequence of creating two parallel frameworks, for live-in or domestic partnerships, and marriages, and the confusion or anomalies this may cause to gendered legal frameworks (as they stand today) - while trying to remedy or mitigate the discrimination faced by queer couples.

118. Addressing all these aspects and concerns means considering a range of policy choices, involving multiplicity of legislative architecture governing the regulations, guided by diverse interests and concerns - many of them possibly coalescing. On 03.05.2023, during the course of hearing, the learned Solicitor General, upon instructions, had expressed the Union's position that a Highpowered committee headed by the Union Cabinet Secretary would be formed to undertake a comprehensive examination to consider such impacts, and make necessary recommendations in that regard.

VII. Transgender persons in heterosexual persons can marry under existing law

119. We are in agreement with the Part (xi) of the learned Chief Justice's opinion which contains the discussion on the right of transgender persons to marry. We are also in agreement with the discussion relating to gender identity [i.e., sex and gender are not the same, and that there are different people whose gender does not match with that assigned at birth, including transgender men and women, intersex persons, other queer gendered persons, and persons with socio-cultural identities such as hijras] as well as the right against discrimination under the Transgender Persons Act 2019.

Similarly, discussion on the provisions of the Transgender Persons Act, 2019 and enumeration of various provisions, remedies it provides, and harmonious construction of its provisions with other enactments, do not need any separate comment. Consequently, we agree with the conclusion [(G(m)] that transgender persons in heterosexual relations have the right to marry under existing laws, including in personal laws regulating marriage. The court's affirmation, of the HC judgment in Arun Kumar v. Inspector General of Registration115 is based upon a correct analysis.

VIII. Issue of joint adoption by queer couples

120. Some of the petitioners have challenged Regulation 5(3) of the 2020 CARA Regulations. By Section 57(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter 'JJ Act'), consent of both the spouses for adoption

is necessary ("shall be required"). By Section 57(5), the authority116 is enabled to frame any other criteria. CARA notified regulations in furtherance of Section 57(3) which inter alia mandates as a prerequisite that the prospective adopting couple should have been in a stable marital relationship for at least 2 years117.

The petitioners argued that these regulations relating to adoption were ultra vires the parent enactment - the JJ Act, and arbitrary for classifying couples on the basis of marital status, for the purpose of joint adoption. We have perused the reasoning and conclusion by the learned Chief Justice on this aspect, and are unable to concur.

121. The interpretation placed on Section 57(2) of the JJ Act by the learned Chief Justice, is that it contemplates (joint) adoption by both married and unmarried couples, but the condition requiring both spouses to consent applies only to married couples. Therefore, while the JJ Act is wider in its scope, the CARA Regulation 5(3) [in furtherance of Section 57(5) which delegates power to prescribe any other criteria] stipulating a 'stable marital relationship' exceeds the power granted by the parent Act, and is ultra vires the express provisions and legislative policy of the JJ Act.

Our disagreement with this characterization is laid out in Part A below. Thereafter, the learned Chief Justice has read down offending part 'marital' from Regulation 5(3), and held that the requirement of 'consent' embodied in Regulation 5(2)(a) would be equally applicable on both married and unmarried couples. We are of the firm opinion that the exercise of reading down itself, is unsustainable [See part B below] and hence, this consequence though favourable, cannot apply. Our reasoning in relation to the aspect of adoption by queer couples, and the indirect discrimination faced, is elaborated in Part C.

A. Not a case of delegated legislation being ultra vires the parent Act

122. With respect, we disagree with the interpretation of Section 57(2) of the JJ Act itself. A reading of the provision as a whole, makes it amply clear that it intends joint adoption only to married couples. While the word "couple" is not preceded by 'married', the use of "spouse" later in the sentence, rules out any other interpretation. The principle of noscitur a sociis (meaning of a word should be known from its accompanying or associating words) is squarely applicable; a provision is to be seen as a whole, wherein words are to be read in the context of accompanying or associating words.

In K. Bhagirathi G. Shenoy and Ors. v. K.P. Ballakuraya & Anr.118, it was observed:

"It is not a sound principle in interpretation of statutes to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim noscitur a sociis (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision."

Furthermore, such an interpretation - of construing a part of one provision as operating to one set of people, and not others, is simply not known to law.

123. To read Section 57(2) as enabling both married and unmarried couples to adopt, but that the statutory provision contemplates a restriction or requirement of 'consent' only on the former kind of couple is not based on any known principle of interpretation. There is a strong legislative purpose in the requirement of obtaining consent of the spouse, which is rooted in the best interest of the child; for their welfare, and security.

The parent Act, and delegated legislation, both are clear that a prospective adoptive parent can be a single person (whether unmarried, widower, etc.) and on them, there exists no restriction other than on a single male being barred from adopting a girl child. The restriction of 'consent' of partner, applies only in the case of a couple. This is because the child will enter into a family unit - consisting of two parents, as a result of the adoption and will in reality, enjoy the home that is made of both partners.

Acceptance, therefore, of the other partner, is imperative; it would not be in the best interest of the child if one of the partners was unwilling to take on the responsibility. The only other legislative model is Section 7 and 8 of the Hindu Adoption and Maintenance Act, 1956 which mandates consent of both spouses (which much like other personal laws, uses the gendered language of "wife" and "husband").

124. Therefore, given that we differ on the starting point itself - that section 57(2) of the JJ Act permits joint adoption by both married and unmarried couples (as held by the learned Chief Justice) - we are of the considered opinion that is not a case of delegated legislation being ultra vires the parent Act. 125. The legislative choice, of limiting joint adoption only to married couples needs to be understood in the broader context of the JJ Act, and its purpose - which is the best interest of the child are paramount. Legal benefits and entitlements, flow either from/in relation to the individual adopting (when a single person adopts), or the married couple adopting as a unit.

In the case of bereavement, of such single parent, custody of the child may be taken by a relative in the former, whereas continued by the surviving spouse, in the latter. But consider, that in the case of a married couple - there is a breakdown of marriage, or simply abandonment/neglect of one partner and the child, by the other. There are protections in the law, as they stand today, that enable such deserted, or neglected spouse, to receive as a matter of statutory right - maintenance, and access to other protections.

Undoubtedly, the DV Act offers this protection even to those in an unmarried live-in relationship, but consider a situation that does not involve domestic violence, and is plain and simple a case of neglect, or worse, desertion. It is arguable that both partners, are equally responsible for the child after the factum of adoption; however - it begs the question, how can one enforce the protection that is due to this child₹

126. The JJ Act merely enables adoption, but for all other consequences (i.e., relating to the rights of a child qua their parents, and in turn obligations of a parent towards the said child) reference has to be made to prevailing law (law relating to marriage and divorce, maintenance, succession, guardianship, custody, etc.). When a single person adopts as an individual, their capabilities are assessed as per Section 57(1) [and Regulation 5(1)], and the responsibility of that child - falls squarely on this individual.

If that person enters into a relationship, whether it later succeeds, or fails, is immaterial - the responsibility of the child remains squarely on the individual (until they are married, and the partner legally adopts the child). When a couple adopts, they are jointly assessed, and in law, the responsibility falls on both parents. If one parent was to abandon the relationship, and the other parent is unable to maintain themselves or the child by themselves- recourse lies in other statutory provisions which enable remedy to be sought.

To read the law in the manner adopted by the learned Chief Justice, with all due respect, would have disastrous outcomes, because the ecosystem of law as it exists, would be unable to guarantee protection to the said child in the case of breakdown of an unmarried couple, adopting jointly. This, therefore, would not be in the best interest of the child.

B. Not a case for reading down or other interpretive construction

127. Counsel relied on the case of X v. Principal Secretary (supra) where this court read down 'married woman' to just 'woman' for the purpose of interpretating the MTPA Act, to argue that a similar interpretation be adopted for the law relating to adoption. In our considered opinion, that case was on a

different footing altogether - it related to an individual woman's right to choice and privacy, affecting her bodily autonomy. Given the fundamental right that each childbearing individual has, and the objective of the Act, the classification on the basis of marital status, was wholly arbitrary. The JJ Act and its regulations are on a different footing. Here, the object of the Act and guiding principle, is the best interest of the child (and not to enable adoption for all).

128. It is agreeable that all marriages may not provide a stable home, and that a couple tied together in marriage are not a 'morally superior choice', or per se make better parents. Undoubtedly, what children require is a safe space, love, care, and commitment - which is also possible by an individual by themselves, or a couple- married or unmarried. There is no formula for a guaranteed stable household. Principally, these are all conclusions we do not differ with.

As a society, and in the law, we have come a long way from the limited conception of a nuclear family with gendered roles, and privileging this conception of family over other 'atypical' families. However, the fact that Parliament has made the legislative choice of including only 'married' couples for joint adoption (i.e., where two parents are legally responsible), arises from the reality of all other laws wherein protections and entitlements, flow from the institution of marriage.

To read down 'marital' status as proposed, may have deleterious impacts, that only the legislature and executive, could remedy - making this, much like the discussion on interpretation of SMA, an outcome that cannot be achieved by the judicial pen. Having said this, however, there is a discriminatory impact on queer couples, perhaps most visible through this example of adoption and its regulation, that requires urgent state intervention (elaborated in Part C).

129. Furthermore, the previous analysis of SMA has led this Court to conclude that its provisions cannot be modified through any process of interpretation and that the expression "spouse" means husband and wife or a male and female as the case may be, on an overall reading of its various provisions. By Section 2(64) of the JJ Act, expressions not defined in that Act have the same meanings as defined in other enactments. The SMA is one example.

Likewise, the other enacted laws with respect to adoption is the Hindu Adoption and Maintenance Act. That contains the expression "wife and husband". In these circumstances, we are of the opinion that the manner in which Section 57(2) is cast, necessitating the existence of both spouse and their consent for adoption of a child. In such a relationship, Regulation 5(3) cannot be read down in the manner suggested by the learned Chief Justice.

130. Therefore, in our opinion, whilst the argument of the petitioners is merited on some counts, at the same time, the reading down of the provision as sought for would result in the anomalous outcome that heterosexual couples who live together, but choose not to marry, may adopt a child together and would now be indirect beneficiaries, without the legal protection that other statutes offer - making it unworkable (much like the discussion on SMA in Part V).

C. Discriminatory impact of adoption regulations on queer persons

131. Section 57(2) of that Act spells out the eligibility conditions of prospective adoptive parents. The petitioner's argument was that the expression "marital" results in discrimination inasmuch as single parent can adopt - the only prohibition being that a single man cannot adopt a girl child. Further, if a single man and/or a single woman choose to adopt separately as an individual, and live together, the resultant de facto parents would still have a choice of marrying each other - for the child in question to be legally the child of both parents.

Or put differently, if a heterosexual couple wants to adopt a child jointly, they have the option of entering into a marriage, thereby making them eligible for joint adoption. However, in the absence of legal recognition of a queer couple union, they are left to adopt as individuals and the resultant de facto family would have no avenue for legal recognition. This iniquitous result too is an aspect which needs to be addressed as the impact here is not only on the queer couple (who have no avenue to seek legal recognition of their union) but also upon the children adopted by them (who have no say in the matter).

132. Furthermore, given the social reality that queer couples are having to adopt in law as individuals, but are residing together and for all purposes raising these children together - means that the State arguably has an even more urgent need to enable the full gamut of rights to such children, qua both parents.

For instance, in an unforeseen circumstance of death of the partner who adopted the child as an individual, the child in question may well become the ward of such deceased's relatives, who might (or might not) even be known to the child, whereas the surviving partner who has been a parent to the child for all purposes, is left a stranger in the law. Therefore, this is yet another consequence of the nonrecognition of queer unions, that the State has to address and eliminate, by appropriate mitigating measures.

133. This is not to say that unmarried couples - whether queer or heterosexual- are not capable or suitable, to be adoptive parents. However, once the law permits, as it has done - adoption by both single individuals, the likelihood of their joining and co-habiting cannot be ruled out. In such event, de facto family

unit can and do come about. The underlying assumption in the law as it exists, that such unmarried heterosexual or queer couples should not adopt needs to be closely examined.

Similarly, the need of such couples to have and raise a family in every sense of the term, has to be accommodated within the framework of the law, subject to the best interests of the child. The existing state of affairs which permits single individuals to adopt, and later to live as a couple in due exercise of their choice, in effect deprives the children of such relationships various legal and social benefits, which are otherwise available to children of a married couple.

In other words, given the objective of Section 57 and other allied provisions of the JJ Act, which is beneficial for children, the State as parens patriae needs to explore every possibility and not rule out any policy or legislative choice to ensure that the maximum welfare and benefits reach the largest number of children in need of safe and secure homes with a promise for their fullest development. This aspect is extremely important given that a large number of children remain neglected, or orphaned.

134. It goes without saying that the welfare and the benefit of the children is paramount in every case, and the State has the duty to act as parens patriae. That our country has countless children who are orphaned or neglected, and in need of loving homes, is not lost on us - and is certainly a concern that the State is most acutely aware of. In these circumstances, it would be in the general interest of all children that such impact is removed at the earliest instance, after undertaking indepth study and analysis of the various permutations and combinations that would arise in opening adoption more widely, without hampering the child's rights.

In its exercise of reframing the regulations or laws, it is reiterated that the State cannot, on any account, make regulations that are facially or indirectly discriminatory on the ground of sexual orientation. It would be entirely wrong, if the observations herein, are construed as saying that the State should hamper or interfere in queer persons who have in the past, or are seeking to adopt as individuals.

These observations are to be construed to enable the state to consider all options, and implications, with the object of promoting the best welfare of children, especially whether joint adoption can be facilitated to such willing couples, even while ensuring that the legal web of statutory protections and entitlements guaranteed to children, are operationalised for these children as well.

135. These observations are not meant to impede all possibilities and make all necessary policy and legislative changes, enabling children's welfare. In other words, the possibility of queer couples adopting children, should be given equal concern and consideration having regard to the larger interest of the largest number of children and their development.

IX. Moulding relief

136. The breadth and amplitude of this court's jurisdiction is incontestable. The constitution framers created this as a fundamental right in most emphatic terms. This jurisdiction enables the court to create and fashion remedies suited for the occasion, oftentimes unconstrained by previous decisions. Yet the breadth of this power is restrained by the awareness that it is in essence judicial. The court may feel the wisdom of a measure or norm that is lacking; nevertheless, its role is not to venture into functions which the constitution has authorised other departments and organs to discharge.

137. Social acceptance is an important aspect of the matrimonial relationship, but that is not the only reality; even in the exercise of choice by the parties to a marriage, there may be no acceptance at all, by members of their respective families; others too may shun them. Yet, their relationship has the benefit of the cover of the law, since the law would recognize their relationship, and afford protection, and extend benefits available to married persons. This however eludes those living in non-heterosexual unions, who have no such recognition in all those intersections with laws and regulations that protect individual and personal entitlements that are earned, welfare based, or compensatory. The impact, therefore, is discriminatory.

138. Does the existence of such discriminatory impacts, in these intersections with the state, and arising out of a variety of regulations and laws, impel this court to fashion a remedy, such as a declaration, which enjoin legislative activity, or instruct the executive to act in a specified manner, i.e., achieving nonheterosexual couple marriage₹ This aspect cannot be viewed in isolation, but in the context of our constitution's entrenchment of separation of powers, which according to Kesavananda Bharati (supra), Indira Gandhi119 and other judgments constitutes an essential feature of the Constitution.

It is one thing for this court, to commend to the state, to eliminate the discriminatory impact of the intersections with laws and publicly administered policies and institutions, upon non-heterosexual couples, and entirely another, to indirectly hold that through a conflation of positive obligations cast on the State, that such individuals' right to choice to cohabit and form abiding relationships,

extends to the right (or some entitlement) to a legally recognised union that must be actualized by State policy/legislation.

139. The petitioners relied on three judgments specifically, to argue that this court could issue directions, to fill the legal lacunae: Common Cause (supra), Vishaka & Ors v. State of Rajasthan (hereafter, "Vishaka")120 and NALSA (supra). We have briefly summarized why these were in a context different from the case before us.

140. In Common Cause (supra), the court elaborated on the theme of liberty under Article 21 of the Constitution and the faÃ§ade of dignity inherent in it. The Court relied on Port of Bombay v. Dilipkumar Raghavendranath Nadkarni121, Maneka Gandhi (supra), and State of A.P. v. Challa Ramkrishna Reddy122. The court also relied on K.S. Puttaswamy (supra), NALSA (supra) and Shabnam v. Union of India123 to underline the intrinsic value of dignity and further stated that life is not confined to the integrity of physical body.

Having said that, the Court formulated the right under Article 21 to include the right to die with dignity, of a dying or terminally ill person and approved the application of only passive euthanasia. The Court further went on to approve the idea of individual autonomy and self-determination, underlining the context expanded and built upon the directions which had been granted in the earlier judgment in Aruna Ramchandra Shanbaug v. Union of India (hereafter, "Aruna Shanbaug")124.

The Court was also influenced by the recommendations of the 241st Law Commission Report which had suggested incorporation of additional guidelines in addition to an elaboration of what had been spelt out in Aruna Shanbaug (supra). The Court rejected the argument that the previous ruling in Gian Kaur v. State of Punjab125 did not rule that passive euthanasia can only be given effect to through legislation and further that the Court could only issue guidelines.

141. The approach of Common Cause (supra) as can be seen from the varied opinions of the Judges forming the Bench was one of seeing the workability and the need to elaborate guidelines formulated in Aruna Shanbaug (supra). The Court had no occasion, really speaking, but to consider whether the directions given could not have been given.

Furthermore, there were reports in the form of Law Commission recommendations which formed additional basis for the Court's discretion and the final guidelines. An important aspect is that all judgments in Common Cause (supra) located the right to passive euthanasia premising upon the right to human dignity, autonomy and liberty under Article 21.

142. Vishaka (supra) was an instance where in every sense of the term, there was all round cooperation as is evident from the position taken by the Union of India which had expressly indicated that guidelines ought to be formulated by the Court. The trigger for these guidelines was the resolve that gender equality (manifested in Articles 14 and 15 of the Constitution as well as the right to dignity) and the right to pursue one's profession and employment [Article 19(1)(g)] needed some express recognition to ensure protection from sexual harassment in the workplace and to work with dignity, is a basic human right which needed to be addressed in the context of women at workplace.

The Court took note of international conventions and instruments and also held that guidelines had to be formulated for enforcement of Fundamental Rights till a suitable law is made. The Court expressly indicated what kind of behaviour was sexual harassment (para 2 of the guidelines) and further that regulations had to be formulated for prohibited sexual harassment and providing for appropriate penalties at workplace.

Other directions were that if the conduct amounted to an offence, the employer had to initiate appropriate action according to law and also ensure that the victims had to be given the option of transfer of their perpetrator or their own transfer. Furthermore, disciplinary action in terms of the rules was directed with a further requirement that necessary amendments were to be carried out. The Court then went on to request the State to consider adopting suitable measures indicating legislation to ensure that the guidelines in the order were employed by the Government.

143. Central to the idea of issuing directions or guidelines in Vishaka (supra) was the felt need to address a living concern - that of providing redressal against socially repressible conduct suffered by women in the course of employment. The Court stepped in, so to say, to regulate this behaviour in public places, which though not criminalized or outlawed (other than in the limited context of Section 354 IPC) actually tended towards criminal behaviour.

The Court articulated the constitutional vision for bringing about gender parity and to that end, elimination of practices which tended to lower the dignity and worth of women through unacceptable behaviour. Guided by Article 15(3), the court stepped in, while limiting itself to regulate workplaces essential in the public field (State or State agencies). The Union of India was actively involved and in fact had given suggestions, at the time of formulation of these guidelines.

At the same time, the court realized its limitation and declared that such guidelines shall continue till appropriate laws are made. Existing service rules were in fact amended to accommodate these concerned, to the extent of

incorporating the forums through which such grievance could be articulated. This later culminated in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which applies not merely to public but all establishments.

144. In NALSA (supra), the Court again was confronted with an acute concern wherein the personhood of transgender persons itself, was not recognized. The court held that the intrinsic worth of every individual and the value of individuals to fully realise their rights, was a premise embedded in the Constitution. The Court sought to address hostile discriminatory practices, which included violence that transgender persons were subjected to routinely.

Given all these circumstances, the Court located the right of those identifying themselves as transgender persons squarely under Article 21 of the Constitution. Any discriminatory practice against such persons, would violate their Article 15 right under the Constitution. The directions given by the Court were that such persons should be treated as third gender, where appropriate, and granted legal protection to their self-identified gender identity.

Further, that the State and Central Government should seriously address problems faced by them by providing measures for medical care and facilities in hospitals, permitting them access to social welfare schemes for their betterment and take other measures. The court also constituted an expert committee to make an in-depth study of problems faced by transgender persons.

145. In the present case, however, the approach adopted in the above three cases would not be suitable. The court would have to fashion a parallel legal regime, comprising of defined entitlements and obligations. Furthermore, such framework containing obligations would cast responsibilities upon private citizens and not merely the State. The learned Chief Justice's conclusions also do not point towards directions of the kind contemplated in Vishaka (supra). However, the outlining of a bouquet of rights and indication that there is a separate constitutional right to union enjoyed by queer couples, with the concomitant obligation on the State to accord recognition to such union, is what we take exception to.

X. Conclusion and directions

146. Marriage, in the ultimate context, is not defined merely by the elements, which delineate some of its attributes, and the differing importance to them, depending on times, such as permanence of a sexual partner; procreation and raising of children, stability to family, and recognition in the wider society. Some, or most of these elements may be absent in many relationships: there may

be no procreative possibility due to choice, or otherwise; some marriages may have no wider context, such as absence of the larger family circle, due to several reasons, including alienation or estrangement; there may be no matrimonial home, in some marriage, because of constraints including spouses being located in different places; some marriages may be (by choice or otherwise) bereft of physical or sexual content.

Yet, these marriages might be as successful, as fulfilling and complete as any other. The reason, in this author's opinion, is that at its core, marriage has signified companionship, friendship, care and spiritual understanding a oneness, which transcends all other contents, and contexts. Thus, "home" is not a physical structure; it is rather the space where the two individuals exist, caring, breathing and thinking, living for each other. This is how traditionally it has been understood.

147. This feeling need not be unique to marriage; and in fact has come to be enjoyed by many without the cover of it (for e.g., those who are simply in committed cohabitational relationships). While many others, may only be able to experience such a feeling and way of life, if it were to have the legitimacy in society, akin to marriage. That law has the potential to play such a legitimising role, cannot be overstated. The feeling of exclusion that comes with this status quo, is undoubtedly one which furthers the feeling of exclusion on a daily basis, in society for members of the queer community.

However, having concluded that there exists no fundamental right to marry, or a right to claim a status for the relationship, through the medium of a law (or legal regime) and acknowledged the limitations on this court in moulding relief, this court must exercise restraint; it cannot enjoin a duty or obligation on the State to create a framework for civil union or registered partnership, or marriage, or abiding co-habitational relationship. Yet, it would be appropriate to note that everyone enjoys the right to choice, dignity, non-discrimination, and privacy.

In a responsive and representative democracy which our country prides itself in being, such right to exercise choices should be given some status and shape. Of course, what that should be cannot be dictated by courts. At the same time, prolonged inactivity by legislatures and governments can result in injustices. Therefore, action in this regard, would go a long way in alleviating this feeling of exclusion that undoubtedly persists in the minds and experiences, of this community.

148. The resultant adverse impact suffered by the petitioners in relation to earned benefits [as elaborated in Part VI], solely because of the State's choice to not recognise their (social) union or relationship, is one which results in their

discrimination. This discriminatory impact - cannot be ignored, by the State; the State has a legitimate interest necessitating action.

The form of action - whether it will be by enacting a new umbrella legislation, amendments to existing statutes, rules, and regulations that as of now, disentitle a same-sex partner from benefits accruing to a 'spouse' (or 'family' as defined in the heteronormative sense), etc.- are policy decisions left to the realm of the legislature and executive.

However, the recognition that their non-inclusion in a legal framework which entitles them, and is a prerequisite eligibility criteria for myriad earned and accrued benefits, privileges, and opportunities has harsh and unjust discriminatory consequences, amounting to discrimination violating their fundamental right under Article 15 - is this court's obligation, falling within its remit.

The State has to take suitable remedial action to mitigate the discriminatory impact experienced by the members of the queer community, in whatever form it deems fit after undertaking due and necessary consultation from all parties, especially all state governments and union territories, since their regulations and schemes too would have to be similarly examined and addressed.

149. This court hereby summarizes its conclusions and directions as follows:

i. There is no unqualified right to marriage except that recognised by statute including space left by custom.

ii. An entitlement to legal recognition of the right to union - akin to marriage or civil union, or conferring legal status upon the parties to the relationship can be only through enacted law. A sequitur of this is that the court cannot enjoin or direct the creation of such regulatory framework resulting in legal status.

iii. The finding in (i) and (ii) should not be read as to preclude queer persons from celebrating their commitment to each other, or relationship, in whichever way they wish, within the social realm.

iv. Previous judgments of this court have established that queer and LGBTQ+ couples too have the right to union or relationship (under Article 21) - "be it mental, emotional or sexual" flowing from the right to privacy, right to choice, and autonomy. This, however, does not extend to a right to claim entitlement to any legal status for the said union or relationship.

v. The challenge to the SMA on the ground of under classification is not made out. Further, the petitioner's prayer to read various provisions in a 'gender neutral' manner so as to enable same-sex marriage, is unsustainable.

vi. Equality and non-discrimination are basic foundational rights. The indirect discriminatory impacts in relation to earned or compensatory benefits, or social welfare entitlements for which marital status is a relevant eligibility factor, for queer couples who in their exercise of choice form relationships, have to be suitably redressed and removed by the State.

These measures need to be taken with expedition because inaction will result in injustice and unfairness with regard to the enjoyment of such benefits, available to all citizens who are entitled and covered by such laws, regulations or schemes (for instance, those relating to employment benefits: provident fund, gratuity, family pension, employee state insurance; medical insurance; material entitlements unconnected with matrimonial matters, but resulting in adverse impact upon queer couples). As held earlier, this court cannot within the judicial framework engage in this complex task; the State has to study the impact of these policies, and entitlements.

vii. Consistent with the statement made before this Court during the course of proceedings on 03.05.2023, the Union shall set up a high-powered committee chaired by the Union Cabinet Secretary, to undertake a comprehensive examination of all relevant factors, especially including those outlined above. In the conduct of such exercise, the concerned representatives of all stakeholders, and views of all States and Union Territories shall be taken into account.

viii. The discussion on discriminatory impacts is in the context of the effects of the existing regimes on queer couples. While a heterosexual couple's right to live together is not contested, the logic of the discriminatory impact [mentioned in conclusion (vi) above] faced by queer couples cohabiting together, would definitionally, however, not apply to them.

ix. Transgender persons in heterosexual relationships have the freedom and entitlement to marry under the existing statutory provisions.

x. Regulation 5(3) of the CARA Regulations cannot be held void on the grounds urged. At the same time, this court is of the considered opinion that CARA and the Central Government should appropriately consider the realities of de facto families, where single individuals are permitted to adopt and thereafter start living in a non-matrimonial relationship. In an unforeseen eventuality, the adopted child in question, could face exclusion from the benefits otherwise

available to adopted children of married couples. This aspect needs further consideration, for which the court is not the appropriate forum.

xi. Furthermore, the State shall ensure - consistent with the previous judgment of this Court in K.S. Puttaswamy (supra), Navtej Johar (supra), Shakti Vahini (supra) and Shafin Jahan (supra)- that the choice exercised by queer and LGBTQ couples to cohabit is not interfered with and they do no face any threat of violence or coercion. All necessary steps and measures in this regard shall be taken. The respondents shall take suitable steps to ensure that queer couples and transgender persons are not subjected to any involuntary medical or surgical treatment.

xii. The above directions in relation to transgender persons are to be read as part of and not in any manner whittling down the directions in NALSA (supra) so far as they apply to transgender persons.

xiii. This court is alive to the feelings of being left out, experienced by the queer community; however, addressing their concerns would require a comprehensive study of its implications involving a multidisciplinary approach and polycentric resolution, for which the court is not an appropriate forum to provide suitable remedies.

XI. Postscript

150. We have the benefit of the final draft by the learned Chief Justice, which contains Section E 'responses to the opinion of the majority' as well. Similarly, we have the benefit of perusing the separate opinion of Sanjay Kishan Kaul, J. While it would not be necessary to deal pointedly with the responses of my learned brothers, certain broad aspects are addressed in the following paragraphs, to clear the air or dispel any misunderstanding.

151. The learned Chief Justice in his response seeks to highlight that the Court has in the past exercised its powers under Article 32 in respect of enforcement of various fundamental rights and cited certain precedents. A close look at each of them would reveal that in almost all cases, the Court enforced facets of personal liberty, or an aspect that was the subject of legislation. The allusion to cases dealing with subjects, particularly, incarceration of persons with mental disabilities (Sheela Barse126), the right to speedy trial (State of Punjab v. Ajaib Singh127), legal aid (Manubhai Pragji Vashi128 etc. are directly concerned with personal liberty.

The reference to cases dealing with clean environment, is also a facet of Article 21. In fact, there are enacted laws in the field of environment protection. The allusion to the directions in PUCL v. UOI129 is pertinent; in that judgment, the

Court in fact issued a series of directions to the State, operationalizing existing government schemes, and issuing consequential directions, to mitigate large-scale loss of grains, by directing that they be distributed/channelized by the State, into the PDS system. The other decision, State of H.P. v. Umed Ram Sharma130 was a case where the High Court had directed speedy implementation and construction of a road which had been sanctioned by the State but had been left incomplete.

It was held that direction was not to supervise the action but only to the apprise state of the inaction to bring about a sense of urgency. The court also observed importantly that it is primarily within the domain of the executive to determine the urgency and manner of priorities of the need of any law. This court by its judgment even observed that there was nothing wrong in such directions, since a sanction for the road had been obtained but there was tardy implementation of the same.

152. That certain fundamental rights have positive content, or obligation, is not disputed - in fact, in paragraph 57 this has been elaborated; exception was instead taken to the approach suggested by the learned Chief Justice, of tracing the right to union from a conjoint reading of multiple Articles (clauses of Article 19, 25 and 21), as necessitating the creation of a legal status to the relationship (a result of the obligation to "accord recognition") and enunciation of a bouquet of entitlements flowing from this [see paragraph 336(i)]. With respect, such a direction is in the nature of creating a legal status.

Further, the discussion on the absence of law, and limited extent of positive rights under Article 19 and 25 in our opinion, was in fact to insist that rather than ordering liberties and enumerating every possible right or the way in which it is to be enjoyed, the content of fundamental rights are that they take up all the space, until restricted - which can be tested on the ground of its reasonableness, as per the limitations in Part III. This in no manner takes away from the previous jurisprudence of this Court where positive obligation under Article 21 has been expounded to locate several obligations upon the State.

153. This Court's observations with respect to the learned Chief Justice's reasoning centered around the enunciation of the bouquet of rights emanating from various provisions other than Article 21 [Article 19 and 25], and locating an obligation, has to be seen in the backdrop of the unanimous view of this Court, that the fundamental right to marry is not found within the Constitution.

Therefore, it is our considered opinion that to create an overarching obligation upon the State to facilitate through policies the fuller enjoyment of rights under Article 19 and 25, is not rooted in any past decision, or jurisprudence. That queer

couples have the right to exercise their choice, cohabit and live without disturbance - is incontestable. In the same vein, that they are owed protection against any threat or coercion to their life, is a positive obligation that binds the State- this is a natural corollary of their right under Article 21.

154. Consider in this context, also the nature of the relief sought, and the positive obligation fashioned. While there are innumerable judgments on the positive content of rights under Article 21, there are also countless judgments that insist upon the separation of powers, when it comes to matters of policy, and the courts not being the appropriate forum for the adjudication of the same. The polycentric nature of the issue, is compelling.

155. Next, on the charge levelled that our conclusion on the challenge to the SMA (Part V of this judgment) and subsequently finding on the disparate or discriminatory impact faced by the queer community (Part VI) being contradictory - a small comment is called for.

The section discussing the provisions of the SMA and the challenge to its validity, was based entirely upon whether it violated the Constitution on the ground of impermissible classification (under Article 14) - for which, the object of the Act (i.e., to facilitate marriage between inter-faith couples, wherein at the time 'marriage' or even a 'couple' only denoted heterosexual couples in light of same sex relations being criminalized), and its provisions, are relevant factors. Classification, involves differentiation; further, this court has discussed how 'under classification' per se does not warrant invalidation.

In contrast, in the latter segment on discriminatory impact (Part VI), the issue that this court was considering, was not reasonable classification but the impact upon queer couples through neutral laws or regulations that they encounter in their everyday lives; the purpose of which, or even their substantive provisions, have nothing to do with matrimony. Its rather to confer other benefits - many of which are earned or accrued on account of individual skill and attainment.

Yet the framing of some benefits or their intended beneficiary - wherever articulated in terms of entitlement to families or spouses, tends to exclude from its ambit, queer couples and their lived realities. When such queer couples are entitled to benefits wherever they fulfil other eligibility criteria; it is the disparate impact of these neutral laws in disbursal of entitlements or benefits, which is seen through the effect/impact lens.

Therefore, the discussion on the constitutionality of the SMA is markedly different from the section on discriminatory impact in certain points for queer persons, as they have no avenue for marriage like heterosexual persons. In the

latter, the impact of various laws were pointed as a starting point for the State to take remedial action.

156. What is apparent, however, from our judicial differences and the manner in which we have articulated them - is that a certain question, of fair significance, arises: whether the absence of law or a regulatory framework, or the failure of the State to enact law, amounts to discrimination that is protected131 against under Article 15₹

With respect, this was perhaps neither argued, nor answered by us; our opinion is limited to testing the provisions of the SMA for violation of fundamental rights and noticing that there are various cracks through which the queer community slip through, in other neutral laws, policies and frameworks, due to the manner in which they privilege marital/spousal status (access to which, is not enabled/possible under existing law).

Article 15(1) now, can be understood as permitting a classification for the purpose of fashioning policies. Can the state's omission to create a classification, and further, its absence of a policy for a distinct group, which in the court's opinion deserves favourable treatment, amount to violation of Article 15₹ There is no known jurisprudence or case law (yet) pointing to the absence of law being considered as discrimination as understood under Article 15.

157. The learned Chief Justice has dealt with in some detail on that section of our judgment, on adoption [Part VIII]. The underlying premise of his comments seek to highlight that the existing legal framework affords protection in the event of an unforeseen eventuality like abandonment, or sudden death of one partner. It is incontestable that Section 63 of the JJ Act, provides legal status to the child, in relation to their adoptive parent(s). However, that per se, is not adequate to address all concerns relating to the child. There would be difficulties faced by children, in claiming entitlements such as maintenance, in the absence of a general law.

The example given by the learned Chief Justice illustrates this: benefit under the Hindu Adoption and Maintenance Act (which is available only to Hindus, but accommodates both genders, unlike other laws). A suggestion of Section 125 of the Criminal Procedure Code would give rise to the same set of difficulties as the earlier discussion on SMA. In other words, to obviate the gendered language, an interpretive exercise of the kind ruled out for the interpretation of SMA, would be necessary.

It is for these reasons, that we highlighted the need for the State to consider all aspects [para 133-135]. This court would reiterate that there is no basis for

interpreting the term 'couple' under Section 57(2) of the JJ Act as including both married and unmarried couples, given the use of the word 'spouse' in the very same provision. It is pertinent to highlight that Section 2(61) of the JJ Act prescribes that expressions not defined, would have the same meaning as in other enactments.

158. As far as the learned Chief Justice's comment with respect to this court not reading down 'marital' or striking down Regulation 5(3), the earlier discussion in Part VIII clarified that there was a conscious legislative policy while highlighting the interpretation of the term 'spouse'. At the same time the court recognised the disparate, and even discriminatory impact, on children of individuals, who formed de facto families (with their unmarried partner). In our opinion, striking down the term 'marital' under Regulation 5(3) - would likely have unintended consequences, which cannot be comprehended by the court as it involves policy considerations. This is the reason for desisting from invalidating the provision but having left it to the State to take measures to remedy these impacts.

159. Lastly, a small note of caution is expressed in relation to a few conclusions of our learned brother Kaul, J. There can hardly be any dispute of the positive outcomes or the need for a broadly applicable non-discriminatory law (as elaborated by Kaul, J). However, the wisdom or unwisdom of such a law, the elements that go into its making are matters that are not before this Court to comment on. Nor can we anticipate what would be its content. We are of the opinion that it is not possible to hold that a positive obligation to enact such a law exists. We, therefore, expressly place our disagreement with the reasoning of Kaul, J on this aspect.

160. The known canons of interpretation require the courts to take any statute and interpret its provisions keeping in mind their contextual setting. Likewise, the meaning of words have to be understood in the totality of provisions of the statute. Thus, wherever a word is used, the overall context of its location plays a role; sometimes, its meaning changes wherever the context is different.

We have hence held that the expressions in the SMA ["wife" and "husband" or "male" and "female"] cannot, have a uniform meaning, because there is an intended gendered binary [e.g., male and female] in the specific enacting provisions. As far as inter se statutes are concerned, the inexpedience of a singular, gender neutral meaning is not a possible outcome, as explained previously. Therefore, it is our considered view, that there is no known interpretive tool enabling an exercise inter se and in between statutes, as held by Kaul, J.

161. Undoubtedly, constitutional values endure; they are not immutable. To the extent it is possible, the statutes may be interpreted in tune with such evolving values. Yet, statutes are neither ephemeral, nor their terms transient, and are meant to confer rights, duties, and obligations - and sometimes impose burdens and sanctions. This means that their contents have to be clear and capable of easy interpretation. The text of the statute therefore must be given meaning - any interpretive exercise must therefore begin with the text of the enacted law.

162. The gaps and inadequacies outlined earlier by this judgment result in widereaching impacts and concern crucial aspects of everyday life. Therefore, the respondents and all institutions should take note of the lived realities of persons across the range of gender identities and suitably prioritize their needs of social acceptance. There is also need for a move towards greater acceptance of personal choices and preferences, and an equal marking of our differences in all their varied hues.

163. In various countries that have since legislated on same-sex marriage, the precursor to this regime was often the civil union route. Known by many names, the concept of civil union enjoys varying rights and entitlements in different jurisdictions. This was a legal relationship for unmarried, yet committed couples, who cohabited together and sought certain rights, and the protection of law. The rights that flowed were not identical in scope or extent of rights arising from marriage, but was still an avenue to provide certain limited, but enforceable rights.

In the US, for instance this was rolled out by many state governments, when same-sex marriage was not legalized by the federal government. What began as an option for same sex couples, to attain financial and legal partnership (tax benefits, property rights, child adoption in some jurisdictions, inheritance, etc.) now remains on the statute books for some states, with which couples who do not want to enter the societal pressures or institution of marriage, are able to protect their rights.

However, many advocates for LGBTQ rights have strongly opposed civil unions in other jurisdictions, as offering a 'second class' status, in the absence of the marriage route. Other alternatives available in some of these countries - the suitability of which have also been subject to criticism of varying degrees, but includes - domestic partnerships, cohabitation agreements, common law marriages, etc.

164. This court would be sorely mistaken if we presume what the queer community - in all its diversity, seeks and lay it out in a formulaic framework. Many may welcome civil unions as a pragmatic first step, while some may find

it to be yet another inequitable solution to the feeling of exclusion that persists in society against this community, and one which simply repackages the stigmatization felt.

Many may desire marriage as understood in the 'traditional' sense to escape their societal realities - a form of financial and social emancipation from opposing natal families, or diametrically opposite - to assimilate and gain more social acceptance in their natal families. Yet, others may, as a result of their experience reject altogether the institution of marriage and all the social obligation and associations that come with it, but still want legal protection of their rights. Certainly, what the former group may want, does not hamper or hinder the latter, in any manner - for it is a choice that they seek.

That the state should facilitate this choice for those who wish to exercise it, is an outcome that the community may agree upon. Yet, the modalities of how it should play out, what it will entail, etc. are facets that the State - here the legislature, and executive - needs to exercise its power in furtherance of. Now whether this will happen through proactive action of the State itself, or as a result of sustained public mobilization- is a reality that will play out on India's democratic stage, and something only time can tell.

165. The State may choose from a number of policy outcomes; they may make all marriage and family related laws gender neutral, or they may create a separate SMA-like statute in gender neutral terms to give the queer community an avenue for marriage, they may pass an Act creating civil unions, or a domestic partnership legislation, among many other alternatives. Another consequence may be that rather than the Union Government, the State legislatures132 takes action and enacts law or frameworks, in the absence of a central law.

What is certain however, is that in questions of such polycentric nature - whether social, or political - the court must exercise restraint and defer to the wisdom of the other branches of the State, which can undertake wide scale public consultation, consensus building and reflect the will of the people, and be in their best interest. If as a result of this, a law is enacted that undermines or violates the constitutionally protected rights of an individual, or a group - no matter how miniscule, their right to seek redressal from this Court is guaranteed under Article 32.

166. That the petitioners seek, what many of us may deem to be the normal, or accepted next step in life upon attaining a certain age, and perhaps take for granted, is not lost on us. Their desire, for social acceptability, in the manner that has been historically known - through the social recognition that marriage

affords- and the lack of which causes them feeling of exclusion and hurt, is one that as individuals, especially those donning the robes of justice, we can certainly have deep empathy with.

However, we are deeply conscious, that no matter how much we empathize with the outcome sought, the means to arriving at such a destination, must also be legally sound, and keep intact, the grand architecture of our Constitutional scheme. For if we throw caution to the wind, we stand the risk of paving the way (wherein each brick may feel justified) to untold consequences that we could not have contemplated.

While moulding relief, as a court we must be cognizant that despite being empowered to see the capabilities of the law in its grand and majestic formulation, we must not be led aground because we are blinded, by its glow.

167. The petitions are disposed of in the above terms. Pending applications (if any) are disposed of.

.....J. [S. Ravindra Bhat]

.....J. [Hima Kohli]

New Delhi;

October 17, 2023

1 Regulation XVII, A. D. 1829 of the Bengal Code

2 With the introduction of the Hindu Women's Right to Property Act, 1937, the widow of the deceased husband now had a right to her husband's property after his death. Unlike previously, where the property was divided among the surviving coparceners by the doctrine of survivorship, now it was the widow who had the sole right to such property. However, she only had limited rights (popularly called "limited estate") over such property, which remained with her till her death.

3 After the coming of the Hindu Succession Act, 1956, any property held by a Hindu female, whether before or after the commencement of that Act and which does not fall under the exception of 14(2), is held by her in an unrestricted and absolute manner. The word "possessed" as incorporated in section 14 was further held by various judgements of this court to include any kind of remote possession, be it constructive, physical, or even a right to possess. The result of the incorporation of this section led to a situation whereby all the limited rights

given to a female Hindu under the 1937 Act became absolute by virtue of section 14(1) of the Hindu Succession Act.

4 1985 (3) SCR 844

5 2001 Suppl. (3) SCR 419

6 Defined as "prohibited degrees" under Section 3 (g) of the Hindu Marriage Act, 1955 - which is not confined to a bar against marriages related by blood, but also through non-biological ties, such as widow of brother, son's widow; mother in law, etc; Section 3 (1) (a) of the Parsi Marriage and Divorce Act, 1936; Section 19, Indian Divorce Act, 1869; Section 88, Indian Christian Marriages Act, 1872. Among Muslims, the concept of consanguinity is known as qurabat, i.e. blood relationships such as marrying one's relatives like mother, grandmother, sister, aunt, niece, etc. Other grounds (affinity or mushaarat) are also prohibited relationships, i.e. marriage with mother in law, daughter in law, step grandmother; step granddaughter, fosterage when a child under the age of two years has been fed by a woman other than his mother, or when the woman becomes his foster mother, a man cannot marry his foster mother or her daughter, i.e. foster sister.

7 Section 5 (i) (ii) (iii), HMA [Hindu Marriage Act, 1955]

8 Section 13 HMA; Section 32 (b) and (bb) Parsi Marriage Act, 1936; Section 10 (1) (iii) Indian Divorce Act, 1869; under Section 2 (v) of the Dissolution of Muslim Marriages Act, 1939

9 Section 2 which says that the Act does not apply to "(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed."

10 "29... (2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act."

11 Section 2 (2), Hindu Marriage Act, and Hindu Succession Act, are identically worded, and state that:

"(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning

of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

The Hindu Adoptions and Maintenance Act, 1956 is worded differently, and covers, inter alia,

"(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;"

12 Section 3 (2) states that "(2) Notwithstanding anything contained in sub-section (1) nothing contained in this Act shall apply to the members of any scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

13 2023 INSC 783; ; 2023 SCC OnLine SC 1087

14 2017 (13) SCR 821

15 2017 (9) SCR 797

16 [1985] Supp. (3) SCR 71

17 2009 (13) SCR 989. This court held that "a woman's right to make reproductive choices" is "a dimension of 'personal liberty' as understood under Article 21".

18 2016 (5) SCR 773

19 2022 (7) SCR 686

20 2017 (1) SCR 945

21 (2014) 4 SCC 786

22 2018 (4) SCR 955

23 Choice was also the central theme, in Gian Devi v. Superintendent, Nari Niketan (1976) 3 SCC 234, Soni Gerry v. Gerry Douglas (2018) 2 SCC 197 and Nanda Kumar v. State of Kerala (2018) 16 SCC 602

24 2017 (10) SCR 569

25 2007 (12) SCR 991

26 2018 (6) SCR 1

27 2018 (9) SCR 561

28 1981 (2) SCR 516

29 1980 (3) SCR 855

30 2016 (4) SCR 638

31 Aharon Barak "Human Dignity - The Constitutional Value and the Constitutional Right" Cambridge University Press (2015)

32 1973 Supp SCR 1

33 State Of Gujarat And Another v. Shri Ambica Mills Ltd 1974 (3) SCR 760

34 This formulation was followed in X v. The Principal Secretary (supra). In Navtej Johar (supra), Dipak Misra, J, said that "[t]his is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary prerequisite that consent is the real fulcrum of any sexual relationship.".

35 (2014) 5 SCR 119

36 2006 Supp (7) SCR 336

37 (2018) 7 SCR 379

38 The principle of non-discrimination was explained in Rajive Raturi v. Union of India & Ors 2017 [12] SCR 827 as existing to "ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation".

39 (2009) 111 DRJ 1 (DB)

40 (2014) 1 SCC 1: (2013) 17 SCR 1019

41 Ibid.

42 2018 (3) SCR 770

43 2021 (3) SCC 360

44 2018 (11) SCR 765

45 Sivasankaran v. Santhimeenal [2021] 6 SCR 169:

"The norms of a marriage and the varying degrees of legitimacy it may acquire are dictated by factors such as marriage and divorce laws, prevailing social norms, and religious dictates. Functionally, marriages are seen as a site for the propagation of social and cultural capital as they help in identifying kinship ties, regulating sexual behaviour, and consolidating property and social prestige." Likewise, in Indra Sarma v. V.K.V. Sarma [(2013) 14 SCR 1019] this court said that "The institutions of marriage and the family are important social institutions." The same decision also recognized the centrality of tradition, and custom, while emphasizing that "Marriages in India take place either following the personal Law of the Religion to which a party is belonged or following the provisions of the Special Marriage Act."

46 Andhra Pradesh Public Service Commission v. Baloji Badhvanath 2009 (5) SCR 668

47 576 US 644 (2015)

48 Loving v. Virginia, 388 US 1 (1967)

49 2022 (7) SCR 557

50 See Navtej Johar (supra). Some of the opinions, notably of Chief Justice Dipak Misra (with whom Justice Khanwilkar concurred) highlighted the need to protect choice of one's partner, in case of non-heterosexual persons. Citing previous decisions of this court, including Shakti Vahini (supra)and Shafin Jahan (supra), Justice Dipak Mishra (Chief Justice, as he then was), concluded that:

"167. The above authorities capture the essence of the right to privacy. There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion

and does not result in violation of the fundamental rights of others." (emphasis supplied)

51 State of Kerela v. N.M Thomas, (1976) 2 SCC 310

52 Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217

53 2011 (5) SCR 488

54 1970 (3) SCR 530

55 1964 (1) SCR 332

56 1986 (3) SCR 518

57 2004 (1) SCR 1038

58 Sakal Papers (P) Ltd v. Union of India 1962 (3) SCR 842

59 Bennet Coleman v. Union of India 1973 (2) SCR 757

60 Express Newspapers (P) Ltd. V. Union of India, (1959) 1 SCR 12

61 The Limited Liability Partnership Act, 2008

62 1962 (3) SCR 269

63 1978 (2) SCR 621

64 Ratilal Panachand Gandhi v. State of Bombay 1954 (1) SCR 1055

65 1983 (2) SCR 165

66 [1954] 1 SCR 30

67 [2021] 11 SCR 720

68 (2010) 14 SCR 873

69 1999 (3) SCR 1146

70 1974 (1) SCR 771

71 (1979) 2 SCR 476

72 State Of Gujarat And Another v. Shri Ambica Mills Ltd 1974 (3) SCR 760

73 1969 (3) SCR 827

74 1984 (3) SCR 252

75 1984 (1) SCR 594.

76 Section 32, clause (b) of Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1954

77 1986 (2) SCR 596

78 2008 (6) SCR 566

79 "(9) If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation."

80 [2019] 6 SCR 307

81 This court indeed cited a number of decisions of the House of Lords, or the UK Court of Appeals: Royal College of Nursing of the United Kingdom v. Department of Health and Social Security, 1981 (1) All ER 545 [HL]; Comdel Commodities Ltd. v. Siporex Trade S.A., 1990 (2) All ER 552 [HL]; McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd., [2000] 4 All ER 913; R v Ireland, R v Burstow 1997 (4) All ER 225; Birmingham City Council v. Oakley [2001] 1 All ER 385 [HL].

82 In this context, the court took note of Goodes v East Sussex County Council (2000 [3] All ER 603) and Southwark London Borough Council v. Mills (1999 [4] All ER 449).

83 [2013] 10 SCR 259

84 [2015] 10 SCR 880

85 1996 (2) SCC 428

86 The court had cited State (Through CBI/New Delhi) v. S.J. Choudhary (1996) 2 SCC 428; SIL Import, USA v. Exim Aides Silk Exporter [1999] 2 SCR 958 and BR Enterprises v. State of U.P. [1999] 2 SCR 1111

87 [1999] 1 SCR 669

88 (2023) 10 SCR 289

89 [Section 10(26AAA) of the I.T. Act, 1961]

90 [Exception 2 to Section 375, IPC, 1860]

91 The reasoning of the court was that "a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years.

This age has no nexus with the object sought to be achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act.

In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

92 (2001) 7 SCC 126,

93 the former President of the Israeli Supreme Court

94 Aharan Barak-Purposive Interpretation in Law (quoted in Shailesh Dhairyawan v. Mohan Balkrishna Lulla ([2015] 12 SCR 70)

95 Lexis Nexis, First Edition (2015)

96 [2021] 14 SCR 321

97 In M. Nizamuden v. Chemplast Sanmar Ltd & Ors ((2010) 4 SCC 240), it was observed:

"Purposive construction has often been employed to avoid a lacuna and to suppress the mischief and advance the remedy. It is again a settled rule that if the language used is capable of bearing more than one construction and if construction is employed that results in absurdity or anomaly, such construction has to be rejected and preference should be given to such a construction that brings it into harmony with its purpose and avoids absurdity or anomaly as it may always be presumed that while employing a particular language in the provision absurdity or anomaly was never intended." Girodhar G. Yadalam v. Commissioner of Wealth Tax & Ors [2015] 15 SCR 543; K.H. Nazar v. Mathew K. Jacob, (2020) 14 SCC 126, which states that in interpreting a statute "the problem or mischief that the statute was designed to remedy should first be identified and then a construction that suppresses the problem and advances the remedy should be adopted."

Again, in New India Assurance Co. Ltd. v. Nusli Neville Wadia [2007] 13 SCR 598, this court explained purposive interpretation to mean one which enables "a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act is fulfilled".

98 1958 SCR 1156

99 To name some, in Bipinchandra Parshottamdas Patel v. State of Gujarat [2003 (4) SCC 642], a provision enabling the suspension of an elected official of a municipality, under detention during trial, was held to include detention during investigation, having regard to the object, or the mischief sought to be addressed by the law."

100 1987 (2) SCR 1

101 [1988] 1 SCR 961

102 Relied on R.L. Arora v. State of Uttar Pradesh {(1964) 6 SCR 784} "It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but that has not been ruled by this Court to be the only and the surest method of interpretation."

103 (2001) Supp (4) SCR 323

104 (1990) Supp. 1 SCR 142

105 2016 (9) SCR 1

106 Likewise, B.R. Kapur v. State of Tamil Nadu 2001 (3) Suppl. SCR 191 - a Constitution Bench ruling of this court, also held that interpretations which read in words, were impermissible.

107 4. Conditions relating to solemnization of foreign marriages.- A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely: -

(a) neither party has a spouse living;

(b) neither party is an idiot or a lunatic;

(c) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship.

108 Ghaidan v Godin - Mendoza, (2004) UKHL 30.

109 Minister of Home Affairs v. Fourie & Anr, [(CCT 60/04) [2005] ZACC 19; 2006 (1) SA 524 (CC)]

110 AK Gopalan v. State of Madras, (1950) 1 SCR 88

111 2021 (4) SCR 633

112 2000 Supp (4) SCR693

113 2022 (12) SCC 1

114 2021 (13) SCR 823

115 (2019) Online SCC Madras 8779

116 CARA (Central Adoption Resource Agency) formed under Section 68

117 5. Eligibility criteria for prospective adoptive parents.-

(1)The prospective adoptive parents shall be physically, mentally, emotionally and financially capable, they shall not have any life threatening medical condition and they should not have been convicted in criminal act of any nature or accused in any case of child rights violation.

(2) Any prospective adoptive parent, irrespective of their marital status and whether or not they have biological son or daughter, can adopt a child subject to the following, namely:- (a) the consent of both the spouses for the adoption shall be required, in case of a married couple; (b) a single female can adopt a child of any gender; (c) a single male shall not be eligible to adopt a girl child.

(3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship except in the cases of relative or step-parent adoption.

118 [1999] 2 SCR 438

119 Indira Nehru Gandhi v. Raj Narain, (1975) Supp. SCC 1

120 1997 Supp 3 SCR 404

121 (1983) 1 SCR 828

122 (2000) 3 SCR 644

123 (2015) 8 SCC 289

124 Aruna Ramchandra Shanbaug v. Union of India, (2011) 4 SCR 1057.

125 (1996) 3 SCR 697

126 1993 Supp (1) SCR 561

127 1995 (1) SCR 496

128 1995 Supp (2) SCR 733

129 W.P.(C)196/2001

130 1986 (1) SCR 251

131 Sexual orientation has been recognised under 'sex' in Article 15 by this court in Navtej Johar (supra) and does not merit elaboration, further than to say that

any law or policy which directly, or indirectly, discriminates against a queer individual on the basis of their sexual orientation would fall foul of the Constitution, unless the law is apermissible classification.

132 Entry 5, List III of the Constitution of India.

IN THE SUPRMEE COURT OF INDIA

Supriyo @ Supriya Chakraborty & Anr.
Vs.
Union of India

[Writ Petition (Civil) No. 1011 of 2022]

[Writ Petition (Civil) No. 1020 of 2022]

[Writ Petition (Civil) No. 1105 of 2022]

[Writ Petition (Civil) No. 1141 of 2022]

[Writ Petition (Civil) No. 1142 of 2022]

[Writ Petition (Civil) No. 1150 of 2022]

[Writ Petition (Civil) No. 93 of 2023]

[Writ Petition (Civil) No. 159 of 2023]

[Writ Petition (Civil) No. 129 of 2023]

[Writ Petition (Civil) No. 260 of 2023]

[Transferred Case (Civil) No. 05 of 2023]

[Transferred Case (Civil) No. 06 of 2023]

[Writ Petition (Civil) No. 319 of 2023]

[Transferred Case (Civil) No. 07 of 2023]

[Transferred Case (Civil) No. 08 of 2023]

[Transferred Case (Civil) No. 10 of 2023]

[Transferred Case (Civil) No. 09 of 2023]

[Transferred Case (Civil) No. 11 of 2023]

[Transferred Case (Civil) No. 12 of 2023]

[Transferred Case (Civil) No. 13 of 2023

JUDGMENT

Pamidighantam Sri Narasimha, J.

1. I am conscious of the ordeals that arise from a multiplicity of judicial opinions in cases involving constitutional questions. Yet, I consider it worthwhile to pen the present opinion, given the significant nature of questions involved. Polyvocality in the exercise of the adjudicatory function may not necessarily be viewed with discomfort; if complemented by judicial discipline, it is truly reflective of the diversity of judicial thought.

2. The constitutional questions for which we seek answers in the present set of petitions are two-fold: (a) the status of the right to marry for LGBTQ+ couples and (b) depending upon the answer to the first, the remedy that must ensue. With respect to the first, the petitioners assert that not only do they have the right to marry under the Constitution, but also that through an interpretative process such a right must be read into the existing legislative framework governing marriages. The respondents, oppose both the foundations upon which the petitioners seek to establish their right, and at the same time they remind us of the judicial limitations on the issuance of positive directions for enforcement of such a right.

3. I had the privilege of traversing through the opinions of the learned Chief Justice, Justice Sanjay Kishan Kaul and Justice Ravindra Bhat. I am afraid I am unable to agree with the opinions of the Chief Justice and Justice Kaul. I am in complete agreement with the reasoning given and conclusions arrived at by Justice Bhat. I will supplement his findings with some of my own reasons. Since the broad arguments and submissions have been succinctly captured in the opinion of the learned Chief Justice, I find no reason to separately enlist them here.

4. At the outset, I will set out my conclusions, which are also in complete consonance with that of Justice Bhat in his opinion.

a. The question of marriage equality of same sex/LGBTQ+ couples did not arise for consideration in any of the previous decisions of this Court, including the decision in Navtej Singh Johar & Ors. v. Union of India1 and NALSA v. Union of India2. Consequently, there cannot be a binding precedent on this count. The reasons for arriving at this conclusion are articulated in the opinion of Justice Bhat.

b. The rights of LGBTQ+ persons, that have been hitherto recognized by this Court, are the right to gender identity, sexual orientation, the right to choose a

partner, cohabit and enjoy physical & mental intimacy. In the exercise of these rights, they have full freedom from physical threat and from coercive action, and the State is bound to afford them full protection of the law in case these rights are in peril.

c. There is no unqualified right to marriage guaranteed by the Constitution, that qualifies it as a fundamental freedom. With respect to this, I agree with the opinion of Justice Bhat, but will supplement it with some additional reasons.

d. The right to marriage is a statutory right, and to the extent it is demonstrable, a right flowing from a legally enforceable customary practice. In the exercise of such a right, statutory or customary, the State is bound to extend the protection of law to individuals, so that they can exercise their choices without fear and coercion. This, in my opinion, is the real import of the decisions in Shafin Jahan v. Asokan K.M.3 and Shakti Vahini v. Union of India4.

e. The constitutional challenge to the Special Marriage Act, 1954 and the Foreign Marriage Act,1969 must fail, for the reasons indicated in the opinion of Justice Bhat.

f. Similarly, Justice Bhat also rightly finds the semantic impossibilities of gender-neutral constructions of the Special Marriage Act, 1954 and the Foreign Marriage Act,1969. On both (e) and (f), the opinion of Justice Bhat is exhaustive as to the reasons, and they need not be supplemented.

g. I find that a right to a civil union or an abiding cohabitational relationship conferring a legally enforceable status cannot be situated within Part III of the Constitution of India. On this count too, I agree with the conclusions of Justice Bhat, and supplement them with my own reasons.

h. I agree with the reasoning and the conclusion of Justice Bhat with respect to the constitutionality of Regulation 5(3) of the CARA Regulations, 2020.

Marriage as Social Institution and the Status of the Right to Marry

5. There cannot be any quarrel, in my opinion, that marriage is a social institution, and that in our country, it is conditioned by culture, religion, customs and usages. It is a sacrament in some communities, a contract in some other. State regulation in the form of codification, has often reflected the customary and religious moorings of the institution of marriage. An exercise to identify the purpose of marriage or to find its 'true' character, is a pursuit that is as diverse and mystic as the purpose of human existence; and therefore, is not suited for judicial navigation. But that does not render the institution meaningless or abstract for those who in their own way understand and practice it.

6. In India, the multiverse of marriage as a social institution, is not legally regulated by a singular gravitational field. Until the colonial exercise of codification of regulations governing marriage and family commenced, the rules governing marriage and family, were largely customary, often rooted in religious practice. This exercise of codification, not always accurate and many a times exclusionary, was the product of the colonial desire to mould and reimagine our social institutions.

However, what is undeniable is that, impelled by our own social reformers, the colonial codification exercise produced some reformatory legislative instruments, ushering in some much-needed changes to undo systemic inequalities. The constitutional project that we committed ourselves to in the year 1950, sought to recraft some of our social institutions and within the first half decade of the adoption of the Constitution, our indigenous codification and reformation of personal laws regulating marriage and family was underway.

7. Even when our own constitutional State attempted codification and reform, it left room for customary practices to co-exist, sometimes providing legislative heft to such customary practices. Section 5(iv)5, section 5(v)6, section 77, and section 29(2)8 of the Hindu Marriage Act, 1955 are illustrative in this regard. Similarly, the Special Marriage Act, 1954 in provisos to sections 4(d)9 and section 15 (e)10 saves customary practices, without which the marriage would have been otherwise null and void. Same is the case with the proviso to section 4(d) of the Foreign Marriage Act, 196911. Legislative accommodation of customary practices is also reflected in section 5 of the Anand Marriage Act, 190912.

8. The legal regulation of the institution of marriage, as it exists today, involves regulation of the solemnisation or ceremony of marriage, the choice of the partner, the number of partners, the qualifying age of marriage despite having attained majority, conduct within the marriage and conditions for exit from the marriage.

9. As to ceremonies and solemnisation, section 2 of the Anand Marriage Act, 190913, section 3(b) of the Parsi Marriage and Divorce Act, 193614, section 10, 11 & 25 of the Indian Christian Marriage Act, 187215 and section 7 of the Hindu Marriage Act, 1955 explicitly recognize the central role that religious ceremonies play in solemnisation of marriages. The Muslim Personal Law (Shariat) Application Act, 193716 clearly saves the application of personal law to marriages, including the nature of the ceremony. Viewed in this perspective, the diverse religious practices involved in solemnizing marriages are undeniable.

10. The choice of the partner is not absolute and is subject to two-dimensional regulations: (i) minimum age of partners and (ii) the exclusions as to prohibited degrees. There is a differential minimum age prescription for male and female partners in most legislations. Thus males, who have otherwise attained the age of majority, cannot marry under these enactments, even though they exercise many other statutory and constitutional rights when they attain the age of eighteen.

11. The concept of prohibited degrees of relationship, is statutorily engraved in section 5 of the Anand Marriage Act, 1909, section 3(a) of the Parsi Marriage and Divorce Act, 193617, section 5(iv) and (v) of the Hindu Marriage Act, 1955 and sections 4(d) & section 15(e) of the Special Marriage Act, 1954. Persons who have attained the requisite age of marriage under these enactments, have their choice and consenting capacities restricted, to this extent.

12. In my considered opinion, the institutional space of marriage is conditioned and occupied synchronously by legislative interventions, customary practises, and religious beliefs. The extant legislative accommodation of customary and religious practices is not gratuitous and is to some extent conditioned by the right to religion and the right to culture, constitutionally sanctified in Articles 25 and Article 29 of the Constitution of India.

This synchronously occupied institutional space of marriage, is a product of our social and constitutional realities, and therefore, in my opinion, comparative judicial perspectives offer little assistance. Given this nature of marriage as an institution, the right to choose a spouse and the right of a consenting couple to be recognized within the institution of marriage, cannot but be said to be restricted.

13. The learned Chief Justice has opined that marriage may not attain the social and legal significance it currently has if the State had not recognised and regulated it through law. It is further opined that marriage has attained significance because of the benefits which are realised through it. In this context, it is necessary to recount that until the post constitutional codification of laws relating to marriage and divorce, there was no significant State intervention on customary laws relating to marriage.

Even today, much of the Mohammedan law of marriage is governed by religious texts and customs and there is hardly any State intervention. The Sixth Schedule areas under the Constitution are largely governed by customary laws of marriage. That the State has chosen to regulate the institutional space of marriage and even if such regulation occupies the space in toto, by itself does not imply that marriage attained significance due to State recognition.

14. I must hasten to add that the aforesaid recollection of legislative illustrations was with a view to demonstrate the cultural relativism involved in the idea of marriage. No singular right can inform unimpeded entry to and unregulated exit from the institution of marriage; for that would disassociate the institution of marriage from its social context. The claim of the right to marry, de-hors the existing statutory framework, is nothing but a claim to create a legally and socially enforceable status. It is not a claim against criminalisation of sexual conduct, which was the issue in Navtej (supra).

It is nothing but a prayer of mandamus to create the necessary legislative and policy space for recognition of relationships as marriages in the eyes of law. The prayer to recognize such a right is not one that expects the State to desist from pursuing an act, but one which will place positive obligations upon the State to erect new laws, or at least amend existing laws. I say laws, because marriage laws do not stand in isolation, they interact in multifarious ways with succession, inheritance and adoption laws, to name a few.

The content of the right claimed by the Petitioners is such that it clearly places positive legislative obligations on the State, and therefore, cannot be acceded to. That there cannot be a mandamus to amend or enact laws, is such a deeply entrenched constitutional aphorism, which need not be burdened by quotational jurisprudence. We are afraid, that the creation of social institutions and consequent re-ordering of societal relationships are 'polycentric decisions', which have "multiplicity of variable and interlocking factors, decisions on each one of which presupposes a decision on all others"18, decisions that cannot be rendered by one stroke of the judicial gavel.

Re: The impermissibility of the creation of a right to a union or an abiding cohabitational relationship

15. Having concluded that there exists no unqualified right to marry, in the ordinary course, no occasion would have arisen for any further deliberation. However, as the learned Chief Justice, in his opinion, has arrived at a conclusion that there exists a constitutional right to a union or an abiding cohabitational relationship, it is necessary for me to express my opinion on this new construction.

16. The learned Chief Justice locates components of this right to union or an abiding cohabitational relationship under Article 19(1)(a), Article 19(1)(c), Article 19(1)(e), Article 21 and Article 25 of the Constitution. In my opinion, it would not be constitutionally permissible to identify a right to a union or an abiding cohabitational relationship mirroring the institution of marriage. The

learned Chief Justice identifies 'tangible' and 'intangible' benefits (bouquet of entitlements) that arise from state recognition and regulation of marriages.

The Chief Justice further opines that the right to marriage is not fundamental. However, it is these very tangible and intangible benefits, the denial of which, according to the learned Chief Justice must inform the reading of a constitutional right to an abiding cohabitational union. In other words, the benefits of marriage, however fundamental to a fulfilling life do not make marriage itself a fundamental right, but they render the right to an abiding cohabitational union fundamental. I find it difficult to reconcile these.

17. The learned Chief Justice opines that "it is insufficient if persons have the ability and freedom to form relationships unregulated by the State. For the full enjoyment of such relationships, it is necessary that the State accord recognition to such relationships.

Thus, the right to enter into a union includes the right to associate with a partner of one's choice, according recognition to the association, and ensuring that there is no denial of access to basic goods and services is crucial to achieve the goal of self-development." The opinion of the Chief Justice, thereafter, classifies that status of two persons in relationship: (a) 'relationships' which do not have legal consequences, (b) 'unions' which have legal consequences and marriages.

In my considered opinion, it is in positively mandating the State to grant recognition or legal status to 'unions' from which benefits will flow, that the doctrine of separation of powers is violated. The framing of a positive right and the positive entitlements which flow therefrom, essentially require the State to regulate such unions and benefits. In my opinion, the direction in effect, is to amend existing statutory frameworks, if not to legislate afresh.

18. Additionally, the opinion of the learned Chief Justice, situates the right to choice of a partner and right to legal recognition of an abiding cohabitational relationship within Article 25 of the Constitution of India. Emphasis is placed on the term "freedom of conscience" which is placed alongside the right to freely profess, practice and propagate religion.

The opinion situates in this freedom of conscience, the right not only to judge the moral quality of one's own action but also to act upon it. If that were permissible under Article 25, then the textual enumeration of freedoms in Article 19 become redundant, since these freedoms can be claimed to be actions on the basis of one's own moral judgment. I find it difficult to agree with such a reading of Article 25.

19. I am not oblivious to the concerns of the LGBTQ+ partners with respect to denial of access to certain benefits and privileges that are otherwise available only to married couples. The general statutory scheme for the flow of benefits gratuitous or earned; property or compensation; leave or compassionate appointment, proceed on a certain definitional understanding of partner, dependant, caregiver, and family.

In that definitional understanding, it is no doubt true, that certain classes of individuals, same-sex partners, live-in relationships and non-intimate care givers including siblings are left out. The impact of some of these definitions is iniquitous and in some cases discriminatory. The policy considerations and legislative frameworks underlying these definitional contexts are too diverse to be captured and evaluated within a singular judicial proceeding.

I am of the firm belief that a review of the impact of legislative framework on the flow of such benefits requires a deliberative and consultative exercise, which exercise the legislature and executive are constitutionally suited, and tasked, to undertake.

20. For the reasons stated above, and in view of the preceding paragraph, the writ petitions are disposed of.

.....J. [Pamidighantam Sri Narasimha]

October 17, 2023

New Delhi.

1 (2018) 10 SCC 1

2 (2014) 5 SCC 438

3 (2018) 16 SCC 368

4 (2018) 7 SCC 192

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

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

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

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

7 **"7. Ceremonies for a Hindu marriage.â€"**

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

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

8 29. Savings.â€"

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act."

9 **"4. Conditions relating to solemnization of special marriages.-** Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:-

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship;"

10 **15. Registration of marriages celebrated in other forms.-** Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 (3 of 1872), or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:-

(e) the parties are not within the degrees of prohibited relationship:

Provided that in the case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two"

11 **"4. Conditions relating to solemnization of foreign marriages.â€"** A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:â€"

(d) the parties are not within the degrees of prohibited relationship:

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship."

12 **5. Non-validation of marriages within prohibited degrees.â€"** Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would, according to the customary law of the Sikhs, render a marriage between them illegal."

13 **2. Validity of Anand marriages.â€"** All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand commonly known as Anand Karaj shall be, and shall be deemed to have been with effect from the date Of the solemnization or each respectively, good and valid in law."

14 **3. Requisites to validity of Parsi marriages.â€"** (1) No marriage shall be valid ifâ€"

(b) such marriage is not solemnized according to the Parsi form of ceremony called "Ashirvad" by a priest in the presence of two Parsi witnesses other than such priest;"

15 Section 10 of the Act reads:

"10. Time for solemnizing marriage.â€" Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening:"

Section 11 reads:

"11. Place for solemnizing marriage.â€" No Clergyman of the Church of England shall solemnize a marriage in any place other than a church where worship is generally held according to the forms of the Church of England, unless there is no such church within five miles distance by the shortest road from such place, or unless he has received a special license authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary."

Section 25 reads:

"25. Solemnization of marriage.â€" After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt:

Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister."

16 Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 reads:

"**2. Application of Personal Law to Muslims.â€"** Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

17 **3. Requisites to validity of Parsi marriages.-** [(1)] No marriage shall be valid if- (a) the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or

18 Indian Ex-Service Movement v. Union of India, (2022) 7 SCC 323, 68.

IN THE SUPRMEE COURT OF INDIA

Abhishek Sharma
Vs.
State (Govt. of NCT of Delhi)

[Criminal Appeal No. 1473 of 2011]

HEADNOTE – Principles to be followed in case of multiple dying declarations

JUDGMENT

Sanjay Karol J.,

1. This appeal impugns a judgment and order of conviction passed by the High Court of Delhi in Criminal Appeal No. 431 of 2009 dated 31 May 2010, confirming the Appellant- Abhishek Sharma's sentence of life imprisonment under Section 302 of the Indian Penal Code, 18601, as awarded by Additional Sessions Judge, Delhi, vide judgment dated 30 April 2009.

Facts

2. The facts, as reflected in the judgments of the courts below, are:-

2.1 Abhishek Sharma2 and Mandeep Kaur3 were colleagues at M/s Sai Telecom at Saraswati Vihar, Delhi where the former was a customer care executive and the latter the team leader/operation manager. On the intervening night of 20th-21st September 2007, the deceased was found engulfed in flames near the Queen Mary School, Model Town, Delhi. Despite efforts to save her at two different hospitals, namely LNJP Hospital and Maharaja Agrasen Hospital, she passed away on 03 October 2007.

2.2 It is recorded that a friendship had developed between these two persons, and the convict-appellant would often drive her home after work, which would end at around midnight. Allegedly, due to a quarrel in regards to her affections being not for him but instead for their boss, he took her to an open site near a school and, in the midst of an argument, set her on fire.

2.3 On the way to the hospital, the deceased told Anoop Singh (PW-16) that the convict-appellant had set her ablaze. SI Balwant Singh (PW-17), along with Constable Paramjit Singh, recorded her statement, based on which an FIR under Section 307 IPC, was registered. The convict-appellant was arrested on 21 September 2007. Upon completing the investigation, a challan was presented to

the Trial Court for proceeding against him under Section 302 IPC on 06 February 2008.

Findings of The Trial Court

3. In support of its case, the prosecution examined a total of 25 witnesses. Following is a tabular representation thereof:-

Sr. No.	Formal Witnesses	Material Witnesses	Medical Witnesses
1	PW1- HC Rajiv Kumar a duty officer	PW16- ASI Anoop Singh In charge PCR Van Commander 63	PW7- Dr. Lata Sr. Resident prepared the death summary of the deceased
2	PW2- Ct. Dalbir Singh photographer	PW15- Ct. Subodh Kumar has accompanied PW16 in the PCR Van	PW8- Dr. S.N. Basna working as CMO in LNJP Hospital
3	PW4- SI Manohar La draftsman	PW17- SI Balwant Singh he obtained the MLC of the injured	PW12- Dr. K. Goyal conducted the postmortem of the deceased
4	PW9- Ct. Mukesh took sealed parcels to deposit the same at CFSI	PW13- Ct. Paramjit Singh did the investigation, along with SI Balwant Singh	PW18- Dr. Raj examined the deceased
5	PW10- HC Pramod Kumar posted at MHC(M)	PW5- Smt. Jasmer Kaur mother of the deceased	PW19- Dr. Sanjay S.R. Surgery examined the accused, Abhishek Sharma
6	PW11- HC Naresh Kumar accompanied SI Balwant Singh to Maharaja Agarsen Hospital	PW6- Sh. Yashin Nagpal partner of M/S Sai Telecom, where the deceased and accused were working	PW20- Dr. Geeta Ramakrisan Micro Biologist who examined the blood sample of the deceased
7	PW14- ASI Suresh Chand he went to the spot for an inspection	PW3- Hemant Aneja brother-in-law of the deceased	PW22- Dr. Ashish Sharma proved the MLC
8	PW21- Sh. K.K. Sharma record clerk from Maharaja Agarsen Hospital		PW24- Shri Pradeep Kumar Misra Junior Scientific Officer, CFSL, Calcutta, examined the

			blood and hair samples.
9	PW23- Inspector Harish Chander got the site plan prepared by SI; recorded the statement of MHC(M);		PW25- Shri Bijayantra Mukhopadhyay Junior Scientific Officer, CFSL, Calcutta, examined the plastic bottle with burnt material.

4. Testimonies of PW18, PW8, and PW12 (Doctors) have established that the deceased died due to burn injuries, ante mortem in nature which facts further stand corroborated by PW16, PW17, PW5, and PW6.

4.1 The deceased gave four dying declarations. The First4 was given to a police officer PW16 i.e., the person who, in the PCR van, reached the spot of the crime and took the deceased to the LNJP Hospital. Even though the defense on the ground questioned the veracity of this declaration that PW15, who was with PW16 while the deceased was taken to the hospital, had not heard the statement being made, the Trial Court found the same to have been established since there was nothing to show that she had been tutored to state thus or that there was no possibility of her having made such a statement.

4.2 The second5 was given to Dr. Raj (PW-18), who had examined the deceased and prepared the MLC. She deposed that the deceased was fit to give a statement and that "by Abhishek" was not written subsequently. PW8 corroborated her statement. The doctors' testimonies remained unchallenged, and therefore, the defense's attempts to term the testimonies as unreliable were not found to be correct by the Trial Court.

4.3 The third6 dying declaration was given to PW17, based on which the FIR was registered. The defense questioned this declaration on the ground that the police had obtained the signatures of the deceased on a blank paper, and the same was manipulated into an FIR. The argument of the defense that a doctor did not attest the same did not find favor with the court, which stated that as per "Sher Singh Vs State of Punjab"7, the endorsement of the doctor is only a matter of prudence. The court held that the deceased had clearly shown the motive and intention of the convict-appellant to kill her.

4.4 The fourth8 dying declaration was given to PW 5 (mother of the deceased). In her deposition, examination-in-chief and cross-examination, it is clearly shown that the deceased was in a fit state of mind to give a statement. It has come forth that this statement was made on 22 September 2007, which was much prior to the deterioration of her condition, because of which she was put on ventilator support six days before her death on 03 October 2007.

4.5 Consequent to the above discussion, the Trial Court found all four dying declarations to be consistent, voluntarily made, and in a fit mental condition. Further, concerning the testimonies of PW6, namely Yasin Nagpal, it is established that the deceased was last seen in the convict-appellant's company when they left the office at around 12:30 AM. The convict-appellant's statement under Section 313 of the Code of Criminal Procedure,1973 stated that he left the office at 12:00 AM and the deceased was still in office.

4.6 The Court found that the statement of the convict-appellant was not credible, and the statement of PW6 was unblemished and unchallenged.

4.7 In view thereof, the convict-appellant was found guilty and convicted under Section 302, IPC.

Findings of The High Court

5. It was observed that the homicidal nature of the death is undisputed. In respect of each of the dying declarations, the High Court agreed with the conclusions arrived at by the Trial Court and observed that the appeal was devoid of merits. The High Court's reasoning per each such declaration is referred to below:-

5.1 DD-I given to PW16 was sought to be challenged on the ground that PW15 had not heard the statement being made. The court noted that in his cross-examination, PW15 had stated that the deceased "might have told the fact that convict-appellant was responsible for the incident". It was further observed that the driver of such a vehicle, when is focused on taking a patient with serious injuries to the hospital with the siren blaring, it is no surprise that he did not hear what the deceased stated to PW16.

5.2 DD-II was made to PW18, which, it has been observed, was entirely in tune with DD-I made to PW16. The concerned doctor has also deposed regarding the deceased's fitness when making such a statement. The addition of "by Abhishek" was not found credible by the High Court as PW18 has denied the same, and no reason was found to disbelieve doctors.

5.3 DD-III was made at 3.30 AM to PW17. This statement also names the convict-appellant. It was observed that between 1.40 AM and 3.30 AM, three consecutive statements were given by the deceased, and the time from when she was found in a burnt condition to the registration of an FIR is barely two hours.

5.4 DD-IV was sought to be discredited on the ground that PW5 was an interested witness. This argument has been termed "hardly any argument," and therefore, in view of the High Court, DD-IV also stood proven.

6. An additional ground taken before the High Court was that a person with 25 % burn injuries could not have given detailed statements. This was disregarded by the court, considering that a doctor had specifically deposed to her fit mental condition. Additionally, the submission in respect of Chapter 13 of Punjab and Haryana High Court Rules, which prescribe the procedure for recording of dying declarations, was held not to be of any aid to the convict-appellant as it was observed that simply because the rules were not complied with, the dying declarations could not be discarded if they had withstood strict scrutiny after applying all cautions.

7. For the aforesaid reasons, the judgment of the Additional Sessions Judge, Tis Hazari, West Delhi, was affirmed.

Our View

8. Before proceeding to the merits of this matter, it would be appropriate to appreciate the various principles of law laid down by this court in regard to cases involving multiple dying declarations.

8.1 This Court in Kamla v. State of Punjab9 has held:

"5. It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests (vide Khushal Rao v. State of Bombay [AIR 1958 SC 22 : 1958 SCR 552 : 1958 Cri LJ 106]). The ratio laid down in this case has been referred to in a number of subsequent cases with approval. It is also settled in all those cases that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration, they should be consistent.

If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one dying declaration if some inconsistencies are noticed between one and the other, the court has to examine the nature of the inconsistencies namely whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

8.2. In State of Punjab v. Parveen Kumar10, this court further observed:

"10. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declarations. It may be that if there was any

other reliable evidence on record, this court could have considered such corroborative evidence to test the truthfulness of the dying declarations."

8.3. In Amol Singh v. State of M.P.11,

"13. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

8.4. Faced with multiple dying declarations, this Court in Lakhan v. State of M.P12 observed-

"21. In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinise the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

This judgment was also referred to by this court recently in Makhan Singh v. State of Haryana13.

8.5. In Ashabai v. State of Maharashtra,14 the court observed:-

"15. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assessed independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variations in the other."

8.6. In Jagbir Singh v. State (NCT of Delhi),15 the following principles were observed: 31. A survey of the decisions would show that the principles of declarations can be culled out as follows:

31.6. However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.

31.7. In such cases, where the inconsistencies go to some matter of detail or description but is incriminatory in nature as far as the Accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

31.8. The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the Accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration buta dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two."

8.7. In Uttam v. State of Maharashtra,16 this court observed:

"15. In cases involving multiple dying declarations made by the deceased, the question that arises for consideration is as to which of the said dying declarations ought to be believed by the court and what would be the guiding factors for arriving at a just and lawful conclusion. The problem becomes all the more knotty when the dying declarations made by the deceased are found to be contradictory.

Faced with such a situation, the court would be expected to carefully scrutinise the evidence to find out as to which of the dying declarations can be corroborated by other material evidence produced by the prosecution. Of equal significance is the condition of the deceased at the relevant point in time, the medical evidence brought on record that would indicate the physical and mental fitness of the deceased, the scope of the close relatives/family members having influenced/tutored the deceased and all the other attendant circumstances that would help the court in exercise of its discretion."

9. Having considered various pronouncements of this court, the following principles emerge, for a Court to consider when dealing with a case involving multiple dying declarations:

9.1 The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind;

9.2 All dying declarations should be consistent. In other words, inconsistencies between such statements should be 'material' for its credibility to be shaken;

9.3 When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purposes of corroboration of the contents of dying declarations.

9.4 The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances.

9.5 Each declaration must be scrutinized on its own merits. The court has to examine upon which of the statements reliance can be placed in order for the case to proceed further.

9.6 When there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicion.

9.7 In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc.

10. We must also notice certain judgments of this court where the extent of burn injuries sustained by the deceased was considered.

10.1 In Chacko v. State of Kerala17 this court declined to accept a dying declaration made by a person, 70 years of age, having sustained 80% burns. Therein, the declaration was recorded 8-9 hours after burns, giving minute details as to motive and manner. It was opined that the condition of the patient described as "conscious, talking" in the wound certificate would in and of itself not testify to the condition of the patient making such declaration, nor would the oral evidence of the doctor or Investigating Officer.

10.2 In P.V. Radhakrishna v. State of Karnataka 18 it was observed that there cannot be any hard and fast rule, lending itself to uniform application on the question whether the percentage of burns suffered is a determinative factor to affect the credibility of the dying declaration. The same would depend on the nature of the burns, the body parts affected, and the effect thereof on mental faculties, as well as other factors.

10.3 In Surinder Kumar v. State of Haryana19 the dying declaration made by a person having 95-97% burn injuries was not accepted given that at the time of making the declaration, the deceased was under the influence of Fortwin and Pethidine injections, because of which she could not have had normal alertness.

11. This Court in Uttam(supra) followed the principle as held in Khushal Rao v. State of Bombay20 that in order to test the reliability of a dying declaration, the

court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the fact stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

12. Having meditated on the above-extracted principles, we now proceed to examine them in the instant facts.

13. DD-I reads as under:

"DD No. 8A dt 21/09/07 PS Model Town Delhi

Information from PCR and despatch.

Received in the night at 1:55. 058 Operator came in the DO room and reported that ASI Anoop Singh No. 5331/PCR has reported that on girl was burning behind Queen Mary School, Model Town Quarter. Her name is Mandeep D/o Late Harender Singh r/o AJ-55C, Shalimar Bagh, Age 22 years. Works at Call Center. She told that my friend Abhishek Sharma has done this. On reaching LNJP, Burari a PCR call information was recorded in Roznamacha and a copy of the report was sent to SI Balwant Singh through Ct. Rameshwar, 5053/DHG.

Sd/-
HC/DO

//True Translated Copy//"

14. A perusal of the dying declaration as above shows it to have been recorded in the third person, that is to say, that ASI Anoop Singh had reported on the incident of the victim being burned and that she had told him that her friend Abhishek Sharma had done so. Undoubtedly, Section 32 IEA is an exception to the rule of hearsay, however, the same would not be applicable in the present case.

15. The statement before the court is that the operator came into 'DO room' and reported that ASI Anoop Singh (PW16) had found a girl burning, and it is to him that she stated that Abhishek Sharma, convict-appellant, had done this to her.

So, as is evident, this statement is three degrees removed from the deceased and thereby unprotected by this exception as the statements far removed from the

original maker of the statement cannot be exempted more so when reliance on the same results in a penal consequence. Had the statement of the deceased, as told to PW16, been before the court as it is, the same could have been considered a dying declaration within the meaning of this section.

16. DD-II is, in fact, an entry in the Medico-Legal Inquiry Register made by Dr. Raj (PW8) at 2:15 AM dt. 21.09.2007, which records "alleged h/o burn at ...in front of Queen Mary School, North Campus, Model Town, Delhi at around 1:40 AM dated 21/09/07 as told by the patient" then considerable gap exists in this record and below this is recorded "by Abhishek."

17. It is true that a dying declaration is not to be discarded on account of brevity, but it is equally true that it must contain the proximate cause of the deceased's condition and the reason therefor. Here, it states the presence of burn injuries and says that the same was caused by Abhishek, which, arguably, is insufficient. There is no particular identification of the convictappellant, nor is there a mention of the means through which the injuries were inflicted (petrol).

18. DD-III was made at 3:30 AM to PW-17, and the same is extracted below:

"Statement of Mandeep Kaur D/o Sardar Harinder Singh R/o AJ-55C, Shalimar Bagh, Delhi aged 22 years, Mobile No. 9811448556.

I am residing with my brother Inderjeet Singh on the abovementioned address and working as office manager in call centre of said telecom at Saraswati Vihar.

Today I got free from my duty at 1 AM, I was coming back from duty with my friend Abhishek Sharma who is residing at Model Town. Abhishek Sharma was threatening me from so many day to kill and today he forcibly took me to Queen Mary School Model Town III inspite of dropping me at my residence in Shalimar Bagh and after stopping the car at Queen Mary School Model Town III, he got down from his car also got me down from the car poured the bottle of oil on me which he had kept in his car and told me that you don't love me and you only love to the company's boss.

At this point we got into heated argument and quarrelled between us and Abhishek put me on fire with matchstick to the poured oil. I got injured from back portion of my body with burning of Kameej and salwar and in the meantime PCR van came at the site and Abhishek absconded from the place of occurrence and PCR van got me admitted at JPN Hospital. Abhishek has attempted to kill me after pouring the oil. Legal action may kindly be taken against Abhishek Sharma.

Statement heard right. Sd/English Mandeep Kaur attested Balwant Singh SIPS Model Town Delhi 21.09.07 Duty Officer PS Model Delhi it is submitted that today after receiving DD No.8A, I went to JPN Hospital with Ct. Paramjeet Singh No. 2678/NW, found patient Mandeep Kaur fit for statement vide MLC No. 105892 and Kumari Mandeep Kaur gave her statement, her statement was read by me in front of her. She got her statement right and signed in English. I got it verified, from the statement, conditions and MLC the occurrence of crime U/s 307 IPC is made out.

Thus, rukka is sent with Ct Paramjeet No. 2673/NW to register the FIR and to inform IO with FIR No and crime team be directed to the place of occurrence. Date & Time of occurrence 1.40 AM dated 21.09.07, Place of occurrence in front of Queen Marry School, Model Town, Delhi, Date & Departure of Rukka: 2.50 AM dated 21.09.07 SI Balwant Singh D-800 PS Model Town Delhi PIS No. 29680224. After registering the FIR the original rukka with FIR copy was sent to SI who was busy in investigation at the place of occurrence. The information of the FIR will be sent to senior officer by post."

19. Despite this being the third statement given, no attempt was made to have the same made before a doctor or magistrate, which, as a rule of prudence, lends support to the prosecution. It reflects from the record that at the time when the third statement was recorded, the deceased had been administered treatment for her injuries.

However, it has not come forth as to the nature of treatment and what kind of medicines were given to her. In the absence of a positive statement by the medical team responsible for her treatment, it cannot be stated, with certainty, that the medicines administered had no effect of impairing the mental fitness of the deceased. There is no medical opinion placed on record in this behalf.

Therefore, with the cloud of doubt surrounding DD-III, it is but natural that the court looks to other circumstances and evidence to satisfy the requirement of the statement made as being true and voluntary. The other circumstances present shall be discussed at a later stage.

20. The credibility of DD-IV has been assailed on the ground that it is, in fact, the statement of the deceased to the mother and that the latter would be an interested witness. The statement of the mother given to the police is reproduced below:

"TRUE TRANSLATED COPY OF STATEMENT OF SMT JASMAIR KAUR

FIR/DD NO. 615/07 DATE: 21.09.2007 U/s 307,302 Indian Penal Code, Police Station: Model Town, Delhi.

Statement of Jasmair Kaur W/o Late Sardar Harvinder Singh, age 61 years, R/o House No. 17-F, Ward No.15, Govind Nagar, Roped, Punjab

STATEMENT

Made the statement that I use to stay in the above address with my family and I am housewife. There was set in fire by pouring petrol on my daughter on 21.09.2007 by Abhishek Sharma, who was admitted in LNJP Hospital by police, on the same day, I along with family members made the arrangements to admit her in Maharaja Agersain Hospital with the intention to give her good treatment. During the treatment, my daughter namely Km. Mandeep Kaur died in the hospital today as on 03.10.2007 at about 3.35 am at Maharaja Agarsain Hospital, I identified her dead body at BJRM Hospital. This is the dead body of my daughter namely Km. Mandeep Kaur, who died due to set in fire.

Heard the statement and found correct.

Sd/-
Jasmair Kaur

Attested by

Sd/-
SI,
Balwant Singh

Police Station: Model Town, Delhi

Date: 03.10.2007

Sd/-
SI,
Balwant Singh

Police Station: Model Town, Delhi

Date: 03.10.2007"

21. We notice that in her cross-examination, this witness denies ever having made any statement to the police on 03 October 2007. Be that as it may,

assuming that she actually made such a statement, we are of the view that still, such a statement, in no manner can be said inculpatory towards the accused, for it is lacking in particulars with regard to the person mentioned therein, i.e., Abhishek Sharma and having no linkage for the same which could lead to the accused person.

22. It is evident from the above that the dying declaration does not exist in any written or other verifiable form. Here, only we may refer to the examination-in-chief of PW-5 (mother of the deceased) post, which, taking both the statement and the testimony together, the evidentiary value of DD-IV shall be examined.

23. The relevant portion of her testimony (examination-in-chief) allegedly implicating the accused is extracted as follows:-

"Mandeep had told me that Abhishek had taken her in car from her office. He did not leave her at her resident but had taken her to a place in Model Town. She was made to come out of the car. Since she did not come out, she was beaten up by Abhishek. As soon as she came out from the car, Abhishek poured petrol on her and set her on fire".

24. It is important to appreciate the law on interested witnesses as enunciated by this court. In Hari Obula Reddy and others v. The State of Andhra Pradesh21, a three-judge Bench has held that evidence of interested witnesses is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony.

It cannot be laid down as an invariable rule that interested evidence can only form the basis of conviction if corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. Suppose on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable. In that case, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.

25. Further, in Pulicherla Nagaraju alias Nagaraja Reddy v. State of Andhra Pradesh22, while dealing with the liability of interested witnesses who are relatives, a two-judge Bench observed that it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or close relative to the deceased if it is otherwise found to be trustworthy and credible.

The said evidence only requires scrutiny with more care and caution so that neither the guilty escapes nor the innocent is wrongly convicted. If, on such

careful scrutiny, the evidence is found to be reliable and probable, then it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the convict-appellant, his testimony should have corroboration regarding material particulars before it is accepted.

26. DD-IV is the statement of the mother (who is not a resident of Delhi and would have only reached Delhi upon being informed of such an incident) wherein the deceased had disclosed specific facts about the occurrence to her mother. When making the declaration, there is nothing on record to indicate a) further deterioration in condition and b) non-availability of a third party, such as a doctor before whom such a statement could be recorded.

The Convict-appellant has assailed the statement's veracity on the ground that, being the mother of the deceased, PW5 is an interested witness. The general rule for appreciation of evidence rendered by an interested witness is that the same should be corroborated by other independent evidence. Considering the nature of the statement made by the deceased to the mother, independent corroboration is difficult.

Keeping in view the two factors enumerated above and the lack of independent corroboration, particularly when the person making the statement is the mother of the deceased, the court cannot rule out, to a positive degree, the role played by a sense of loss and possibly even anger, to rely on such statement. Had there been some sort of corroboration with other persons being present, the same could have been relied on. However, in the absence thereof, reliance on the same would prejudice the convict-appellant, and therefore, the same cannot be justified.

27. Such unreliability of this statement is enhanced by the fact that there is a material difference between the statement of the mother treated as DD-IV and her deposition in which she claims the convict-appellant to have physically assaulted the deceased before setting her on fire. In contrast, none of the other statements made to the police officials or the doctor reflect such an occurrence.

Also, the MLC does not record any physical injury apart from the 30% burns sustained. This can be said to be an improvement/exaggeration that originates in a desire to see the convict-appellant punished for a crime he has allegedly committed. Another crucial difference between the statement and the testimony is that in the statement made to the police, the fact that "Abhishek poured petrol on her and set her on fire" is conspicuously absent from there.

28. DD-I raises only questions and provides no context or answers to the incident. It is a statement that only mentions that one person, i.e., the convict-appellant, was the person responsible for the injured condition of the deceased. Keeping this in view and then taking note of subsequent conduct of the hospital as well as the investigating authorities forces us to ask certain questions-

a) Given that the declaration only mentioned the name Abhishek Sharma and not any other particulars which may be relevant and helpful in the process of identification such as telephone, address details, description of convict-appellant, place of work, etc., how is it that the investigating authorities got in touch with the employer?

b) If such a call was made, why is there no record of the same?

c) The statement was recorded at 1:55 AM, and the manager of the call centre where both the convict-appellant and the deceased were employees was contacted at 2:00 AM as is evident from his uncontroverted testimony- in view of the above, how was this possible? The record does not reflect as to how the police zeroed in on him.

29. Another question that may be asked is that when DD-I was reported, and a doctor took DD-II, why was it only after the recording of DD-III that an FIR was lodged? We must also consider that, as per DD-II, the burns received by the deceased were on the back, arm, shoulder, and hair, resulting in superficial and deep burns amounting to 30%. In such a situation, can it be said that there was a reasonable apprehension of death, making the statements admissible as dying declarations?

30. The convict-appellant was not seen at the spot of the crime, nor has the last seen theory been invoked by the prosecution to establish that the deceased and he were together at the time and place of the incident. There is no evidence on record to show what transpired in the investigation of the police from the time of DD-I when, allegedly, the police came to know of the convict-appellant having committed this crime against the deceased and when he was finally arrested at 8 PM.

31. From the aforesaid discussion, it is clear that DD-I and DDIV must entirely be ruled out on the grounds of a degree of hearsay and that of an interested witness with no corroboration. Regarding DD-II, the suspicion of interpolation and subsequent insertion of the first name of the convict-appellant has not been sufficiently dispelled, for no satisfactory explanation stands accorded for the prominent gap. Regarding DD-III, it is found that the mental state in which it is made cannot be ascertained as there is no discussion on the treatment given to

the deceased. In the absence of such clarification, such a statement cannot be relied on without corroboration.

32. Further, on perusal of the record, we find inconsistencies to be dotted throughout. For instance, PW13 states that he, along with PW17, had left the police station at about 1:55 AM to go to the hospital where the deceased had been admitted. Upon reaching there, it is PW13's case that the brother of the deceased was present there. However, on the contrary, PW17 states that while he was in the hospital, "no relation of the injured had arrived in the emergency."

It is unclear how and when the authorities obtained contact details of the brother and got him to come to the hospital. Further confusion arises from the statement of PW5, who stated that she did not live in Delhi and came here in the company of her son and visited the hospital the next day, i.e. on 22 September 2007. Intriguingly, the prosecution did not find it fit to examine the brother, which could have thrown light upon the deceased's relationship with the convict-appellant, among other essential facts.

33. It is undisputed that the deceased was in a position to speak up until six days prior to her death when she was put on life support. Yet the non-recording of the deceased's statement in the presence of the Magistrate or actual ascertainment of her fitness to make statements by doctors remains unexplained.

34. Additionally, we may note that apart from the alleged dying declarations of the deceased, there is no evidence on record to point to the guilt of the convict-appellant. It is an established principle that a dying declaration, if it is free of tutoring, prompting, etc. can form the sole basis of conviction. However, having perused the record minutely, we do not find even a scintilla of evidence by which we may uphold the judgments of the courts below.

For instance, nothing on record indicates- the ownership of a vehicle by the convict-appellant; any disagreement or animosity between the convict-appellant and the deceased, that is of such an extreme nature as to set her on fire; any connection between the convict-appellant and the inflammable substance used to kill the victim such as the record of purchase or statement of any person to show such substance to be in possession of the convict-appellant, etc. These factors and the fact that the crime in question occurred at an open public access place cast doubt on the prosecution case.

35. Considering the aforementioned factors, placing the gauntlet of guilt upon the convict-appellant based on dying declarations when no other material particulars, apart from his name, could be elicited therefrom would be unjustified.

Furthermore, when considering other circumstances that may or may not point to the guilt of the convict-appellant, as discussed above, we find gaps unexplained in the prosecution case, which cast sufficient doubt as to leave the case short of the threshold of beyond reasonable doubt.

36. Consequently, the Appeal is allowed. The bail granted to the convict-appellant vide order dated 21.10.2013 is confirmed, and the bail bonds stand discharged.

37. Interlocutory Applications, if any, stand disposed of.

.....J. (Abhay S. Oka)

.....J. (Sanjay Karol)

New Delhi.

October 18, 2023;

1 For Short, IPC

2 Hereinafter referred to as "convict-appellant"

3 Hereinafter referred to as the "Deceased"

4 For ease, DD-I

5 For ease, DD-II

6 For ease, DD-III

7 (2008) 4 SCC 265

8 For ease, DD-IV

9 (1993) 1 SCC 1(2-Judge Bench)

10 (2005) 9 SCC 769 (2-Judge Bench)

11 (2008) 5 SCC 468 (2-Judge Bench)

12 (2010) 8 SCC 514 (2-Judge Bench)

13 (2022) SCC OnLine SC 1019 (2-Judge Bench)

14 (2013) 2 SCC 224 (2-Judge Bench)

15 (2019) 8 SCC 779 (2-Judge Bench)

16 (2022) 8 SCC 576 (2-Judge Bench)

17 (2003) 1 SCC 112(2-Judge Bench)

18 (2003) 6 SCC 443(2-Judge Bench)

19 (2011) 10 SCC 173 (2-Judge Bench)

20 AIR 1958 SC 22 (3-Judge Bench)

21 (1981)3 SCC 675(3-Judge Bench)

22 (2006) 11 SCC 444 (2-Judge Bench)

IN THE SUPREME COURT OF INDIA

Debasish Paul & Anr.
Vs.
Amal Boral

[Civil Appeal No. 6565 of 2023]

HEADNOTE – Section 5 of Limitation Act, 1963 (Extension of prescribed period in certain cases) cannot be used to extend the time limit prescribed, when a lesser time period has been specifically provided under the relevant act for a particular purpose.

JUDGMENT

Sanjay Kishan Kaul, J.

1. Respondent is stated to have been inducted as a tenant in respect of shop No. AC 249, Rabindrapally, Krishnapur, Post Office Prafulla Kanan, Police Station Baguiati, Kolkata - 700101, District 24 Parganas (North) at an agreed rent of Rs.352/- per month of which the appellants are the landlords.

It is the say of the appellants that the respondent stopped paying the rent from February 2005, and on that account ultimately a notice was served on 31.10.2013 on the respondent to vacate the premises. Soon thereafter, the appellants filed a suit for eviction, being title Suit No.667/2013 against the respondent-tenant for non-payment of rent.

2. In the proceedings, the respondent made an application under Sections 7(1) and (2) of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as the 'said Act'). The application was rejected by the Trial Court vide a judgment dated 11.09.2018 on the ground that the respondent had entered appearance in the suit on 09.02.2016 but filed the application only on 14.12.2016 i.e., after a delay of ten months.

3. The application, not being filed within the statutory period of one month, was, thus, rejected. No application was filed under Section 5 of the Limitation Act, 1963.

4. The respondent, aggrieved, by the same preferred a Civil Revision before the High Court and in terms of the judgment dated 21.08.2019, the High Court set aside the judgment dated 11.09.2018 and granted liberty to the respondenttenant to file an application under Section 5 of the Limitation Act, 1963 explaining the

circumstances causing the delay for the purpose with the prayer for condonation of delay in support of the application under Sections 7(1) and 7(2) of the said Act already filed.

5. We may notice that the ground sought to be made out by the respondenttenant was that his failure to deposit arrears of rent coupled with monthly rent was on account of ill-advise by his advocate that no steps were required to be taken in view of the stay granted by the High Court in C.O. No.233/2006.

The respondent claimed that having become cognizant of this, he made amends by filing the written statement on 14.12.2016 along with the application under Sections 7(1) and 7(2) of the said Act, which was rejected. The High Court directed the Trial Court to dispose of the application under Section 5 of the Limitation Act, if any, filed within the stipulated period mentioned without granting any unnecessary adjournments and preferably within two months from the date of filing of the application.

6. Notice was issued in the SLP and thereafter leave was granted.

Relevant Provisions

7. In order to appreciate the contours of the arguments, it is necessary to reproduce the relevant provisions of the said Act and the Limitation Act as under:

Section 5 of The Limitation Act, 1963

"5. Extension of prescribed period in certain cases. - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation - The fact that the appellant or the applicant was missed by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

Section 40 of the West Bengal Premises Tenancy Act, 1997

"40. Application of the Limitation Act, 1963 to proceedings and appeals.- Subject to the provisions of this Act relating to limitation, the provisions of the Limitation Act, 1963, shall apply to proceedings and appeals under this Act."

Section 7 of the West Bengal Premises Tenancy Act, 1997

"7. When a tenant can get the benefit of protection against eviction. -

(1) (a) On a proceeding being instituted by the landlord for eviction on any of the grounds referred to in section 6, the tenant shall, subject to the provisions of sub-section (2) of this section, pay to the landlord or deposit with the Controller all arrears of rent, calculated at the rate at which it was last paid and up to the end of the month previous to that in which the payment is made together with interest at the rate of ten per cent per annum.

(b) Such payment or deposit shall be made within one month of the service of summons on the tenant or, where he appears in the proceeding without the summons being served upon him, within one month of his appearance.

(c) The tenant shall thereafter continue to pay to the landlord or deposit with the Controller month by month by the 15th of each succeeding month, a sum equivalent to the rent at that rate.

(2) If in any proceeding referred to in sub-section (1), there is any dispute as to the amount of the rent payable by the tenant, the tenant shall, within the time specified in that sub-section, deposit with the Controller the amount admitted by him to be due from him together with an application for determination of the rent payable. No such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable.

On receipt of the application, the Controller shall, having regard to the rate at which rent was last paid and the period for which default may have been made by the tenant, make, as soon as possible within a period not exceeding one year, an order specifying the amount, if any, due from the tenant and, thereupon, the tenant shall, within one month of the date of such order, pay to the landlord the amount so specified in the order:

Provided that having regard to the circumstances of the case, an extension of time may be granted by the Controller only once and the period of such extension shall not exceed two months."

Arguments of learned counsel for the parties and our conclusion:

8. The default of the respondent in payment of the rent is not in dispute. The application, which was filed under Sections 7(1) and 7(2) of the said Act, was not within the window of the statutory period. The only reason stated was that there was lack of proper advice from the advocate and the proceedings before the Trial Court and subsequently he sought to make amends by filing the written

statement. The arguments had, thus, revolved around the issue whether the High Court could have invoked the provisions of Section 5 of the Limitation Act, 1963 to give benefit to the respondent for such a claim to be considered by the Trial Court.

9. On perusal of the provisions of Section 7 of the said Act, it is apparent that the tenant can get protection under the said Act only in compliance of what has been set out therein. Clause (a) of Sub-Section 1 of Section 7 provides for payment of arrears by the tenant to the landlord where there neither exist a dispute qua quantum of rent nor the time period involved.

In the factual matrix of the present case, there is really no dispute either qua the quantum or the time period. In terms of Clause (b), the payment has to be made within one month of the service of summons on the tenant or where he appears in the proceedings without the summons being served on him within one month of his appearance and in terms of Clause (c), the tenant thereafter to pay the landlord or deposit with the controller month-by-month a sum equivalent to the rent by the 15th of each succeeding month.

10. Sub-Section (2) of Section 7 refers to a scenario where there is dispute about the rent payment and even then, there is a bounden duty of the tenant to deposit with the Controller the amount admitted by him due from him together with the application of determination of rent payable. As per the Proviso under Section 7, an extension of time can be granted by the Controller only once and the period of such extension cannot exceed two months.

11. The submission of the respondent is that in view of Section 40 of the said Act, provisions of the Limitation Act apply to proceedings in appeal and, thus, the respondent is entitled to take recourse to the said provisions.

12. On the other hand, the submission of the learned counsel for the appellant is that the said provision is the general provision, but where a lesser period is provided for any purpose, then that period cannot be expanded by taking recourse to the general provision under the Limitation Act, 1963.

13. It is the say of the appellant that the matter is fully covered by a Two- Judges Bench of this Court in Bijay Kumar Singh v. Amit Kumar Chamariya1, opining that the provisions of Section 5 of the Limitation Act, 1963 will not apply in such an instance. The Court observed as under:

"21. The deposit of rent along with an application for determination of dispute is a precondition to avoid eviction on the ground of non-payment of arrears of rent. In view thereof, tenant will not be able to take recourse to Section 5 of the

Limitation Act as it is not an application alone which is required to be filed by the tenant but the tenant has to deposit admitted arrears of rent as well."

14. On the other hand, it is the submission of the learned counsel for the respondent that the aforesaid judgment is contrary to the view of a Three-Judges' Bench judgment in Nasiruddin and Ors v. Sita Ram Agarwal2. It is, however, conceded that the said judgment has been referred to by Two-Judges Bench in Bijay Kumar Singh case3.

15. It is relevant to note that the case of Bijay Kumar Singh,4 in turn, referred to the observations made in Nasiruddin case5 in the following terms:

"37. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression "shall or may" is not decisive for arriving at a finding as to whether the statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character.

38. if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified."

16. We have no doubt over the proposition that though generally the Limitation Act is applicable to the provisions of the said Act in view of Section 40 of the said Act, if there is a lesser time period specified as limitation in the said Act, then the provisions of the Limitation Act cannot be used to expand the same.

It is in this context that in Nasiruddin6 case, it has been mentioned that the real intention of the legislation must be gathered from the language used. Thus, the reasoning in Bijay Kumar Singh7 case cannot be doubted more so as the requirement is for a tenant to file an application, but he has to deposit the admitted arrears of rent as well, which has certainly not been done.

17. We are of the view that a combined reading of the two statutes would suggest that while the Limitation Act may be generally applicable to the proceedings under the Tenancy Act, the restricted proviso under Section 7 of the said Act, providing a time period beyond which no extension can be granted, has to be applicable. The proviso is after Sub-Section (2) of Section 7 but Sub-Section (2) of Section 7 in turn refers to Sub-Section (1) implying the application of the proviso to Sub-Section (1) too.

18. There is also a larger context in this behalf as the Tenancy Acts provide for certain protections to the tenants beyond the contractual rights. Thus, the provisions must be strictly adhered to. The proceedings initiated on account of non-payment of rent have to be dealt with in that manner as a tenant cannot occupy the premises and then not pay for it. This is so even if there is a dispute about the rent.

The tenant is, thus, required to deposit all arrears of rent where there is no dispute on the admitted amount of rent and even in case of a dispute. The needful has to be done within the time stipulated and actually should accompany the application filed under Sub-Sections (1) & (2) of Section 7 of the said Act. The proviso only gives liberty to extend the time once by period not exceeding two months.

19. The respondent neither paid the rent, nor deposited the rent by moving the application nor deposited it within the extended time as stipulated in the proviso. The mere allegation of absence of correct legal advice cannot come to the aid of the respondent as if such a plea was to be accepted it would give a complete license to a tenant to occupy premises without payment of rent and then claim that he was not correctly advised. If the tenant engages an advocate and abides by his advice, then the legal consequences of not doing what is required to be done, must flow.

20. We have also been given a statement of arrears of rent, which would show that for 142 months i.e., from February 2005 till filing of the petition under Section 7 of the said Act in December, 2016, rent was not paid and even thereafter arrears has not been paid as per the admitted rent of Rs.352 per month. The chart in this behalf, as submitted in Court, reflects the position as under:

No.	**Description**	**Number of months**	**Amount**
1.	From February, 2005 till the filing of Section 7 petition in December, 2016	142 X 352/-	49,984
2.	From January, 2017 till the dismissal of Section 7 petition in September, 2018	21 X 352/-	7,392
3.	From October, 2018 till the impugned order in August, 2019	10 X 352/-	3,520
4.	From September, 2018 till October, 2023	49 X 352/-	17,248
	Total arrears of rent		**78,144**

Admitted Rent: Rs.352 per month

21. We, thus, have no hesitation in coming to the conclusion that the impugned order of the High Court dated 21.08.2019 is not sustainable and the same is accordingly set aside while sustaining the order of the Trial Court dated 11.09.2018.

22. The appeal is accordingly allowed with costs throughout in favour of the appellants.

.....J. [Sanjay Kishan Kaul]

.....J. [Sudhanshu Dhulia]

New Delhi.

October 18, 2023.

1 (2019) 10 SCC 660

2 (2003) 2 SCC 577

3 (supra)

4 (supra)

5 (supra)

6 (supra)

7 (supra)

IN THE SUPRMEE COURT OF INDIA

Initiatives for Inclusion Foundation & Anr.
Vs.
Union of India & Ors.

[Writ Petition (Civil) No. 1224 of 2017]

HEADNOTE – Directions to the Union government, and all State/UT governments to ensure the effective implementation of the provisions of the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) read with its Rules.

JUDGMENT

S. RAVINDRA BHAT, J

1. The writ-petitioner organisation, approaches this court under Article 32 of the Constitution, seeking issuance of appropriate orders directing the respondents [Union government, and each State/UT government - collectively referred to as 'respondent-state'] to take steps for implementing the provisions of the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 read with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 [hereafter "Act/POSH Act" or "Act" and "Rules/POSH Rules" respectively]. The detailed claims1 are extracted verbatim:

"1. To issue a writ in the nature of mandamus or an appropriate writ, order or direction as may be necessary:-

a. Directing all the Respondents, i.e. Union of India, States and UTs to implement the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act, 2013 and the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Rules, 2013 without any further delay;

b. Directing all the States/UTs to notify and appoint the District Officers as per Section 5 of the Act;

c. Directing all the States/UTs to constitute LCCs in all the districts as per Section 6 & 7 of the Act;

d. Directing all the States/UTs to appoint Nodal Officers as per Section 6 of the Act;

e. Directing all the States/UTs to constitute ICCs as per Section 4 of the Act in all the workplaces defined in Section 2(o) of the Act;

f. Directing all the States/UTs to ensure reporting and collection of Annual Compliance Reports from all workplaces by all the District Officers of respective States as per Section 21 and 22 of the Act;

g. Directing all the States/UTs to ensure that the Annual Compliance Reports collected by District Office[r]s, containing information on the number of cases filed and their disposal, are consolidated and the reports are published and put in public domain;

h. Directing all the States/UTs to give due publicity to the Acts and Rules in all the Districts - block, talukas, tehsil in rural or tribal area and ward or municipality in the urban area and that awareness activities will be organized to advance the understanding of the provisions of this Act;

i. Directing all the States/UTs that the gist of important provisions will be displayed at all working places in all the States/UTs.

j. Directing Respondent No.1 to frame rules and/or directions as provided in Section 29 of the Act, to clarify role of Districts in collecting annual compliance reports from ICCs and LCCs, role of District Officers in collecting fines for non-compliance of the Act and appropriate authority for collection of fines;

2. Issue any other writ/order/direction as this Hon'ble Court may deem fit and proper in the circumstances of the case."

2. Over the course of many hearings, this court, with the able assistance and cooperation of learned counsels involved in the matter - on both sides - undertook an exercise to delineate lacunae in the implementation of the Act, on ground. Further, in compliance with orders of this court, numerous states2 filed affidavits highlighting steps taken by their respective governments in furtherance of implementing the Act and Rules in letter and spirit.

3. On 20.02.2023, learned counsels addressed this court on certain questions regarding the setting up of Nodal Cells in the concerned Central Union Ministry and also with respect to setting up of Local Committee and appointment of Nodal Officers in all districts of the country. This judgment pertains to these specific issues and the suggestions made in this regard.

4. Recently, this court in another bench composition, in Aureliano Fernandes v. State of Goa & Ors.3 had occasion to pass directions regarding the implementation of the POSH Act. These directions are comprehensive with

regards to seeking compliance of the Act by the appropriate government [as defined under Section 2(b)] and its many departments, authorities, institutions, etc.; the High Courts and the courts it supervises; specific non-state authorities/organisations such as - statutory bodies of professionals (at the apex and state level), universities and other educational institutions, hospitals/nursing homes, etc.

It specifically directed NALSA and SLSAs, and the National Judicial Academy and State Judicial Academies, to develop modules for workshops and awareness programmes, in their capacities. Given that the directions passed overlap with the scope of the present writ petition that is before this court, they merit emphatic reiteration:

"77. To fulfil the promise that the PoSH Act holds out to working women all over the country, it is deemed appropriate to issue the following directions:

(i) The Union of India, all State Governments and Union Territories are directed to undertake a timebound exercise to verify as to whether all the concerned Ministries, Departments, Government organizations, authorities, Public Sector Undertakings, institutions, bodies, etc. have constituted ICCs/LCs/ICs, as the case may be and that the composition of the said Committees are strictly in terms of the provisions of the PoSH Act.

(ii) It shall be ensured that necessary information regarding the constitution and composition of the ICCs/LCs/ICs, details of the e-mail IDs and contact numbers of the designated person(s), the procedure prescribed for submitting an online complaint, as also the relevant rules, regulations and internal policies are made readily available on the website of the concerned Authority/Functionary/Organisation/Institution/Body, as the case may be. The information furnished shall also be updated from time to time.

(iii) A similar exercise shall be undertaken by all the Statutory bodies of professionals at the Apex level and the State level (including those regulating doctors, lawyers, architects, chartered accountants, cost accountants, engineers, bankers and other professionals), by Universities, colleges, Training Centres and educational institutions and by government and private hospitals/nursing homes.

(iv) Immediate and effective steps shall be taken by the authorities/managements/employers to familiarize members of the ICCs/LCs/ICs with their duties and the manner in which an inquiry ought to be conducted on receiving a complaint of sexual harassment at the workplace, from the point when the complaint is received, till the inquiry is finally concluded and the Report submitted.

(v) The authorities/management/employers shall regularly conduct orientation programmes, workshops, seminars and awareness programmes to upskill members of the ICCs/LCs/ICs and to educate women employees and women's groups about the provisions of the Act, the Rules and relevant regulations.

(vi) The National Legal Services Authority (NALSA) and the State Legal Services Authorities (SLSAs) shall develop modules to conduct workshops and organize awareness programmes to sensitize authorities/ managements/ employers, employees and adolescent groups with the provisions of the Act, which shall be included in their annual calendar.

(vii) The National Judicial Academy and the State Judicial Academies shall include in their annual calendars, orientation programmes, seminars and workshops for capacity building of members of the ICCs/LCs/ICs established in the High Courts and District Courts and for drafting Standard Operating Procedures (SOPs) to conduct an inquiry under the Act and Rules.

(viii) A copy of this judgment shall be transmitted to the Secretaries of all the Ministries, Government of India who shall ensure implementation of the directions by all the concerned Departments, Statutory Authorities, Institutions, Organisations etc. under the control of the respective Ministries. A copy of the judgment shall also be transmitted to the Chief Secretaries of all the States and Union Territories who shall ensure strict compliance of these directions by all the concerned Departments. It shall be the responsibility of the Secretaries of the Ministries, Government of India and the Chief Secretaries of every State/Union Territory to ensure implementation of the directions issued.

(ix) The Registry of the Supreme Court of India shall transmit a copy of this judgment to the Director, National Judicial Academy, Member Secretary, NALSA, Chairperson, Bar Council of India and the Registrar Generals of all the High Courts. The Registry shall also transmit a copy of this judgment to the Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and the Engineering Council of India for implementing the directions issued.

(x) Member-Secretary, NALSA is requested to transmit a copy of this judgment to the Member Secretaries of all the State Legal Services Authorities. Similarly, the Registrar Generals of the State High Courts shall transmit a copy of this judgment to the Directors of the State Judicial Academies and the Principal District Judges/District Judges of their respective States.

(xi) The Chairperson, Bar Council of India and the Apex Bodies mentioned in sub-para (ix) above, shall in turn, transmit a copy of this judgment to all the State Bar Councils and the State Level Councils, as the case may be.

78. The Union of India and all States/UTs are directed to file their affidavits within eight weeks for reporting compliances. List after eight weeks."

5. In addition to these detailed directions, a few aspects relating to the effective implementation of the POSH Act highlighted in the present writ petition, require our attention.

Authorities responsible for the implementation of the POSH Act

6. The POSH Act is comprehensive, and a code in itself, for prevention, punishment and redressal of sexual harassment complaints. It takes the remit of the remedy envisaged in the Vishaka Guidelines beyond the State and public functionaries, to a larger, much wider scope of 'employee'4 and 'employer'5 than any other legislation. As a result, it comes too, with its own challenges for effective implementation. Anticipating this, the Act provides for a tiered-model for its functioning, and in turn for monitoring of its implementation.

7. Each employer is legally mandated to constitute an ICC under Section 4. To address the gaps where there is no ICC (i.e., for those working in a workplace that employs less than 10 workers or where the employer themselves are the respondent), the Act provides for an LC in each district, which is to be constituted by the District Officer under Section 6. The District Officer is also tasked with designating a nodal officer in each block, taluka, and tehsil in rural or tribal area, and ward or municipality in the urban area, to receive complaints and forward the same to the concerned LC.6

These nodal officers are meant to be the first point of contact in that sense, especially in situations where there is no ICC constituted. The ICC or LC after conducting inquiry (or recording settlement7 if such is the case), has to in its inquiry report recommend to the employer, or District Officer, respectively, what action is to be taken against the respondent (or in the situation of a false/malicious case8, against the complainant), in each case.9

8. The Petitioner has pointed out that there is a lack of clarity as to the District Officer's role in relation to the annual reports contemplated under Section 21 and 22. A reading of these provisions together offers some clarity: both the ICC and LC prepare annual reports and submit it either directly (in the case of the LC) or through the employer (here, the ICC), to the District Officer.10

While Section 21(1) does not mention the ICC report being forwarded to the District Officer, Section 22 right after, states that the employer is mandated to mention in its report the number of cases lodged and disposed (if any), and even in the absence of a report it must intimate the numbers to the District Officer.11 Further, it is the District Officer, in turn, who submits a brief report to the State Government.12

9. The appropriate government [defined under Section 2(b)], is responsible at the last level, to monitor the implementation of this Act and maintain data on the number of cases filed and disposed of in respect of all cases of sexual harassment at workplace.13 It is also obligated to take measures to publicise the Act.14 Another built-in safeguard in the framework is that the appropriate government is empowered to call for information and inspection of records15 - wherein it may call upon an employer or District Officer to furnish in writing any information relating to sexual harassment it may require, or produce any record required by an officer authorised to carry out an inspection.

10. What is wholly apparent from this outline of the scheme of the Act, is that the role of the District Officer, is pivotal; they are responsible for numerous aspects in the implementation of the Act. It is where the buck stops, so to say, in terms of coordination and accountability relating to the POSH Act. Even in terms of payment and fees - the District Officer is responsible for payment of allowances to the Chairman and members of the LC16, which it receives from the agency set up by the State Government (ref: Section 8 of the Act). Interestingly, the District Officer also performs a duty in terms of enforcement; under Section 13, if the respondent in any case fails to pay any sum so directed, the ICC/LC can forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.17

11. Section 5 stipulates that:

"5. The appropriate Government may notify a District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as a District Officer. for every District to exercise powers or discharge functions under this Act."

And Chapter VII, titled 'Duties and Powers of the District Officer' states under Section 20:

"20. The District Officer shall, -

(a) monitor the timely submission of reports furnished by the Local Committee;

(b) take such measures as may be necessary for engaging nongovernmental organisations for creation of awareness on sexual harassment and the rights of the women."

While the language used in Section 5 is 'may', the context of the statute - as elaborated above, and specifically Section 20 (which uses 'shall' and obligates the District Officer to perform pivotal functions) makes it quite clear that the District Officer, is the most important functionary in the system, tasked with keeping the redressal and monitoring framework both intact, and smoothly running. In one of the first cases on the interpretation of 'may', this court in State of Uttar Pradesh v. Jogendra Singh18 held:

"There is no doubt that the word "'may" generally does not mean 'must' or 'shall'. But it is well settled that the word "may" is capable of meaning "must" or 'shall' in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' which denotes discretion should be construed to mean a command. Sometimes, the legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive."

Treating Section 5 as directory, would leave a gaping hole in the otherwise clearly delineated workflow and redressal mechanism, and the efficacy of this legislation, as a result, falls flat.

12. We have perused the replies/affidavits filed by numerous states pursuant to receiving notice; seen together, they are marked by a lack of uniformity in terms of implementation of the Act. Numerous states have tried to force-fit the institutional requirements of the Act, within their existing bureaucratic frameworks (for instance, some states have assigned its implementation to departments other than their Women and Child Development Ministry, like the departments dealing with Social Welfare, Social Security, Legislative Affairs, etc.).

The affidavit filed by the petitioner in response to the replies by the States, highlights the many lacunae and lack of uniformity in the implementation of the POSH Act, by various state governments. District Officers were in most states notified after notice of this writ petition was served on them, and even among those states that have taken action - they have simply notified a specific post as District Officer, without providing any specific details of the officers, their contact information, etc.

Most states have failed to provide documentation on constitution of LCs, and even those who have, many have not constituted one in each district. Only a handful of states have provided any details of 'nodal officers'- but even among these, the nodal officers are specific posts notified, and not individuals at every taluka, ward, municipality, etc. as contemplated under Section 6(2).

The information on annual reports is perhaps most alarming- only three have provided a consolidated report (relying on differing sources, or just the LCs). Each State, has notified a different Ministry as the 'nodal' ministry for implementation of the Act - some have notified the Social Welfare Ministry or its allied departments, while others rely on the Women and Child Development department.

13. The general thrust of the affidavits, especially that of the Union of India - has been to highlight the generation of awareness through a massive publicity campaign and issuance of advisories, publication of handbooks, etc. However, it is quite plainly clear that though the generation of awareness is necessary, if a woman suffers sexual harassment at the workplace - the framework for redressal has to in fact exist. The failure to notify district officers specifically, has a snowballing effect on appointment of the LCs and nodal officers, in addition to other aspects.

The complaint mechanism, and larger framework - no matter how effective, remain inadequate if the authorities set out in the Act, are not duly appointed/notified. Therefore, the State/UT government must ensure that every district, at all times has a notified District Officer; in case of vacancy caused by retirement, or any other reason, it must be duly remedied, to enable smooth transition between officers, and ensure that there is always someone incharge of this position.

Furthermore, effort has to be undertaken to orient, train and sensitise these district officers, with regards to the provisions of the Act and Rules, with an emphasis on their roles and obligations. Similar range of activities must be conducted for the nodal officers appointed and LCs constituted by each district officer.

Operationalizing the Act for the unorganized sector

14. This Act is a pioneering legislation with a 'horizontal' mechanism and rights framework. A look at some of the definitions - 'employee'19, 'employer'20, and 'workplace'21 drives this point home and demonstrates the scope of its horizontal application. Further, the inclusion of definitions of 'domestic worker',

and 'unorganized sector' in Section 2, which though not expressly referred to in the substantive content of the Act, is telling:

"(e) "domestic worker" means a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer;"

"(p) "unorganised sector" in relation to a workplace means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten."

The inclusion of these definitions, has greatly expanded the scope of this Act's application. An aggrieved domestic worker, thus, can take action against a person residing in the house they work at, using the LC framework; see Section 2(o) which defines 'workplace' and includes under sub-clause (vi) "a dwelling place or house":

"(o) "workplace" includes-

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;

(vi) a dwelling place or a house"

15. Consider next, the composition and role of the LC - which is the foundational body in the district, especially so for the unorganized sector. This committee is headed by a nominated chairperson who is an eminent woman in the field of social work and committed to the cause of women; one member is nominated from the women working in a block/taluka/tehsil (rural) or ward/municipality (urban); two more, of which at least one has to be a woman to be nominated amongst NGOs or associations committed to cause of women or a person familiar with the issues relating to sexual harassment.

Further one must be with legal background/knowledge of the law, and one must belong to a Scheduled Caste, Scheduled Tribe, or Other Backward Class.22 An LC is empowered with powers equivalent to a civil court23 to conduct inquiry, issue summons, enforce attendance, etc., which is reflective of its importance in the framework.

The inclusion of nominees from such NGOs is also helpful, because in a context where LCs may convey a sense of formality, women find it easier to approach local NGOs; this is one of the finding in a 2015 International Labour Organization (ILO) report.24 However as pointed out, there is no avenue in the law for these NGOs to register or pursue the matter on behalf of such consenting women. Thus, the spreading of awareness relating to LCs and dispelling the air of formality, should form a priority of the highest level State, that seeks to implement the Act.

16. Lastly, it is relevant to note a major limitation of the Act, which depends on the Union Government to disburse funds to the States, which using an agency, can transfer the same to the district officer.25 Similarly Section 20 and 24, which obligate the district officer and appropriate government to take steps to publicise the Act, is limited by Section 24 which states that:

"The appropriate Government may, subject to the availability of financial and other resources, -

(a) develop relevant information, education, communication and training materials, and organise awareness programmes, to advance the understanding of the public of the provisions of this Act providing for protection against sexual harassment of woman at workplace;

(b) formulate orientation and training programmes for the members of the [Local Committee]."

(emphasis supplied)

In the absence of a delineated budget to pay the concerned officers and conduct events for awareness and training, various LCs are rendered infructuous or remain vacant.26 Therefore, the requirement of setting the budget for the implementation of this Act, at each district level, and thereafter state-level, to ascertain disbursal of grants from the Union Government.

17. In this manner, the Act contemplates a wide scope for both the aggrieved woman, and the respondent, and place a public duty on the employers, or LCs as the case may be, to ensure prevention, prohibition and redressal of complaints of sexual harassment. Operationalizing LCs and ensuring their effectiveness, remains the key to making these remedies accessible to the unorganized sector.

Discussion on specific directions sought by the petitioners

18. The directions prayed for in the present writ petition, can be traced directly to the obligations and duties set out in the express provisions of this Act:

Prayer		**Provision under the Act**	**Public functionary in charge/ obligation on**
(a)	Implement the provisions of the POSH Act and Rules	-	Union of India, State governments, and union territories
(b)	Notify and appoint district officers	Section 5	State and UT governments
(c)	Appointing LCs in each district	Section 6 and 7	District Officer
(d)	Appointing nodal officers	Section 6(2)	District Officer
(e)	Constituting ICCs in all workplaces as defined under s. 2(o)	Section 4	To be constituted by each employer
(f)	Ensure reporting and collection of annual compliance reports from all workplaces	Section 21 and 22	District Officers
(g)	Annual compliance reports are consolidated and the reports are published in the public domain	Section 23	Appropriate government
(h)	Publicising the Act and Rules and organize awareness activities to advance understanding of the	Section 24; Section 20(2)	Appropriate government; District Officer to take measures for engaging NGOs for creation of

	provisions of the Act		awareness
(i)	Gist of important provisions will be displayed at all working places	Section 19(b)	Duty of each employer
(j)	Framing of rules and or direction to clarify aspects not covered under the prevailing Rules	Section 29	Union Government

19. Prayer (g) directing the State/UT governments to ensure that the annual compliance reports collected by the District Officers are consolidated and the reports are published in the public domain, requires some consideration. Section 23 of the Act reads as follows:

"23. Appropriate Government to monitor implementation and maintain data.-

The appropriate government shall monitor the implementation of this Act and maintain data on the number of cases filed and disposed of in respect of all cases of sexual harassment at workplaces."

While the Act does not contemplate such publication in the public domain, there is certainly merit in using this anonymised data on cases lodged and disposed, to consolidate statistics, that will reflect efficacy of the implementation of the Act. Therefore, while there is no need for such an express direction by this court, the Central Government, and State Government, as the case may be, in the interest of transparency and good governance may consider to make these statistics public- the access to which, would certainly have a positive impact on various stakeholders. This in turn will also strengthen the monitoring of the implementation of this Act.

20. Prayer (j) seeking the framing of rules and/or directions as provided in Section 29 of the Act is limited to three lacunae pointed out by the petitioner: (i) to clarify the role of districts in collecting the annual compliance reports from ICCs and LCs; (ii) role of district officers in collecting fines for non-compliance of the Act; and (iii) identify the appropriate authority for collection of fines. This court has considered the Rules, as they stand, closely; there is certainly some gaps. On point (i), this court's discussion in paragraph 8 clarifies the position - although the required amendment explicitly laying this out in the Rules, would be appropriate. Points (ii) and (iii) are cause for real concern.

21. Section 26(1) of the Act defines penalty to be imposed on the employer for failing to: constitute the ICC under Section 4, conduct inquiries under Section 13

and 14, submit annual compliance reports as per Section 22, or contravention of any other provision of the Act or Rules. Contravention of the Act, attracts a penalty of 50,000.

However, the Rules ₹ are woefully silent on the reporting authority actually responsible for taking note of the noncompliance, and the public authority empowered to collect the said fine27. Given the scheme of the Act, it would be recommended that the District Officer itself, be made this authority - however, presently since they are not empowered to take appropriate action against employers for non-compliance of the Act, it renders the framework rather toothless.

Similarly under Section 26(2) which provides further penalty (including cancellation of business license or withdrawal of renewal or approval of cancellation of registration by the government or local authority required for carrying on their business/activity) on an employer for continuous violations of the same provisions - does not mention the authority under the Act responsible for carrying out this function.

Conclusion and Directions

22. Having regard to the above discussion, it is appropriate for this court to issue the following directions (under the relevant heads) to ensure the effective implementation of the POSH Act, and render it workable:

A. Coordination between Union Government and State/UT Governments

i. The Women and Child Development Ministry of every State/UT, through its Principal Secretary, should consider identifying a 'nodal person' within the Department, to oversee and aid in coordination as contemplated under the POSH Act. This person would also be able to coordinate with the Union Government on matters relating to this Act and its implementation.

ii. Each State/UT Government is to submit a consolidated report of its compliance with the below directions to the Union Government within 8 weeks. The latter is hereby directed to consolidate the various reports, identify any lapses in the compliance by the State and try to remedy it, before filing a consolidated affidavit of compliance - detailing the States' compliance, and the Union Government's action taken in regard to the direction within 12 weeks from the date of this judgment.

B. Appointment of public authorities

iii. The concerned Principal Secretary of the State/UT Ministry of Women and Child [or any other Department, subject to amendment of the Rules as per direction (vii) below], will personally ensure appointment of a district officer in each district within their territorial jurisdiction, as contemplated under Section 5 within four weeks from the date of this judgment.

iv. Thereafter, each appointed district officer

(a)must in compliance of Section 6(2) appoint nodal officers in every block, taluka and tehsil in rural or tribal area and ward or municipality in the urban area;

(b)must constitute a LC, as contemplated under Section 6 and 7 of the Act; and (c) ensure the contact details of these nodal officers, and LCs, shall be forwarded to the nodal person within the State Government Ministry of Women and Child Development within 6 weeks from the date of this judgment.

v. Thereafter, a circular/bulletin containing names of all district officers, and their contact details (phone, address, and email), along with a district wise chart of the various nodal officers and their contact details, must be uploaded on the department's website (or in the absence of one, on the main State government website) in a conspicuous location, along with a compiled version of the Act, Rules, and simple charts/explainers on the basics of the Act, within 6 weeks from the date of this judgment.

C. Amendments and gaps in Rules that State must fill

vi. The Union Government ought to consider amending the Rules, so as to operationalise Section 26 of the Act, by recognising a reporting authority, and/or a fine collecting authority. This direction must be read in light of the discussion in paragraph 8 (role of district officer with regards to annual compliance reports) and paragraph 21 (on the penalty regime contemplated in the Act and resulting lacunae in the Rules) above. vii.

The Union Government may also consider amending the Rules so as to identify one Department (preferably the Women and Child Department), and creating a 'nodal person' post within the said Department to be responsible for the coordination required in the implementation of the Act [see direction (i)]. This will ensure greater uniformity in the implementation of the Act across the country.

D. Training and capacity building

viii. The District Officers and LCs should be mandatorily trained regarding their important responsibilities. Given their position in the redressal framework contemplated in the Act, they must first be sensitised to the nature of sexual harassment, the gendered interactions that occur in the workspace, etc. The State Governments, must organise periodic, and regular training sessions at the District level which are to be attended by the District Officer, members of the LC, and nodal officers [ref: Section 24(b)].

E. Larger efforts towards awareness

ix. In furtherance of Section 24, the State/UT Governments, and Union Government are hereby directed to set out the financial resources allocated and or needed, to developing educational, communication and training material for spreading awareness of the provisions of this Act to the public, and formulate orientation and training programmes as elaborated in direction (viii) above. This plan of action, must form part of the compliance affidavit filed by each State. The discussion in paragraph 16 is to be read along with this direction.

x. The District Officers, once nominated by the State are hereby directed to identify the non-governmental organisations working with women and their protection within the district, and take action pursuant to their duty under Section 20(b) for creation of awareness.

xi. The appropriate government or district officers in question, must also undertake effort to spread awareness on the existence of LCs, and make them approachable for the unorganized sector - thus operationalizing the horizontal import of this Act.

xii. The directions (iv) and (v) passed in Aureliano Fernandes v. State of Goa & Ors.28 (supra) cover specifically the direction to authorities, management and employers to familiarize the members of the ICCs and LCs of their duties and detailed step-wise manner in which an enquiry ought to be conducted on receiving a complaint of sexual harassment; conduct orientation programmes, workshops, seminars, awareness programmes, etc. and to educate women employees and women groups about the Act, Rules, and regulations are reiterated. The modules prepared by NALSA [as per direction (vi) in Aureliano Fernandes] to conduct workshops and organize awareness programmes to sensitise authorities, managements, employers could be used in this regard.

xiii. It is relevant to add here that the Ministry of Women and Child Development, Government of India, has prepared a Handbook for implementation of POSH Act29, which serves as a useful guide for not just

employees seeking information, but also more pertinently those who are nominated or appointed as members of the ICs (by the employer) or LCs (by the District Officer). It is hereby directed that a targeted effort be made to share this information with each District Officer, who may in turn disseminate it to their respective LCs, the nodal officers appointed under Section 6(2), and employers who constitute their own ICCs.

F. Annual Compliance Reports

xiv. Due compliance with Section 21(1) and (2), and Section 22, must be undertaken by each District Officer, of the State - including collecting the reports from the IC/employers (or information where no report is available), and from the LC, and preparation of a brief report to be shared with the State government. The State/UT Governments is hereby directed to create a Standard Operating Procedure (SOP) including the procedure, and timelines for this process, so as to enable it to, in turn, comply with Section 23 of the Act, i.e., monitoring implementation and maintaining data. This direction may be read in light of the discussion contained in paragraph 18 above.

G. Monitoring of ICs and compliance by employers

xv. The directions passed in Aureliano Fernandes v. State of Goa & Ors.30 (supra) address most specifically, the constitution of ICs - in public establishments [falling broadly within Section 2(o)(i)] and some private establishments - such as bodies governing professional associations, etc.; those directions are hereby reiterated, to avoid multiplicity or overlap of efforts. It is however further, directed that efforts made must be in line with the scheme of the Act, and through the authorities so designated for the various roles.

xvi. Similarly, directions are hereby made to hospitals, nursing homes, sports institutes, stadiums, sports complex, or competition or games venues [as defined in Section 2(o)(iii) and (iv)] to establish ICs, and report compliance as per the duties under this Act.

xvii. The District Officer must be supplied a list of establishments (compiled by the relevant departments of the State/UT Government) that fall within the scope of Section 2(o), so that they may write to them and ensure that they are well versed with the provisions relating to employers, and their duties (including constitution of ICC under Section 4, duties under Section 19, etc.) and are implementing them in letter and spirit.

This will also enable collection of annual reports, as contemplated under Section 21. The consequent direction to all private sector workplaces under Section

2(o)(ii) can be passed once the District Officer is able to discern an exhaustive list of entities.

23. List this matter in the first week of February 2024, for further compliance.

.....J. [S. Ravindra Bhat]

.....J. [Dipankar Datta]

New Delhi

October 19, 2023.

1 The following abbreviations have been used in the writ petition, as well as in this judgment hereafter:

"LCC" or "LC" mean 'Local Committee' (as per Act 23/2016 which amended 'local complaints committee' to 'local committee'); and "ICC" or "IC" to mean 'Internal Complaints Committee'.

2 Including Nagaland, Madhya Pradesh, Meghalaya, Goa, Puducherry, Dadra & Nagar Haveli, Karnataka, Manipur, Haryana, Telangana, Gujarat, Assam, Rajasthan, Himachal Pradesh, Chandigarh UT, Andaman and Nicobar, Uttarakhand, Uttar Pradesh, Sikkim, Punjab, Odisha, Maharashtra, Jharkhand, NCT Delhi, Bihar, Tamil Nadu, Kerala, and Tripura.

3 Judgment dated 12.05.2023 in Civil Appeal No. 2482/2014.

4 Section 2(f) reads as follows:

"(f) "employee" means a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name"

5 Section 2(g) reads as follows:

"(g) "employer" means-

(i) in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local authority, the head of that department, organisation, undertaking,

establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf;

(ii) in any workplace not covered under sub-clause (i), any person responsible for the management, supervision and control of the workplace.

Explanation.-For the purposes of this sub-clause "management" includes the person or board or committee responsible for formulation and administration of polices for such organisation;

(iii) in relation to workplace covered under sub-clauses (i) and (ii), the person discharging contractual obligations with respect to his or her employees;

(iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker;"

6 Section 6(2) of the POSH Act.

7 Section 10 of the POSH Act.

8 Section 14 of the POSH Act and Rule 10 of the Rules.

9 Section 13 of the POSH Act and Rule 9 of the Rules.

10 Section 21(1) of the POSH Act.

11 Section 22 of the POSH Act.

12 Section 21(2) of the POSH Act.

13 Section 23 of the POSH Act.

14 Section 24 of the POSH Act.

15 Section 25 of the POSH Act.

16 Rule 5 of the POSH Rules

17 Second proviso to Section 13(3) of the POSH Act.

18 [1964] SCR (2) 197

19 Section 2(f), extracted above in fn 4.

20 Section 2(g) extracted above in fn 5.

21 Section 2(o) of the Act.

22 As per Section 6 and 7 of the Act.

23 Section 11 of the Act.

24 ILO, Insights into working conditions in India's garment (2015) <https://ruralindiaonline.org/en/library/resource/insights-into-working-conditions-in-indias-garment-industry/>
(accessed on 17.10.2023).

25 Section 8 of the Act.

26 See NHRC's report on status and Functioning of Local Complaints Committees under the Act (2019)

https://nhrc.nic.in/sites/default/files/Status_and_Functioning_of_Local_Complaints_Committees_under_the_Sexual_Harassment.pdf (accessed on 17.10.2023).

27 The other provision which contemplates penalty, is Section 17 [Penalty for publication or making known contents of complaint and inquiry proceedings] which states:

"17. Where any person entrusted with the duty to handle or deal with the complaint, inquiry or any recommendations or action to be taken under the provisions of this Act, contravenes the provisions of section

16, he shall be liable for penalty in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist, in such manner as may be prescribed."

Rule 12 of the POSH Rules has set the fine to be Rs. 5000, which is to be collected by the employer.

28 Judgment dated 12.05.2023 in Civil Appeal No. 2482/2014.

29 Government of India, Handbook on Sexual Harassment of Women at Workplace (2015)

https://wcd.nic.in/sites/default/files/Handbook%20on%20Sexual%20Harassment%20of%20Women%20at%20Workplace.pdf (accessed on 26.09.2023).

IN THE SUPREME COURT OF INDIA

Indrakunwar
Vs.
State of Chhattisgarh

[Criminal Appeal No. 1730 of 2012]

HEADNOTE – Right to remain silent not be used against accused under Sec. 313 Cr.P.C.

JUDGMENT

Sanjay Karol J.,

1. The questions arising for consideration in the present appeal are:

1) To what extent does the right to privacy shield the matters concerning the personal life of a woman accused of committing a crime, particularly when the prosecution has failed to discharge its duty?

2) To what extent are the rights or duties of the accused to explain the incriminating circumstances appearing against them in a statement under Section 313 of the Code of Criminal Procedure1?

2. This appeal at the instance of the convict-appellant impugned a judgment of the High Court of Chhattisgarh passed in Criminal Appeal No.605 of 2005 dated 20th April 2010, whereby the judgment of conviction under Section 302 of Indian Penal Code, 18602 and order of sentence dated 4th July 2005 passed by the Additional Sessions Judge, Baikunthpur, District Koriya (Chhattisgarh) in Sessions Trial No. 525 of 2004 was upheld.

Background of The Case

3. Eschewing unnecessary details, the facts of the case put forward by the prosecution are:

3.1 The convict-appellant had relations with a co-villager, namely, Baiga Gond, as a result of which she conceived a child. She, upon giving birth, allegedly killed this child and threw the corpse into a dabri (small water body- pond).

3.2 An FIR (First Information Report) dated 14th September 2004, the very day on which the alleged corpse of the newborn child of the convict-appellant was found, stood registered. After due investigation, the chargesheet was filed on

13th October 2004, and eventually, the accused was charged with committing an offence punishable under Section 302 of the IPC.

4. The Trial Court, having recorded the statements of various witnesses, observed that the case is the one resting upon circumstantial evidence.

4.1 The prosecution declared five of the eight witnesses examined hostile, including Jai Mangal Singh - PW1, at whose instance the FIR was registered.

4.2 The other witnesses, for instance, Sumitra - PW4, is recorded to be "guessing" about the convict-appellant being pregnant; Kuwarobai - PW8 refused that she ever saw the convict-appellant pregnant as also that she would use a 'chadar' to hide her pregnancy.

4.3 Yet, referring to the statements of PW1, Suraj Kumar Singh - PW2, Rambaran Singh - PW3, PW4, Ram Jhalako - PW5, Birhulia - PW6, Rambai - PW7, A.R. Manikpuri (Head Constable) - PW9 to establish the presence of the body of the deceased child in 'Suraj ki dabri' the statement under Section 313 CrPC of the convict-appellant along with the statement of Dr. Divya Rani Tigga - PW11 regarding the signs of recent delivery on the person of the convict-appellant found the following circumstances to have been proved: -

a) The accused was living in the village alone as her husband deserted her. Also that, she was pregnant.

b) In the dabri (small pond), the body of a newborn baby was found on 14th September 2004, and a few days before that, i.e., 2-3 days, the accused had delivered a child.

c) The accused did not state anything nor tell anyone about the delivery.

4.4 Given the above, the Trial Court found the offence punishable under Section 302 IPC to have been proved beyond reasonable doubt.

5. The High Court, in the judgment impugned before us, taking note of the testimony of PW11, who deposed that she had, upon examination, found the convict-appellant to have delivered a child and that the deceased had suffered injuries, convicted the accused. However, the doctor admits that the death of the child being prior to or after the birth remains unmentioned. The same was noted to be of no consequence as the injuries recorded on the body of the deceased child established the death to be homicidal in nature. In conclusion, the High Court held that the conviction under Section 302 IPC was warranted.

6. It is observed that the Courts below, in holding the accused guilty, primarily relied on the testimonies of eight independent witnesses, the testimony of the doctor PW11, and the statement of the accused under Section 313 Cr.P.C.

Our View

7. Awarding the punishment of life imprisonment requires due appreciation of evidence and cannot be awarded mechanically and in a perfunctory manner. The law requires that the High Court, must, only after re-appreciation of evidence confirm or overturn the findings of fact returned by the Trial Court. Recently, this Court in Geeta Devi v. State of U.P.3 has succinctly dealt with this issue.

8. The judgment under challenge, which we are constrained to observe, makes only general and sketchy observations, unlike the appreciation of evidence as is required by law, in respect of testimonies of the witnesses and other evidence. This approach cannot be appreciated, especially when the conviction rendered is for a serious offence, that is, Section 302 IPC. In Geeta Devi (supra), the Court found it fit to remand the matter to the High Court for consideration afresh, but in the present case, such course will not be prudent given that this appeal dates back to the year 2010. Hence, we proceed to examine the evidence on record.

9. The testimony of Jai Mangal Singh - PW1, who was Sarpanch at the time of the incident, also reveals that he was informed by a villager about the dead body of a newborn child found in the pond but did not know to whom it belonged to. Also, he had no knowledge about the pregnancy of the accused. He did not know when and by whom the child was thrown. In his crossexamination, he stated that there were houses belonging to other people near the dabri where the dead body was found. Significantly, we find none of them stands examined, testifying to the presence of the accused near the pond, nor does this witness testify to such an effect.

10. Suraj Kumar Singh - PW2, who saw the dead body of a child in his dabri, admits the place to be open from all sides, having access by all. He further deposes that he did not see any woman, much less the accused, throw the child.

11. Rambaran Singh - PW3, who was informed by PW2 of the dead body of a child lying in the dabri, admits having no knowledge as to whom the child belonged to. His testimony reveals the reason for suspicion and doubting the accused, for she being the only one without a husband.

12. Smt. Sumitra - PW4, in her testimony, only discloses the factum of the accused being pregnant. The testimonies of PW5 and PW6 are also to similar effect.

13. Similarly, though, Smt. Rambai - PW7 denies any knowledge of the accused being pregnant but only adds that the accused's body looked as though she had just delivered a child. However, the latter part is denied by PW8.

14. The testimony of the Investigating Officer - PW10 is only to the effect of spot verification and conduct of procedural formalities.

15. PW11 is the Medical Officer who examined the child's dead body and the accused person. She gave her opinion that the child was delivered prematurely, i.e., prior to 9 months. She also stated that the child died within 45 to 50 hours of the medical examination, and its death was homicidal in nature. On examination, she found the accused to be physically weak. She admitted not to have mentioned as to whether the child had died before or after birth. She did not even mention if the child belonged to the accused person.

16. Thus, none of these witnesses could prove, much less beyond a reasonable doubt, the prosecution case of the accused having thrown the child in the dabri after delivery or having caused the death.

17. In her defense, the convict-appellant categorically denied the accusation of having killed any child, much less the child in question. She states that Baiga Gond, who had fathered the child she was carrying, in an endeavor to get rid of the child, forcibly tried to have her take some medicine. He pushed her into 'Suraj ki dabri' on her refusal, leading to her miscarriage. The further defence set up by her was that she had not killed the child and was being falsely implicated.

18. A perusal of the statement of the convict-appellant gives rise to the question as to whether she had admitted her guilt? Whether upon such a statement, the onus on the prosecution stood shifted? Whether it could be said that the convict-appellant was obliged to disclose her pregnancy, if so, and what became of such child that she was allegedly carrying?

19. Further, what must be considered is whether the convict-appellant has no right of privacy of not disclosing the prosecution or the Court as to what happened to her child which she was carrying in her womb, particularly when the prosecution failed to discharge the initial burden and onus of establishing the deceased, in any manner to be related to the accused?

20. Is not, inherent in a lady the right of confidentiality and privacy in matters concerning her personal life, of not disclosing any circumstances, as may be required by law?

21. In searching for answers to the questions above, it is pertinent for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom.4 The right to privacy is the underpinning of human dignity and is fundamental to the realization of human rights.

22. Right to Privacy is regarded as one of the most crucial human rights in the contemporary day. In many different countries and civilizations, privacy is cherished. It is also protected by numerous international and regional human rights treaties, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and many more.

23. The importance of this right was underscored by U.S. Supreme Court as far as the year 19585 by quoting William Pitt, Earl of Chatham:

"The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake, the wind may blow through it, the storms may enter; the rain may enter but the King of England cannot enter, all his forces dare not cross the threshold of the ruined tenement."

24. In K.S. Puttaswamy (Privacy-9J.) v. Union of India,6 this Court, speaking through Dr. D.Y. Chandrachud, J. (as the learned Chief Justice then was) while discussing the essential nature of privacy observed:

"297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual.

The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop.

Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each

individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others.

Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude.

Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy.

Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms.

The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.

The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."

(Emphasis supplied)

25. In matters concerning women, this Court has repeatedly stated that much is left to be desired in securing constructive equality. We may refer to what Krishna Iyer J. has stated7:

"The fight is not for woman's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender but for cosmic harmony which never comes till woman comes".

26. We also find this Court to have recognized, in Shakti Vahini v. Union of India8, that the right to choose a partner is a fundamental right under Article 19 and 21 of the Constitution of India. In the celebrated case, Shafin Jahan v. Asokan K.M.9 it was observed:-

"84. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable."

In S. Khushboo v. Kanniammal10, this Court observed:

"46. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not coextensive."

(Emphasis supplied)

27. The essence of a woman's fundamental right to equality and privacy, regarding private matters of bodily and psychological integrity is the ability to

make autonomous decisions about her own body and reproductive choices. It is entirely within the realm of privacy of a woman to decide whether or not to bear a child or abort her pregnancy (within the framework of law).

28. This Court in Suchita Srivastava v. Chandigarh Admn.11, observed that the statutory right of a woman to consent or not, to a termination of pregnancy in accordance with the Medical Termination of Pregnancy Act, 1971 is deduced from a woman's right to privacy, dignity and bodily integrity.

29. In X v. The Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and Ors.12, this Court observed that the right of a woman to become pregnant is not married to her marital status. It is a choice irrespective thereof. In case the pregnancy is warranted, it is equally shared by both partners. However, in case of an unwanted or incidental pregnancy, the burden invariably falls on the pregnant woman affecting her mental and physical health. It was held that it is the woman's decision alone to undergo medical termination of pregnancy particularly when it is her mental or physical health that is in question.

30. Recently, this Court in XYZ v. The State of Gujarat & Ors.13 in the context of abortion reiterated that the right of every woman to make reproductive decisions, including the decision to terminate the pregnancy, is within her competence and authority. The right of every woman to make reproductive choices without undue interference from the state is central to the idea of human dignity. Deprivation of access to reproductive healthcare or emotional and physical well-being also injures the dignity of women.

31. The above discussion was only to point out that the right to privacy is inviolable. Unfortunately, the view taken and the language adopted by both the Courts below lays to waste such a right inherent in the convict-appellant. It is apparent that the guilt has been placed on her without any solid foundation thereto since no relationship of any nature whatsoever could be established between her and the deceased child discovered in the dabri. The conclusion drawn is simply on the basis that the convict-appellant was a woman living alone and had been pregnant (as admitted in the statement under 313 CrPC). This, in the Court's view, was in itself suspect since she had been 'deserted' by her husband.

32. Such a view being taken, i.e., thrusting upon a woman the guilt of having killed a child without any proper evidence, simply because she was living alone in the village, thereby connecting with one another two unrelated aspects; reinforces the cultural stereotypes and gendered identities which this Court has explicitly warned against.14

33. Keeping in view the understanding of the principles of privacy and the propositions of law in regard thereto, we now travel to what, by law, may be required of the convict-appellant in her statement under Section 313 Cr.P.C.

34. A perusal of various judgments15 rendered by this Court reveals the following principles, as evolved over time when considering such statements.

34.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.

34.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

34.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alterum partem.

34.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

34.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning.

34.6 The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason.

34.7 This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.

34.8 This statement is to be read as a whole. One part cannot be read in isolation.

34.9 Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

34.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.

34.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

34.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision.

Answers to The Questions

35. In light of the principles listed above, what we must consider is whether, in explaining the purported incriminating circumstance against her, the convict-appellant ought to have disclosed, over and above denial of any relationship with the deceased child, the specifics of her miscarriage and its aftermath; particularly when the prosecution has failed to discharge its burden of establishing such relationship between the deceased and the convict -appellant.

36. It is established that negative inferences cannot be drawn for a question or incriminating circumstance not put to an accused while making a statement under Section 313 Cr.P.C. Her statement, nowhere reflects an answer to a question concerning the particulars of the child that she was admittedly carrying but denied that the deceased was not the one recovered from the dabri. Although there is a requirement by law to disclose the aspects required to adjudicate in a criminal matter, such duty cannot unreasonably and unwarrantedly step over the fundamental right of privacy.

37. Before examining this case from the lens of circumstantial evidence, it would be apposite to refer to the position in law.

38. In Shailendra Rajdev Pasvan v. State of Gujarat16 this Court observed that the courts ought to have a conscientious approach in a case based on circumstantial evidence, and conviction ought to be recorded only in cases where all the links of the chain are complete, pointing only to the guilt of the accused and none else, also eliminating the element of his innocence. Each link, unless connected together to form a chain, may suggest suspicion, but the same, in itself, cannot take the place of proof and will not be sufficient to warrant the conviction of the accused.

39. In Munikrishna v. State17 this Court, while following the parameters laid down in Hanumant Govind Nargundkar v. State of Madhya Pradesh18 and Sharad Birdhichand Sarda19, observed that in cases based on circumstantial evidence, heavy onus and duty is cast upon the prosecution to prove its case beyond reasonable doubt.

40. In Sharad Birdhichand Sarda (supra), while discussing the effect of non-explanation, this Court observed that the absence of explanation or a false explanation will amount to an additional link to complete the chain provided the following essential conditions must be satisfied, that is to say, various links in the chain of evidence led by the prosecution have been satisfactorily proved; it should only point to the guilt of the accused with reasonable definiteness, and proximity of the circumstance with the time and situation.

41. It is a matter of record that none of the witnesses has seen the convict-appellant throwing the deceased child into the dabri; as hitherto observed, no conclusive proof, of any nature, of relationship had been put forth by the prosecution; no evidence has been led to cast doubt upon the version of the convict.

The statement of the doctor is silent on the death of the deceased having occurred prior to or after birth, although in examination in chief, the doctor has deposed that the death of the deceased child was homicidal in nature; however, in the cross-examination, it is admitted that such fact does not form part of the record, thereby calling into question the conclusion itself as it is a vital piece of information that has been omitted.

42. Having considered the gaps mentioned above in the prosecution case, we cannot agree with the learned Courts below that the circumstances conclusively point to the guilt of the convict-appellant, Indrakunwar.

43. Given the foregoing discussion, we find the conviction recorded against the convict-appellant to be entirely based on mere presumption, with the actual evidence on record failing to establish the prosecution case much less beyond reasonable doubt. We are constrained to observe that the High Court has confirmed the view of the Trial Court awarding life imprisonment without supplying any cogent reasons therefor.

44. In that view of the matter, the conviction returned by the Trial Court in Session Trial No.52 of 2004 and affirmed by the High Court in Criminal Appeal No.605 of 2005 is quashed and set aside. The convict-appellant is acquitted of all charges and, if in jail in connection with the instant lis, is set at liberty forthwith. Her bail bonds stand discharged.

45. The questions raised in the instant case are answered as above.

46. The appeal is allowed in the aforesaid terms.

47. Pending Interlocutory application(s), if any, shall stand disposed of.

.....J. (Abhay S. Oka)

.....J. (Sanjay Karol)

New Delhi.

19 October, 2023;

1 Hereinafter referred to as 'CrPC'

2 Hereinafter referred to as 'IPC'

3 2022 SCC OnLine 57 (2-Judge Bench)

4 Joseph Shine v Union of India 2019 3 SCC 39 (5-Judge Bench)

5 Miller v United States 357 U.S. 301(1958)

6 (2017) 10 SCC 1

7 V.R.Krishna Iyer, Law and Life, Vikas Publishing House, New Delhi, 1979, p. 31.

8 (2018) 7 SCC 192 (3-Judge Bench)

9 (2018) 16 SCC 368 (3-Judge Bench)

10 (2010) 5 SCC 600(3-Judge Bench)

11 (2009) 9 SCC 1 (3-Judge Bench)

12 2022 SCCOnLine SC 905 (3-Judge Bench)

13 Criminal Appeal No. /2023 (@ Slp (Crl.) Dy. No. 33790/2023)

14 In striking down Section 497 IPC, the Constitution Bench in Joseph Shine v Union of India (2019) 3 SCC 39 has engaged in an extensive discussion In regard to stereotypes and has found such stereotypes to be offending Article 14 of the Constitution of India.

15 Premchand v. State of Maharashtra (2023) 5 SCC 522 (2-Judge Bench); Jai Dev v. State of Punjab [AIR 1963 SC 612]; Asraf Ali v. State of Assam (2008) 16 SCC 328 (2-Judge Bench); Inspector of Customs v. Yashpal (2009) 4 SCC 769 (3-Judge Bench); Fainul Khan v. State of Jharkhand (2019) 9 SCC 549 (2-Judge Bench); Mohd. Firoz v. State of M.P. (2022) 7 SCC 443 (3-Judge Bench);

Bishnu Prasad Sinha v. State of Assam (2007) 11 SCC 467 (2-Judge Bench; Dehal Singh v. State of H.P. (2010) 9 SCC 85 (2-Judge Bench); Brajendrasingh v. State of M.P. (2012) 4 SCC 289 (2-Judge Bench); Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 (3-Judge Bench); Hate Singh Bhagat Singh v. State of Madhya Pradesh [1951 SCC 1060]; Shamu Balu Chaugule v. State of Maharashtra (1976) 1 SCC 438; Paul v. State of Kerala (2020) 3 SCC 115 (2-Judge Bench); Kalicharan v. State of U.P. (2023) 2 SCC 583 (2-Judge Bench); Nasib Singh v. State of Punjab (2022) 2 SCC 89 (3-Judge Bench); Jai Prakash Tiwari v. State of Madhya Pradesh 2022 SCC OnLine SC 966 (3-Judge Bench); Satbir Singh v. State of Haryana (2021) 6 SCC 1 (2-Judge Bench); Bable v. State of Chhattisgarh (2012) 11 SCC 181 (2-Judge Bench); and Selvi v. State of Karnataka (2010) 7 SCC 263 (3-Judge Bench).

16 (2020) 14 SCC 750 (3-Judge Bench)

17 2022 SCC OnLine SC 1449 (3-Judge Bench)

18 (1952) 2 SCC 71 (3 Judge Bench)

19 (1984) 4 SCC 116 (3-Judge Bench)

IN THE SUPREME COURT OF INDIA

Paranagouda and Anr.
Vs.
State of Karnataka and Anr.
[Criminal Appeal No._____ of 2023
@ SLP (Crl.) No. 12216 of 2022]

HEADNOTE – Conviction under Sec. 498-A IPC can be upheld despite acquittal under Sec. 304-B IPC

JUDGMENT

Aravind Kumar, J.

1. Leave granted.

2. The judgment dated 20.07.2022 passed by High Court of Karnataka, Dharwad Bench dismissing the Criminal Appeal No.2847 of 2012 by affirming the judgment and order of sentence convicting the appellants passed by the Sessions Judge, Bagalkot in S.C. No.35 of 2011 dated 14.09.2012 for the offences punishable under Section 498A, 304B read with Section 34 of IPC and Section 3 and 4 of Dowry Prohibition Act (for short the 'DP Act') has been called in question.

Factual Background

3. The third daughter of the complainant (Shri Chandappa Gooli) named Akkamahadevi was married to second respondent/accused No.1 herein on 16.05.2010. A complaint came to be lodged by Sri Chandappa Gooli, father of the deceased on 20.12.2010 alleging thereunder that a dowry of Rs. 31,000 and 1.5 tolas of gold was given at the time of marriage and additional dowry of Rs. 50,000 and gold was demanded after two months of marriage.

It was alleged that accused No.1 and his parents (appellants) gave physical and mental torture to his daughter and unable to bear the same she committed suicide by self-immolating namely by pouring kerosene and lighting fire. A dying declaration came to be recorded on 20.12.2010 and she died on 24.12.2010 due to burn injuries. Initially FIR came to be registered in Crime No.143 of 2010 for the offences punishable under Section 323, 498A read with Section 34 of IPC and 504 of IPC and Sections 3 and 4 of the DP Act and on her death on 24.12.2010, Section 304B of IPC was added.

On completion of investigation charge-sheet came to be filed and the jurisdictional sessions judge took cognizance of the offence alleged against the accused persons namely husband-accused No.1 (R-2 herein), appellant No's 1 and 2 herein (accused No.2 and 3) and Smt. Ningamma accused No.4. On behalf of the prosecution, 32 witnesses were examined as PW-1 to PW-32 and they got marked 50 documents as Ex.P-1 to P-50 and three material objects as MO 1 to MO 3. On closure of prosecution side, the accused were examined and their statements also came to be recorded under section 313 of Cr.P.C. Accused No.4 (mother of accused No.3) had expired on 28.02.2012 and as such the proceedings against her stood abated.

After hearing the learned Public Prosecutor and the learned advocates appearing for accused No. 1 to 3, they came to be convicted for the offences alleged against them. The learned Trial Judge had convicted the accused by relying upon the dying declaration (Ex.P.45) and sentenced them to undergo 7 years of simple imprisonment for the offence under Section 304B, five years of simple imprisonment for the offence under Section 3 of Dowry Prohibition Act, one year of simple imprisonment for the offence under Section 498A r/w Section 34 of IPC and one year of simple imprisonment for the offence under Section 4 of Dowry Prohibition Act with fine of Rs. 1000 for each of the offences under Section 498A, 304B and Section 4 of DP Act for each of the accused and in default to undergo further simple imprisonment for a period of 3 months, and fine of Rs. 31,000 each for the offence under Section 3 of DP Act with default sentence of three months. All sentences were ordered to run concurrently.

4. Being aggrieved by said judgment, appeal came to be preferred on various grounds and primarily on the ground that deceased had suffered burn injuries to the extent of 70-80% and she was not in a position to speak. It was also contended that Doctor PW-32 who had certified that deceased was able to speak had not even recorded the blood pressure and pulse rate of the deceased in the case-sheet and the treated doctor PW-31 has also admitted that general condition of the deceased was poor at the time of admission to the hospital itself.

It was also urged that evidence which was available before the trial court was not appreciated in proper perspective and mere dying declaration cannot be the sole basis of conviction unless it was corroborated. It was also contended that none of the prosecution witnesses supported the story of prosecution and they had turned hostile and as such learned Session Judge ought not to have convicted the accused persons.

5. The High Court by the impugned judgement having formulated points for its consideration vide paragraph 18 of the impugned judgment, has answered the points formulated, in favour of the prosecution and against the accused by

holding that dying declaration was recorded properly and same is proved by taking into consideration the contents of the same and the evidence of Tehsildar who recorded the same as well as the evidence of Doctor PW-31 who treated the deceased and had issued Ex.P-46 (case sheet of deceased Mahadevi). Hence, this appeal.

6. We have heard the arguments of the learned advocates appearing for the parties. Learned advocate appearing for the appellants contends that dying declaration is neither true nor voluntary statement of deceased as she was not physically or mentally fit to make any declaration and undisputedly the parents of the deceased had not supported the case of the prosecution.

He would also contend that doctor who had examined the deceased and treated her has clearly deposed that deceased was suffering from breathlessness when brought to the hospital and he had also certified that she had suffered 70 to 80% burn injuries and thereby making her physically and mentally incapacitated to give any declaration or make any statement.

7. Per contra Shri V.N. Raghupathy, learned Standing Counsel appearing for the State by supporting the judgment of both the courts would submit that there is no cogent material to displace the findings recorded by the courts below. He would also contend that dying declaration cannot be brushed aside merely because deceased had suffered 70% to 80% burn injuries and this cannot be a ground to set aside the conviction.

He would submit that Doctor PW-31 had deposed in clear terms that deceased was mentally fit to make statement and as such no doubt can be raised as regards the mental capacity of the deceased to make statement wherein she had assigned the reasons for her self-immolation. Hence, he prays for rejection of the appeal.

Discussion, Findings and Conclusion

8. The facts narrated hereinabove would suffice for examining as to whether the orders of the courts below requires to be sustained or modified or set aside. Elaborate narration of factual aspects would only burden this judgment and as such we desist from doing so, except to the extent required.

9. The solemnisation of marriage between second respondent and Mrs. Akkamahadevi on 16.05.2010 is not in dispute. She having died on 24.12.2010 due to burn injuries sustained on 20.12.2010 is also not in dispute.

9.1 The gist of the prosecution case is that there was consistent demand for dowry and deceased was tortured for additional dowry and unable to sustain the

physical and mental torture meted out to her, she had committed suicide by self-immolation viz, by pouring kerosene and lighting herself.

9.2 The complainant, PW-24 who is the father of the deceased has not supported the case of the prosecution and he has deposed that accused had looked after the deceased well. Long and short of the deposition of PW-24 (father of deceased) is that he did not support the case of the prosecution. PW-1 witness to the inquest panchanama too has turned hostile. The neighbours of the house where the deceased was residing namely PW-3 and PW-4 have turned hostile.

PW-5 and PW-21 whom the prosecution claimed of having known the fact of illtreatment given by the accused to the deceased have turned hostile. The persons who are said to have advised the accused not to ill-treat the deceased have also turned hostile. The persons who were present during the marriage talks of the deceased and accused No.1 namely PW-7 to PW-9 have also not supported the case of the prosecution.

Other witnesses namely PW-10, 11, 12, 19, 18, 30 as well as the mother of the deceased PW-22 have not supported the case of the prosecution. Dr. Suresh Basarkod (PW.26) who tendered the case sheet attested by casualty medical officer of Kumareshwar Hospital, Bagalkot, where deceased was admitted, has deposed that Dr. Pramod Mirji (PW-31) and Dr. Vishwanath are competent to speak about medical treatment extended to Mahadevi (deceased). However, Dr. Vishwanath was not examined.

9.3 Dr. Pramod Mirji has been examined as PW-31 and he has stated that deceased was conscious and she was complaining of pain. He has further deposed to the following effect:

"The patient was conscious and she was complaining of pain. There were burn injuries over entire body excepted face. The injured has burn injuries of 70% - 80%. The patient was in a position to speak. She was under my treatment till she died on 24.12.2010 at about 5.15 a.m. Now I see Ex.P-46 and it is Xerox copy of case sheet of the said injured. In case sheet Ex.P-46 I have mentioned that the patient was under agony due to pain and pulse not filed and B.P. was not recordable and therefore I have opined that general condition of patient was poor."

Perusal of his cross-examination would indicate that he had treated the deceased for four days and the pulse rate and blood pressure was not recorded on the day of admission and it is kept blank in the case sheet Ex.P-46. He also admits that entries in the case sheet would reflect that the general condition of the deceased was poor. He further admits that blood pressure of the deceased was not

recordable and pulse was feeble. He further admits that deceased was suffering from breathlessness as per the entries found in Ex.P-46 (case sheet). He has also admitted that even though patient was conscious at times the patient had not been in a position to talk.

9.4 Dr. Mahalingappa Kori (PW32) who was CMO at Kumareshwar Hospital, Bagalkot during the relevant period when the dying declaration (Ex.P-45) was recorded has deposed that he was working as casualty medical officer at the hospital on 20.12.2010 from 2:00 PM to 8:00 PM.

He has further deposed that Tahasildar (PW25) had expressed his intention to record the dying declaration of injured Mahadevi and he had requested him to be present at the time of recording of the statement. He states that he examined Mahadevi at that time and she was conscious and in a condition to speak. He also states that the statement of Mahadevi was recorded between 4:20 PM to 5:15 PM. He has identified his endorsement and signature at Ex- P45(b) on the dying declaration.

10. Taluka executive Magistrate Basappa Laxmappa Gothe PW-25 is said to have recorded the dying declaration of the deceased as per Ex.P-45, based on which the accused has been convicted by the trial court and affirmed by the High Court. PW25 who was the Tahasildar at Bagalkot during the relevant period has deposed that he was working as Tahasildar in Bagalkot from 08/07/2009 to 27/04/2011.

He has deposed that Dr. Mahalingappa Kori (PW32) was present when he recorded the statement of Mahadevi from 4:20 PM to 5:15 PM. He further deposes that Dr. MC Kori had talked to the deceased and found that she was in a fit condition to give statement. He further deposes that he was also convinced that Mahadevi was fit to give statement. He has identified the statement recorded by him as Ex-P45 and also the LTM of the deceased found in Ex-P45.

He has deposed that doctor was present throughout the time of recording of statement and the signature & endorsement of the doctor marked as Ex-P45(b) has been identified. PW25 had also conducted inquest panchnama (Ex.P-1) & recorded the statement of Renavva Chandappa Guli (PW22) and he has identified his signature found on the statement of PW22 (Ex.P40) as Ex.P-40(a). He has denied the suggestion that deceased Mahadevi had not given any statement.

11. The learned Sessions judge has referred to the judgment of this Court in the case of Salim Gulab Pathan vs. State of Maharashtra (2012) 6 SCC 606 whereunder it has been held that dying declaration can be the sole basis of

conviction if it inspires full confidence of the court. Yet another judgment of this Court in the case of Atbir vs. Government (2010) 9 SCC 1 which is to the same effect has also been relied upon by the Sessions Judge to convict the accused, whereunder it has been held that dying declaration can be the sole basis for conviction.

"(a) If it satisfies the conscience of the court that deceased was in a fit state of mind at the time of making the statement and that it was not a case of prompting or imagination;

(b) It is true and voluntary and no further corroboration is required;

(c) It is not suspicious."

It has also been observed therein that rule requiring corroboration is merely a rule of prudence. If the dying declaration discloses that deceased was unconscious or could never have made any statement, the conviction cannot be sustained. Even nonmentioning of minute details cannot be a ground to reject the said declaration and brief statement would suffice. If the evidence on record would suggest that the deceased was not in a fit condition to make statement or declaration, the medical opinion cannot prevail.

12. In the instant case, we notice from the facts that the deceased had self-immolated. A plain reading of the dying declaration Ex.P-45 recorded by PW-25 would indicate that reason for self-immolation by the deceased was on account of her inability to tolerate the torture meted out by the accused persons and she was not able to withstand the same and as such she self-immolated in the agricultural land.

The physical disability suffered by her on account of the burn injuries sustained would not disentitle her to make statement, if said statement had been made consciously knowing the consequences thereof and such statement or declaration cannot be brushed aside only on the ground of burn injuries (in the instant case 70% to 80%) having been sustained by her. As such, the contention raised by the learned advocates appearing for the appellants cannot be accepted or in other words the dying declaration cannot be brushed aside.

The acceptance of the dying declaration by the court below is just a proper and under similar circumstances, this Court, in the case of Kamlavva And Anr Vs. State of Karnataka (2009) 13 SCC 614 has held that even in circumstances where the burn injuries was to the extent of 70% to 80% the dying declaration can be accepted and it has been further held to the following effect.

"20. The next and the most vital issue which was raised is regarding the admissibility of the dying declaration stated to have been made by the deceased before her death. Before dealing with the factual aspect of the dying declaration, it would be necessary to know the exact legal position which has been laid down and reiterated by this Court time and again.

21. The question as to admissibility of a dying declaration came up before this Court in several cases. In Laxman v. State of Maharashtra, wherein also a question regarding the admissibility of the dying declaration was raised, the Constitution Bench held that the Court must decide that the declarant was in a fit state of mind to make the declaration, but where the eyewitnesses' evidence including the evidence of a Magistrate who had recorded the dying declaration to that effect was available, mere absence of doctor's certification as to the fitness of the declarant's state of mind, would not ipso facto render the dying declaration unacceptable. It was further held that the evidentiary value of such dying declaration would depend upon the facts and circumstances of each particular case.

22. In para 3 of the said judgment in Laxman case, this Court discussed the juristic theory regarding acceptability of a dying declaration in the following manner: (SCC p. 713)

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement."

23. The Constitution Bench in Laxman case also referred to an earlier decision of this Court in Koll Chunilal Savjl v. State of Gujarat wherein it was held that the ultimate test with regard to the admissibility of a dying declaration is whether the dying declaration can be held to be a truthful one and voluntarily given. In the said decision it was also held that before recording the declaration, the officer concerned must find that the declarant was in a fit condition to make the statement. The aforesaid ratio of Koli Chunilal Savji case was affirmed by the Constitution Bench in Laxman caseÂ¹.

24. In Vikas v. State of Maharashtra this Court elaborately discussed the previous relevant decisions governing the legality of dying declaration and

observed in para 45 as follows: (SCC pp. 529-30) 45. The Court, referring to earlier case law, summed up principles governing dying declaration as under: (Paniben case, SCC pp. 480-81, para 18)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(vii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the court in order to satisfy itself whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

25. After referring to the decision of this Court in Khushal Rao v. State of Bombay, this Court in Vikas reiterated the legal position that where a dying declaration is recorded by a competent Magistrate, it would stand on a much higher footing inasmuch as a competent Magistrate has no axe to grind against the person named in the dying declaration of the victim and in absence of

circumstances showing anything to the contrary, he should not be disbelieved by the court."

13. In the light of above discussion, we are of the considered view that the dying declaration Ex.P-45 in the instant case which came to be accepted by the courts below cannot be found fault with, particularly, in the backdrop of the evidence tendered by the person who recorded the same as per Ex.P-45 and he having stood to his ground in the cross-examination and having spoken about her mental capability to make such statement and that too consciously. Dr. M.C. Kori PW-32 in whose presence the dying declaration Ex.P-45 came to be recorded by PW-25 has categorically stated that deceased Mahadevi was conscious and she was in a condition to speak.

There is no prescribed format for recording the dying declaration. The perusal of the dying declaration in the instant case clearly suggests the same to be genuine and the maker has stated the true story. On going through the same, it appears to our mind as it appeared to the trial court and the High Court to be genuine, true and not tainted with doubt or shrouded with mystery. The contents of the dying declaration Ex.P-45 suggests the possible explanation of the occurrence of the incident and it also appears to be the truthful version of the maker.

14. The incidental question that would also arise for our consideration is: whether the conviction of the accused under Section 304B would be sustainable? The ingredients to be satisfied for convicting an accused for the offence punishable under Section 304B are:

"(i) The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.

(ii) Such a death should have occurred within seven years of her marriage.

(iii) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

(iv) Such cruelty or harassment should be for or in connection with demand of dowry.

(v) Such cruelty or harassment is shown to have been meted out to the woman soon before her death."

15. This Court in the case of Bansilal vs. State of Haryana (2011) 11 SCC 359 has held that, to attract the provision of Section 304B of the IPC, one of the main ingredients of the offence which is required to be established is that "soon before

her death", she was subjected to cruelty and harassment "in connection with the demand of dowry". It has been further held:

"20. Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death. It may also be pertinent to mention herein that the expression "soon before her death" has not been defined in either of the statutes.

Therefore, in each case, the Court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. (Vide T. Aruntperunjothi v. State ; Devi Lal v. State of Rajasthan ; State of Rajasthan v. Jaggu Ram ; Anand Kumar v. State of M.P. and Undavalli Narayana Rao v. State of A.P."

16. In Sher Singh Alias Partapa vs State of Haryana (2015) 1 SCR 29 it has been held:

"16. As is already noted above, Section 113-B of the Evidence Act and Section 304-B IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word "deemed" in Section 304-B to distinguish this provision from the others. In actuality, however, it is well-nigh impossible to give a sensible and legally acceptable meaning to these provisions, unless the word "shown" is used as synonymous to "prove" and the word "presume" as freely interchangeable with the word "deemed".

In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word "deem" to denote a set of circumstances which call to be construed contrary to what they actually are. In criminal legislation, however, it is unpalatable to adopt this approach by rote. We have the high authority of the Constitution Bench of this Court both in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory [AIR 1953 SC 333] and State of T.N. v. Arooran Sugars Ltd. [(1997) 1 SCC 326] , requiring the Court to ascertain the purpose behind the statutory fiction brought about by the use of the word "deemed" so as to give full effect to the legislation and carry it to its logical conclusion.

We may add that it is generally posited that there are rebuttable as well as irrebuttable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had

neither intention to commit it nor active participation in its commission. It is after deep cogitation that we consider it imperative to construe the word "shown" in Section 304-B IPC as to, in fact, connote "prove". In other words, it is for the prosecution to prove that a "dowry death" has occurred, namely,

(i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured,

(ii) within seven years of her marriage,

(iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband,

(iv) in connection with any demand for dowry, and

(v) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry.

We are aware that the word "soon" finds place in Section 304-B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304-B or the suicide under Section 306 IPC.

Once the presence of these concomitants is established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt.

It seems to us that what Parliament intended by using the word "deemed" was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt. This interpretation provides the accused a chance of proving their innocence. This is also the postulation of Section 101 of the Evidence Act. The purpose of Section 113-B of the Evidence Act and Section 304-B IPC, in our opinion, is to counter what is commonly encountered-the lack or the absence of evidence in the case of suicide or death of a woman within seven years of marriage.

If the word "shown" has to be given its ordinary meaning then it would only require the prosecution to merely present its evidence in court, not necessarily through oral deposition, and thereupon make the accused lead detailed evidence to be followed by that of the prosecution. This procedure is unknown to common law systems, and beyond the contemplation of CrPC."

17. In the instant case as noticed hereinabove, the parents of the deceased and other witnesses who had recorded their statement before the I.O. with regard to alleged demand of dowry have retraced their steps or in other words have turned hostile and have not supported the prosecution and have denied of having made any such statement before police. Be that as it may.

This Court having arrived at a conclusion that the dying declaration made by the deceased as per Ex.P-45 being genuine and when said declaration is perused it would not suggest that there was any proximate nexus to the act of committing suicide on account of preceding demand for dowry or in other words the demand of dowry on any particular date having triggered the deceased to commit the suicide or forced her to selfimmolate. This proximate link not being available in the facts obtained in the present case, we are of the considered view that conviction of the accused under Section 304B cannot be sustained.

18. In the aforesaid analysis of law, when we turn our attention to the facts on hand it would emerge from the records that appellantsaccused persons have been convicted for the offences punishable under Sections 498A, 304B of IPC and Section 3 and 4 of Dowry Prohibition Act. Section 498A of IPC prescribes imprisonment which may extend to 3 years and the Explanation thereunder has two parts.

The first part would relate to subjecting a married woman to cruelty for any willful conduct which is of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb, or health (whether mental or physical). Second Part i.e. Clause (b) of Section 498A would indicate that cruelty would encompass harassment of a married woman where such harassment is with a view to pressurize her or any person related to her to meet any unlawful demand for any property or valuable security on account of failure by her or any person related to her to meet such demand.

19. In Dinesh Seth v State of NCT of Delhi (2008) 14 SCC 94, this Court has examined the width and scope of two Sections i.e., 304B & 498A and was held to be different. Section 304B deals with cases of death as a result of cruelty or harassment within 7 years of marriage.

Whereas Section 498A has a wider spectrum and it covers all cases in which the wife is subjected to cruelty by her husband or relative of the husband which may result in death by way of suicide or cause grave injury or danger to life, limb or health (whether mental or physical) or even harassment caused with a view to coerce the woman or any person related to her to meet any unlawful demand of property or valuable security.

We have already discussed hereinabove as to there being no nexus for the deceased to self-immolate herself on account of such demand having preceded immediately before her death. As such we have opined that convicting the accused/appellants under Section 304B was improper or the prosecution had failed to establish that the death had occurred and soon before her death she was subjected to cruelty or harassment by the appellants.

20. It has been held in Dinesh Seth's (Supra) Case

"24. Section 498-A was added to IPC by amending Act 46 of 1983 in the backdrop of growing menace of dowry related cases in which the women were subjected to cruelty and harassment and were forced to commit suicide. This section lays down that if the husband or his relative subjects a woman to cruelty, then he/she is liable to be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation appended to this section defines the term "cruelty" to mean any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

25. After three years, Section 304-B was inserted by amending Act 43 of 1986 to deal with cases involving dowry deaths occurring within seven years of marriage. Sub-section (1) of Section 304-B IPC lays down that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. By virtue of Explanation appearing below sub-section (1), the word "dowry" used therein carries the same meaning as is contained in Section 2 of the Dowry Prohibition Act, 1961.

26. The ingredient of cruelty is common to Sections 304-B and 498-A IPC, but the width and scope of the two sections is different, inasmuch as Section 304-B deals with cases of death as a result of cruelty or harassment within seven years of marriage, Section 498-A has a wider spectrum and it covers all cases in which the wife is subjected to cruelty by her husband or relative of the husband which may result in death by way of suicide or cause grave injury or danger to life, limb or health (whether mental or physical) or even harassment caused with a

view to coerce the woman or any person related to her to meet unlawful demand for property or valuable security."

21. Section 498A having a wider scope, it will have to be examined as to whether the accused is to be convicted for the offence punishable under Section 498A or in other words, the order of conviction passed by Sessions Court and affirmed by High Court deserves to be affirmed, notwithstanding the conviction under Section 304B having been set aside.

Irrespective of the fact that accused have been acquitted for the offence punishable under Section 304B, Section 498A would cover the cases in which the wife is subjected to cruelty by husband or relatives of the husband which may result in death by way of suicide or cause grave injury or danger to life, limb or health (whether mental or physical). In the light of dying declaration (Ex.P- 45) having been accepted to have been made by the deceased and the contents of the same disclosing that she was unable to withstand the torture meted out, which resulted in her committing suicide would suffice to convict the accused for the offence punishable under Section 498A.

22. This takes us to the next question as to whether the accused can be convicted for the offence punishable under Section 306 IPC though not charged for said offence. Similar situation arose before this Court in Dalbir Singh vs State of U.P. (2004) 5 SCC 334 where a charge for the offence under Section 306 had not been framed against the accused though accused had faced trial in respect of the charges under Section 302, 498A and 304B IPC as has happened in the instant case where the accused have been tried for the offences punishable under Section 498A, 304B IPC and Section 3 and 4 of DP Act and this Court had answered in the affirmative in Dalbir Singh's case by arriving at the following conclusion:

"17. There is a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 CrPC, it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion.

In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangaraboina Sreenu [(1997) 5 SCC 348 : 1997 SCC (Cri) 690] was not

correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC.

18. The facts and circumstances of the present case may now be examined in the light of the principle discussed above. The trial court and also the High Court have recorded a clear finding and with which we are in complete agreement, that the accused had started making a demand of dowry soon after marriage. Even after his father-in-law had given him a colour TV, a scooter and money for purchasing the flat, he did not feel satisfied and continued to harass his wife.

He used to frequently taunt her that some of the items given by way of gift at the time of marriage were of poor quality and were not of his standard. He had also assaulted his wife and even his seven-year-old daughter on several occasions. It was in such circumstances that Vimla took the extreme step of not only setting herself on fire, but also her two daughters, one of whom was only one-year old. The letter written by Vimla just before taking such an extreme step speaks volumes about the treatment meted out to her by the accused. Therefore, the basic ingredients of the offence under Section 306 IPC have been established by the prosecution.

These features of the prosecution case were sought to be established by the prosecution in order to substantiate the charge under Section 498-A IPC and also for showing that the accused had a motive to commit the crime of murder for which he was actually charged. The cross-examination of the witnesses shows that every effort was made to demolish the aforesaid aspect of the prosecution case, namely, that neither was any demand of dowry made nor were any gifts or presents or money received by the accused at a subsequent stage and that Vimla had not been subjected to any kind of harassment or ill-treatment.

The next question to be seen is whether the accused was confronted with the aforesaid features of the prosecution case in his statement under Section 313 CrPC. His statement runs into six pages where every aspect of the prosecution case referred to above was put to him. He also gave a long written statement in accordance with Section 233(2) CrPC wherein he admitted that Vimla committed suicide. He also admitted that the scooter and colour TV were subsequently given to him by his in-laws but came out with a plea that he had paid money and purchased the same from his in-laws.

There is no aspect of the prosecution which may not have been put to him. We are, therefore, of the opinion that in view of the material on record, the conviction under Section 306 IPC can safely be recorded and the same would not result in failure of justice in any manner. The record shows that the accused

was taken into custody on 29-3-1991 and was released from jail after the decision of the High Court on 20-3-1997 and thus he has undergone nearly six years of imprisonment. In our opinion, the period already undergone (as undertrial and after conviction) would meet the ends of justice."

22. In Dinesh Seth's case (supra) it has been held that in certain situations, an accused can be convicted for an offence with which he may not have been specifically charged and an error, omission or irregularity in framing of charge is, by itself not sufficient for upsetting the conviction. The only exception to this general rule as can be noticed from Section 464 of Cr.P.C. is, unless the accused is able to demonstrate a failure of justice has in fact been occasioned thereby. It has been held thereunder as:

"21. The ratio of the abovenoted judgments is that in certain situations an accused can be convicted for an offence with which he may not have been specifically charged and that an error, omission or irregularity in the framing of charge is, by itself not sufficient for upsetting the conviction. The appellate, confirming or revisional court can interfere in such matters only if it is shown that error, omission or irregularity in the framing of charge has caused prejudice to the accused and failure of justice has been occasioned."

23. After noticing the meaning to be attached to the plain language of Section 221 and Section 464 of Cr.P.C. this Court in Dinesh Sethsupra has opined:

"11. A reading of the plain language of Sections 221(1) and (2) shows that if a single act or a series of acts constitute several offences and the prosecution is not certain about the particular offence then the accused can be charged with the allegation of having committed all, some or any of the offences. In such a case the accused can be convicted of the offence with which he may not have been specifically charged but evidence produced by the prosecution proves that such an offence has, in fact, been committed.

12. Section 222(1) lays down that when a person is charged with an offence consisting of several particulars and combination of only some of the particulars constituting a minor offence is proved then he can be convicted of the minor offence with which he may not have been charged. Section 222(2) lays down that when a person is charged with an offence but the facts proved constitute a minor offence then he can be convicted of the minor offence despite the fact that he may not have been charged with that offence. Sub-section (3) of Section 222 lays down that a person charged with an offence, can be convicted of an attempt to commit such offence even though a separate charge may not have been framed on that account.

13. Section 464(1) lays down that any error, omission or irregularity in the framing of charge including any misjoinder of charges, will not invalidate a finding, sentence or order by a court of competent jurisdiction unless the higher court comes to a conclusion that failure of justice has been occasioned. Sub-section (2) of Section 464 specifies the modes which can be adopted by the court of appeal, confirmation or revision, if such court is of the opinion that a failure of justice has been occasioned on account of non-framing of charge or any error, omission or irregularity in the framing of charge."

24. In the light of aforesaid analysis, the question that would arise is: whether the accused in the instant case can be convicted for the offence punishable under Section 306 IPC? Section 306 reads as under:

"306. Abetment of suicide.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The basic ingredients of an offence under Section 306 is suicidal death and its abetment thereof. To attract the ingredients of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide would be necessary.

25. It would be necessary at this juncture itself to note the statement made by the deceased in her dying declaration Ex.P-45 which is to the following effect:

"I have been given in marriage xxx for the dowry all of them were harassing me by saying my father had given less dowry and customary gifts to the groom. As I couldn't tolerate the torture, I have set fire to myself by pouring on me at the shade situated in our land on 20.12.2010 in early morning at about 6:30 to 7:00. My husband xxx Bagalkot city."

(Emphasis supplied by us)

26. The court below had formulated point No.1 for its adjudication which is to the effect: whether the deceased Akkamahadevi died suicidal death? and, answered the same in the affirmative by opining that deceased died due to burn injuries which she had suffered on account of self-immolation. The act of cruelty has been spelt out by none else than the victim herself in her dying declaration Ex.P-45. She has in clear words stated all the accused were harassing her by stating that her father had given less dowry and customary gifts to her husband and being unable to tolerate this mental torture, she had set fire to herself on the fateful day.

The accused being the husband, father-in-law & mother-in-law are said to have harassed the deceased, subjected her to cruelty and the deceased has in clear terms stated in her dying declaration that she could not tolerate the same. Thus, the torture which has taken place within the four walls is supported by the statement of the victim and stands proved by virtue of dying declaration having been accepted by us. It is this act of torture which led the deceased to commit suicide and these acts have forced the deceased to commit suicide.

27. Omission to frame charge does not disable the court from convicting the accused for the offence which is found to have been proved on the evidence on record. The code has ample provisions to meet a situation like the one before us. From the statement of charge framed under Section 304B and in the alternative Section 306, it is clear that all the facts and ingredients for framing the charge for offence under Section 306 existed.

The mere omission on the part of the trial judge to mention Section 306 IPC with 498A would not preclude this Court from convicting the accused for the said offence when found proved. In the charge framed under Section 304B of IPC, it has been clearly mentioned that the accused has subjected the deceased to such cruelty and harassment as to drive her to commit suicide by self-immolation and as such non-framing of the specific charge would not be fatal in the instant case as no injustice is being caused to the accused.

28. This court in K. Prema S. Rao & anr v. Yadla Srinivasa Rao and others (2003) 1 SCC 217 has held that mere omission or defect in framing of charge would not be fatal if from the statement of charge under Section 304B and in the alternative Section 498A, it is clear that all facts and ingredients for framing of charge under Section 306 existed in the case, same would suffice. It was further held that:

"22. Mere omission or defect in framing charge does not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record. The Code of Criminal Procedure has ample provisions to meet a situation like the one before us. From the statement of charge framed under Section 304-B and in the alternative Section 498-A IPC (as quoted above) it is clear that all facts and ingredients for framing charge for offence under Section 306 IPC existed in the case.

The mere omission on the part of the trial Judge to mention Section 306 IPC with Section 498-A IPC does not preclude the court from convicting the accused for the said offence when found proved. In the alternate charge framed under Section 498-A IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide.

The provisions of Section 221 CrPC take care of such a situation and safeguard the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence. Section 221 CrPC needs reproduction:

"221. Where it is doubtful what offence has been committed.-

(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

23. The provision of sub-section (2) of Section 221 read with sub-section (1) of the said section can be taken aid of in convicting and sentencing Accused 1 of offence of abetment of suicide under Section 306 IPC along with or instead of Section 498-A IPC.

24. Section 215 allows the criminal court to ignore any error in stating either the offence or the particulars required to be stated in the charge, if the accused was not, in fact, misled by such error or omission in framing the charge and it has not occasioned a failure of justice. See Section 215 CrPC which reads:

"215. Effect of errors.-No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

25. As provided in Section 215 CrPC omission to frame charge under Section 306 IPC has not resulted in any failure of justice. We find no necessity to remit the matter to the trial court for framing charge under Section 306 IPC and direct a retrial for that charge. The accused cannot legitimately complain of any want of opportunity to defend the charge under Section 306 IPC and a consequent failure of justice. The same facts found in evidence, which justify conviction of the appellant under Section 498-A for cruel treatment of his wife, make out a case against him under Section 306 IPC of having abetted commission of suicide by the wife.

The appellant was charged for an offence of higher degree causing "dowry death" under Section 304-B which is punishable with minimum sentence of seven years' rigorous imprisonment and maximum for life. Presumption under Section 113-A of the Evidence Act could also be raised against him on same facts constituting offence of cruelty under Section 498-A IPC. No further opportunity of defence is required to be granted to the appellant when he had ample opportunity to meet the charge under Section 498-A IPC."

29. In the aforesaid background and the evidence on record as already noticed by us hereinabove, it can be safely noted that High Court ought to have examined as to whether accused could have been convicted for an offence for which no charge was framed and not undertaking of such an exercise would result in failure of justice?

Thus, it will have to be seen from the facts unfolded in the present case as to whether the accused was aware of the basic ingredients of the offence for which they are being tried and whether the main facts sought to be established against them were explained to them clearly and whether they got a fair chance to defend themselves. If the answer is in the affirmative, then necessarily this Court will have to proceed further and examine as to whether accused can be convicted for the offence not charged and if the answer is in the negative it would result in acquittal of the accused for said offence.

In the instant case the dying declaration of the deceased would clearly indicate that deceased was mentally traumatized and she was unable to tolerate the torture and harassment meted out by the accused person on account of which she committed suicide.

It is this taunting or mental torture which she could not withstand and forced her to commit suicide by selfimmolation. In that view of the matter, we are of the considered opinion that accused persons are liable to be convicted for the offence punishable under Section 306 IPC though charge was not framed.

The accused (appellant Nos.1 and 2) are now aged about 66 and 61 years respectively. They have already spent one year, one month and 27 days in prison. They do not have any past history of criminal record. Hence, a lenient view has to be taken while imposing the sentence.

30. For the reasons afore-stated the appeal is allowed in part. The judgment and order of conviction passed by the Sessions Court in SC No.35 of 2011 dated 14.09.2012 as affirmed in Criminal Appeal No.2847 of 2012 by judgment dated 20.07.2022 is hereby modified.

The appellants are acquitted for the offences punishable under Section 304B IPC and Section 3 and 4 of Dowry Prohibition Act and convicted for the offence punishable under Section 306 and Section 498A read with Section 34 IPC and sentenced to imprisonment for the period already undergone with fine of Rs.5000/- each and in default to pay the fine to undergo one month simple imprisonment for each of the offence.

.....J. (S. Ravindra Bhat)

.....J. (Aravind Kumar)

New Delhi,

October 19, 2023

IN THE SUPREME COURT OF INDIA

Yashpal Jain
Vs.
Sushila Devi & Ors.
[Civil Appeal No. 4296 of 2023]

HEADNOTE – Issues twelve directions for speedy disposals of Civil Cases

JUDGMENT

Aravind Kumar, J.

PREFACE

1. Even after 41 years, the parties to this lis are still groping in the dark and litigating as to who should be brought on record as legal representative of the sole plaintiff Mrs. Urmila Devi (hereinafter referred to as 'Urmila Devi' for the sake of brevity). This is a classic case and a mirror to the fact that litigant public may become disillusioned with judicial processes due to inordinate delay in the legal proceedings, not reaching its logical end, and moving at a snail's pace due to dilatory tactics adopted by one or the other party.

The said suit, OS No.2 of 1982, was instituted for the relief to declare the sale deed, executed by Shri Mangal Singh (hereinafter referred to as 'first defendant' for the sake of convenience) in favour of defendants No.4 to 32 in respect of the suit properties described in the plaints schedule as item No.1 to 8, to be null and void by claiming to be the owner of the said properties; and for a decree of possession of the suit properties with costs.

BACKGROUND OF THE CASE:

2. When the aforesaid suit was still at infancy stage the soleplaintiff expired on 18.05.2007. One Mr. Manoj Kumar Jain filed an application to substitute him as her legal heir, by placing reliance on the Will dated 19.05.1999 and claiming to be a legatee under the said registered Will. He also filed an affidavit stating thereunder that Mr. Yashpal Jain (hereinafter referred to as 'appellant' for the sake of convenience) was a witness to the said registered Will.

The defendants objected to the said application contending inter alia that the appellant herein was the adopted son of late Urmila Devi by relying upon the adoption deed dated 06.01.1973 duly registered in the office of the Sub-Registrar. In the said proceedings, the present appellant also filed an affidavit stating thereunder that he was a witness to the Will dated 19.05.1999 executed

by Urmila Devi in favour of Manoj Kumar Jain. The application filed by Manoj Kumar Jain came to be allowed by order dated 24.02.2010.

2.1 Being aggrieved by the said Order the legal heirs of the first defendant namely, legal heirs of Mangal Singh, filed a Civil Revision No.2 of 2010 before the District Judge which came to be allowed by setting aside the Order of the Trial Court on the ground that applicant had stated during the course of the revisional proceedings that he would not press the said application and as such directed the Trial Court to consider the application filed by Yashpal Jain-appellant herein and permitted him to file an application seeking condonation of delay along with the application to bring on record the legal representatives of the sole plaintiff, since he had failed to do so earlier.

Accordingly, revision application came to be allowed by order dated 02.12.2011 and Mr. Yashpal Jain filed an application before the Trial Court for condoning the delay in filing such application and also prayed for abatement of suit to be set aside. The learned Trial Judge vide Order dated 09.05.2012 allowed the application by setting aside the abatement and permitted Yashpal Jain to be substituted as legal representative of late Urmila Devi.

3. At this juncture, we would like to point out that a careful perusal of the application and the orders passed by the courts below would indicate that the parties and the courts below seem to have proceeded on the footing that they were to adjudicate the rights of a legal heir which if seen in the light of expression used in the Code of Civil Procedure (hereinafter referred to as 'CPC') is impermissible, as it is not referable to 'legal heir' but 'legal representative' as defined under Section 2 (11) which reads:

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

On the death of a party to the suit it is the legal representative who is/are entitled to prosecute the proceedings and, in law, represent the estate of the deceased. The legal representative who is brought on record not only includes a legatee under a Will but also an intermeddler of the property who would be entitled to sue and to be sued and/or continue to prosecute the proceedings. This vital aspect seems to have been lost sight of by the courts below conveniently.

4. Be that as it may, the aforesaid Urmila Devi who claimed to be Bhumidar and owner in possession of land situated in village Sonargaon, Patti Katulsyun, District Garhwal, Uttarakhand has contended in her suit that the suit schedule

properties were looked after by Mangal Singh- the first defendant and as he had fraudulently obtained a Bhumidar Sanad of the land comprising No.77, 3/16 Nalis, she had filed an application under Section 137-A of UP Act No.1 of 1951 before the Tehsildar/Assistant Collector, Pauri Garhwal, challenging the said Bhumidari Sanad obtained by the first defendant, which was held in her favour by the Tehsildar, and confirmed by the appellate authority.

Not being satisfied with the said order, the first defendant had filed a second appeal before the Revenue Board which came to be allowed in favour of Mangal Singh, against which a review petition was filed thereon by Urmila Devi which came to be allowed on 30.08.1982. The said order was challenged before the High Court of Uttarakhand in Writ Petition (M/S) No.342 of 2005 (old No.14655 of 1983) by Mangal Singh.

In the said proceedings a substitution application came to be filed by the legal representative of Mangal Singh stating thereunder that Yashpal Jain (appellant herein) is the legal representative of deceased Urmila Devi and prayed for his name to be substituted. The said application came to be allowed vide order dated 24.02.2012 and appellant herein was substituted as the legal representative of Urmila Devi in writ proceedings. There is no further challenge to said order or in other words, it has attained finality.

5. As already noticed hereinabove, appellant herein filed an application for substitution as legal representative of the original plaintiff-Urmila Devi along with an application for condoning the delay in filing said application and to set aside the abatement. The said application came to be allowed vide Order dated 09.05.2012. Being aggrieved by the said order, the Legal Representatives of Mangal Singh filed Civil Revision No.4 of 2012 before the District Judge who affirmed the Order of the Trial Court and dismissed the Revision Petition by Order dated 13.12.2012.

The legal representatives of Mangal Singh filed WP No.144 of 2013 before the High Court challenging the Orders dated 09.05.2012 and 13.12.2012 passed by the Trial Court and the Revisional Court, respectively. The High Court allowed the writ petition by quashing the impugned orders and rejecting the application of the appellant herein, thereby restoring the original order dated 17.05.2008 wherein Manoj Jain had been ordered for being substituted as legal representative of late Urmila Devi on the strength of the registered Will dated 19.05.1999 propounded by him with a direction to conclude the proceedings within a period of 9 months. Being aggrieved by the same, the present appeal has been filed.

SUBMISSIONS ON BEHALF OF THE PARTIES

6. We have heard the arguments of Ms. Rachna Srivastava, learned Senior Advocate, appearing for the appellant and Mr. Rameshwar Prasad Goyal, learned counsel, appearing for the respondents.

7. It is the contention of Ms. Rachna Srivastava, learned Senior Advocate appearing for the appellant, that the High Court committed a serious error in upsetting the findings of the Trial Court and the Revisional Court whereunder the discretionary power was exercised by condoning the delay while setting aside the abatement and allowing the application of the appellant herein to be brought on record as legal representative of deceased Urmila Devi; the High Court erred in not considering the fact that courts below had recorded a clear finding that appellant herein was the sole surviving legal representative of the deceased plaintiff and as such it ought not to have interfered with the well-reasoned order passed by the Trial Court as affirmed by the Revisional Court; She would also contend that defendants in this suit who were the writ petitioners in WP(M/S) 342 of 2005 (old number 14655 of 1983) had substituted the appellant herein as legal representative of Urmila Devi in dispute related to the suit schedule property (involved in OS No.2 of 1982) and as such defendants cannot be permitted to take stand contrary to same. Hence, it is contended that impugned order is liable to be set aside.

8. Per contra, Shri Rameshwar Prasad Goyal, learned counsel appearing for the respondents, supports the impugned order and contends that in the Writ Petition No.144 of 2013, appellant herein who was a party therein had not filed a counter-affidavit and as such High Court had recorded that non-traversing of petition averments would amount to admission and had also taken note of the fact that appellant herein had filed an affidavit before the Trial Court on 25.10.2008 whereunder he has accepted the Will dated 19.05.1999 executed by deceased Urmila Devi and thereby supported the stand of Manoj Kumar Jain being the legal heir of Urmila Devi.

He would also draw the attention of this Court to yet another affidavit dated 21.08.2009 filed by the appellant himself in OS No.2 of 1982 whereunder he has again supported the Will dated 19.05.1999 or in other words, supported the substitution of Shri Manoj Kumar Jain as legal representative of deceased Urmila Devi. Hence, he contends there is no illegality committed by the High Court. It is further contended that appellant was having knowledge of OS No.2 of 1982 and as such he cannot plead ignorance for the delay. Lastly, challenging the adoption on the ground that same cannot be the basis for the appellant herein to be brought on record, he has sought for rejection of this appeal.

POINTS FOR CONSIDERATION

9. Having heard the learned counsels appearing for the parties and after bestowing our careful and anxious consideration to the rival contentions raised at the Bar, we are of the considered view that following points would arise for our consideration:

(i) Whether the impugned order dated 28.11.2019 passed in Writ Petition (M/S) No.144 of 2013 quashing the orders dated 13.12.2012 rendered in Civil Revision No.4 of 2012 by the High Court whereby the order dated 09.05.2012 passed by trial court allowing the impleadment application filed by the appellant herein had been rejected, is to be sustained or set aside?

(ii) Whether any further direction or directions requires to be issued for concluding the proceedings in a time bound manner on account of Suit No.2 of 1985 pending for trial for past 41 years?

(iii) What order?

RE: POINT No.(i)

10. It is not in dispute that Smt. Urmila Devi had instituted a suit O.S. No.2 of 1982 against Mangal Singh and others in respect of suit schedule properties as described in the plaint schedule for declaring the sale deeds executed by Mangal Singh in favour of defendant Nos.4 to 32, as mentioned in Plaint Schedule 1 to 18, as null and void; and during the pendency of the said suit the plaintiff- Smt. Urmila Devi expired on 18.05.2007. On her demise Mr. Manoj Kumar Jain filed an application on 17.05.2008 for substitution as her legal heir and claiming right legatee under the Will dated 19.05.1999.

This application was followed by an affidavit of the appellant (Yashpal Jain) dated 25.10.2008 stating thereunder that his mother Urmila Devi had executed a Will dated 19.05.1999 in favour of Manoj Kumar Jain and also stating thereunder that Will was duly registered. The legal heirs of the defendant objected the said substitution contending, inter alia, that the present appellant is the adopted son of Urmila Devi and said adoption deed was duly registered on 06.01.1973 in the office of the Sub-Registrar.

It was also contended that Shri Rajendra Prasad Jain was the holder of power of attorney of Urmila Devi and on his (Rajendra Prasad) death on 18.02.2001, she had executed another power of attorney on 21.04.2001 appointing Virender Kumar Jain and on the basis of the same the name of his wife came to be mutated in respect of the lands indicated thereunder.

Hence, it was contended that Will propounded by Manoj Kumar Jain was fabricated and forged. Hence, it was prayed that claim of Manoj Kumar Jain for being substituted as legal representative of Urmila Devi is liable to be rejected. Yet another affidavit was also filed by the appellant on 21.08.2009 reiterating the contents of the earlier affidavit dated 25.10.2008. In other words, it was contended that Manoj Kumar Jain was not the legal representative of Urmila Devi.

11. The learned trial judge allowed the application by order dated 24.02.2010 for substitution by condoning the delay with costs and directed substitution of Manoj Kumar to be the legal representative of deceased plaintiff Urmila Devi.

12. The aforestated order dated 24.02.2010 came to be challenged by legal representatives of Mangal Singh in Civil Revision No.2 of 2010 which resulted in same being allowed vide order dated 02.12.2011 and the order of the trial court dated 24.02.2010 was set aside by taking note of the fact that Manoj Kumar Jain had stated in his application 27/C along with affidavit that he would not press the substitution application.

The appellant was granted liberty to file an application for impleadment as a party before the lower court. In this background appellant herein filed an application for substitution as legal representative of Urmila Devi and this application came to be filed on 05.12.2011 along with application for condonation of delay and to set aside abatement, which was opposed by the legal representatives of the first defendants by filing objections and contending that application filed by Yashpal Jain is not maintainable.

After hearing the learned Advocates appearing for the parties learned trial judge by a detailed order dated 09.05.2012 condoned the delay and allowed the application of the appellant to be brought on record as legal representative of the deceased-plaintiff Urmila Devi. This order came to be affirmed by order dated 13.12.2012 in Civil Revision No.4 of 2012 filed by the legal representatives of Mangal Singh.

13. It is pertinent to mention at this juncture that during the life time of Urmila Devi an application came to be filed under Section 137- A of U.P. Act No.1 of 1951 before Tehsildar/Assistant Collector, Pauri Garhwal contending that the Bhumidari Sanad had been obtained by Mangal Singh, with reference to land comprising Nos.77, 3/16 Nalis, by adopting forgery, which came to be accepted. The appeal filed by Mangal Singh before the Assistant Collector against the order of Tehsildar did not yield any result, which gave rise to filing of a Second Appeal before the Revenue Board culminating in said appeal being allowed in favour of Mangal Singh.

The Review Petition filed against the order of the Second Appellate Authority came to be allowed and this was challenged by Mangal Singh in WP (M/S) No.342 of 2005 (Old No.14655 of 1983). During the pendency of the said writ petition, as noticed earlier, Urmila Devi expired and an application for substitution came to be filed by the very same legal representatives of Mangal Singh (who are Respondent Nos.1 to 5 herein) vide Annexure P-10, specially pleading thereunder to delete the name of Respondent No.4 (therein) Smt. Urmila Devi and substitute Yashpal Jain (appellant herein) in her place.

This application came to be allowed by order dated 24.02.2012 as reflected in Annexure RA/2 annexed to the rejoinder affidavit of the appellant. In this view of the matter, it cannot be gain said by the respondents herein that the appellant is not to be substituted as legal representative of deceased Urmila Devi. It is for this cogent reason, the learned trial judge vide order dated 09.05.2012 allowed the substitution and permitted the appellant herein to be substituted as legal representative of deceased plaintiff-Urmila Devi. Rightly so, this order of the trial court came to be affirmed by the Revisional Court vide order dated 13.12.2012.

It would be apt and appropriate to note at this juncture and at the cost of repetition that Manoj Kumar Jain, who had initially filed an application for substitution which came to be allowed by the trial court by order dated 24.02.2010, which order was carried in Civil Revision No.2 of 2010 and in the said proceedings an application came to be filed by said Manoj Kumar Jain stating thereunder that he does not intend to press the application filed by him for being substituted as legal representative of Urmila Devi. This fact also persuaded the Revisional Court to remand the matter back to the trial court vide order dated 02.12.2011.

14. In this factual scenario, the defendants cannot be heard to contend that appellant herein had filed two affidavits (Annexure P-5 and Annexure P-7) whereunder he had admitted Manoj Kumar Jain as the legal representative of deceased Urmila Devi and as such he cannot turn around to assert himself to be the legal representative of Urmila Devi, for the simple reason that affidavits filed by the appellant Yashpal Jain does not even remotely suggest or indicate that he have admitted Manoj Kumar Jain being the legal representative of Urmila Devi. On the other hand, said affidavits which has been perused by us, would clearly indicate that he has only affirmed and reiterated the fact that he is a signatory to the said Will and nothing more or nothing less.

15. Mr. Rameshwar Prasad Goyal, learned counsel appearing for the respondents herein, have also contended that on account of nontraversing of the writ petition averments the contents thereof are to be presumed true and correct, though

seems to be an attractive proposition at first brush, it cannot be accepted for the simple reason that consent does not confer jurisdiction.

Even otherwise, the records would clearly indicate that Manoj Kumar Jain himself had filed an application, accompanied by affidavit before the Revisional Court in Civil Revision No.2 of 2010, stating thereunder that he would not press the application filed by him for substitution and this was sufficient for the High Court to have accepted the plea of the appellant or in other words, it should have sustained the order of trial court and ordered for appellant being brought on record as legal representative of deceased Urmila Devi.

16. At the cost of repetition, it requires to be noticed that respondents herein themselves having filed an application in WP (M/S) No.342 of 2005 for bringing the present appellant (Yashpal Jain) as her legal representative in the writ petition (M/S) 342/2005 and prosecuted the same, would reflect that they were in the acquaintance of the fact that present appellant being the legal representative of deceased Urmila Devi but yet are attempting to contend that Manoj Kumar Jain is to be brought on record as legal representative of Urmila Devi.

In this background the impugned order which has resulted in rejection of the application filed by the appellant to be brought on record as legal representative of Urmila Devi if sustained would result in the estate of deceased plaintiff not being represented, as a consequence of which suit would abate or would be put to a silent death by the defendants without claim made in the suit being adjudicated on merits. Hence, point No.(i) is answered in favour of the appellant and against respondents and therefore, the impugned order is set aside.

17. As far as the question of right of the appellant over the suit schedule properties, we are of the view, by virtue of adoption propounded, it is an issue which would be at large before the learned trial court and the veracity of the Will dated 19.05.1999 alleged to have been executed by Urmila Devi in favour of Manoj Kumar Jain, is to be decided in appropriate proceedings and as such we desist from expressing any opinion in that regard and contentions of both parties are kept open.

RE: POINT No.(ii)

18. Case papers on hand would disclose that dispute between the parties relates back to 02.02.1982 the date of institution of the suit No.2/1982 by the original plaintiff Smt. Urmila Devi. As to the stage of the suit namely, as to whether trial has commenced or otherwise, the material available before this court are silent but the fact remains that proceedings have got protracted from 1982 till demise

of Urmila Devi on 18.05.2007 and thereafter it has moved at a snail's pace or in other words, the litigation seems to have not been taken to its logical end for reasons best known.

The death of the original plaintiff opened up a flood of litigation and as a result of it, several orders came to be passed by the courts below, both in original jurisdiction and revisional jurisdiction, which also reached the High Cout and ultimately before this Court by the present proceedings. The cause for delay has been myriad.

It is for this reason we have expressed our anguish at the beginning of this judgment as to likelihood of litigant public getting disillusioned of justice delivery system due to delays. It would be apt to note that certain litigations initiated more than 50 years back are still pending. As per the data extracted from National Judicial Data Grid (NJGD), we have noted hereinbelow the three oldest civil and criminal cases:

TOP 3 PENDING CIVIL CASES

1. West Bengal

(a) Civil Judge Senior Division, Malda - Partition Suit No.30 of 1952 - registered on 04.04.1952

(b) Civil Judge, Sr. Division, Medinipur - Other Suit No.39 of 2017 -registered on 15.09.1953.

2. Uttar Pradesh

Civil Judge, Junior Division, Varanasi - Original Suit No.319 of 1953 - registered on 02.07.1953

TOP 3 PENDING CTRIMINAL CASES

(1) Maharashtra

(a) Chief Judicial Magistrate, Amravati - R.C.C. No.2319 of 1959 - registered on 11.04.1959

(b) CJJD & JMFC Mehkar - R.C.C. No.61 of 1960 - registered on 06.10.1959

(c) Chief Judicial Magistrate, Amravati - R.C.C. No.778 of 1961 - registered on 30.08.1961

19. The causes of delay are numerous loopholes in the law itself, redundant and voluminous paper work, absence of the witnesses, adjournments sought and granted for no justifiable reason as also delay in service of summons, lack of implementation of the provisions of Code of Civil Procedure (hereinafter referred to as 'CPC') and Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C'), as the case may be. These are only illustrative and not exhaustive. It is not that there has been any lack of effort to speed up the Justice Delivery System. However, the attempts made hitherto have yielded limited results.

Time and again various provisions of C.P.C. and Cr.P.C. have been amended to cater the ever-increasing demands for speedy disposal of cases and the results are not inspiring. There is an urgent need to take pro-active steps to not only clear the huge backlog of cases at all levels but there should be introspection by all the stakeholders to gear up to meet the aspirations of the litigant public who would only seek for speedy justice and to curtail the methods adopted to delay the proceedings which may suit certain section or class of the litigant public. When millions of consumers of justice file their cases by knocking at the doors of the courts of first instance, they expect speedy justice.

Thus, an onerous responsibility vests on all stakeholders to ensure that the people's faith in this system is not eroded on account of delayed justice. It is imperative to note that about 6 per cent of the population in India is affected by litigation, in such a scenario the courts would play an important role in the life of a nation governed by Rule of Law. Peace and Tranquility in the society and harmonious relationship between the citizens are achieved on account of effective administration of justice and its delivery system, even the economic growth of a country is dependent on the robust Justice Delivery System which we have in our country.

20. When the efficiency has become the hallmark of modern civilization and in all spheres of life there is an urgent need to hasten the pace of delivery of justice by reducing the time period occupied by the trial of suits and criminal proceedings as also the offshoots of such litigation which results in revisions, appeals etc. arising out of them.

A historical outlook of steps taken to curb the Judicial delay

21. The issue of delay has been bothering all the stakeholders for ages. Way back in the year 1924, a committee was constituted known as the Civil Justice Committee to enquire into the issues relating to changes and improvements necessary to bring in "more speedy, economical and satisfactory dispatch of the business transacted in the courts" under the chairmanship of Justice Rankin. Delay in disposal of cases beyond a period of two and a half years was a crucial

concern and it was emphasized by the said Committee that "where the arrears are unmanageable, improvement in the methods can only palliate.

It cannot cure".1 The Central Government under the chairmanship of Justice S.R. Das set up a committee known as High Court Arrears Committee in the year 1949. In 1979, the Law Commission of India in its 77th Report on 'delay and arrear in trial courts' observed that the delay in civil or criminal matters have decreased the confidence among the general public about the judicial system.

It was emphasized that civil cases should be treated as lapsed if the matter was not disposed of within one year from the date of registration, whereas a criminal matter should be disposed within six months and in case of sessions trial it should not go beyond one year. It was also suggested to timely fill up the vacancies, appoint additional and ad-hoc judges and increase overall judicial strength. Some of the key recommendations of the Committee were:

"(i) Improvement of judicial system to meet modern requirement of society.

(ii) Time for scrutiny of the cases should not take more than one week.

(iii) Summons and notices should be attached with the plaint at the stage of filing, without stating the filing date.

(iv) Procedural reforms in civil and criminal case proceedings."

22. The 79th reports of the Law Commission of India pertains to "Delay and Arrears in High Courts and Appellate Court" which when read along with the 77th report as aforementioned, has provided a step-by-step manual for managerial judging, prescribing upper time limits for trial procedure to ensure speedy disposal of cases to be followed by Trial Courts, High Courts, and other appellate courts. Its recommendations range from ways in which judges should expedite the service of summons to the drafting of the decree and includes the suggestions that they should become more active in conciliation efforts. Other notable recommendations include:

"(i) Appointment of administrative justices who supervise the work of process servers;

(ii) Fixing of dates should be done by presiding officer and not readers, cases should deliberately not be fixed when the prospects of them being taken up for low and a standard of number of cases pending before courts should be decided and whenever there are indications that the number of cases will go beyond the standard, additional courts should be set up."

23. The 120th Law Commission Report on 'Manpower planning in judiciary: a blueprint' recommended that the most effective way to overcome the heavy pendency of cases clogging on the judicial system is by reducing judicial delay. It further states that the judiciary is overburdened by large number of cases filed each year, which clog an already stressed system. The report states that in 2002, when the ratio of the judges to population was 13 judges to 10,00,000 people, the Supreme Court recommended, in All India Judges Association vs. Union of India (2002) 4 SCC 247, to increase the ratio to at least 50 judges per 10,00,000 people.

24. The Malimath Committee, constituted on Reforms of Criminal Justice System, suggested multiple recommendations in its report, for Criminal Justice System, however some of them can be applied even in the civil litigation:

1. Time limit for filing written statements, amendments of pleadings, service of summons etc., must be prescribed.

2. So far as possible, parties must endeavor to decide or to settle the cases outside the court and to carry out the same objective, Section 89 in CPC, was introduced.

3. To record the evidences by issuing the Commission instead of by presence before the court of law. For the purpose of the same under Section 75 of the CPC, commission can be issued for collecting evidence.

4. Time frame need to be provided for oral argument before the court of law.

5. Restriction on Right of appeal.

25. Similarly, the Delhi High Court undertook a pilot project titled "Zero Pendency Court Project Report'2 whereunder 22 specific pilot and reference courts were referred to collect data to examine meticulously the life cycles of the legal cases. At its core, the project sought to understand how the cases progressed through the legal system in the absence of any backlog.

The Data collected from the pilot project led to suggestions of some major recommendations which included, primarily, the assessment of Judicial strength, which as per the report, is regarded as a vital attribute to the cause of delay. The report in this regard suggested to arrive at an optimal judge strength to handle cases pending in different court and went on to provide the Ideal number of judges for different court.

The report also highlighted that in criminal cases, prosecution evidence hearings accounts for the Highest percentage of court hearings however when it comes to

allocation of time, the courts tend to dedicate more minutes to final arguments and the issuance of final orders. In civil cases, miscellaneous hearings are common, but final order proceedings receive more time nevertheless, judges allocate a greater amount of time to the final order or judgment hearings.

26. Melvin M Belli, a member of the California Bar, in his article titled "The Law's Delays: Reforming Unnecessary Delay in Civil Litigation", which was prepared as a project for the Belli society, has noted "Trial delays or the period of the American Legal System". The backlog of the system has become so typical that a plaintiff has to wait 5 years for trial of a simple personal injury claimed. In case, if there is an appeal, a final disposition of the case may occur 10 years after plaintiff has been injured and the following factors were outlined as the major contributors to the delay:

(i) The inefficient management of the court system by the judiciary.

(ii) A Tremendous increase in litigation.

(iii) The philosophy of procrastination of many judges and lawyers, and

(iv) The priority of criminal or civil cases on the court calendar.

To tackle the aforesaid problems, the following remedial measures were suggested as possible solutions:

1) Appointment of surrogate judges (auditors, referees, judges pro tempore) to handle certain cases. The idea of using surrogate judges is to avoid unnecessary adjudication under formal trials. This is followed in Massachusetts, where court appointed auditors or referees, who were practicing attorneys, used to adjudge motor vehicle tort cases. They report their findings of facts and conclusions to the court and the parties may accept the auditor's report as final or request a trial. If the case goes to trial, the auditor's findings are prima facie evidence and may be read to the jury.

2) The imposition of interest accruing retroactively from the time of incident, rather than from time of judgment, to remove defendant's incentives to delay.

3) The elevation of civil cases to parity with criminal cases so that civil cases will not be usurped.

4) A requirement that judges set definite trial dates and honor them, so that litigation cannot be delayed by one of the attorneys.

DELAY ON ACCOUNT OF PROCEDURAL LAWS

27. At the outset, it is necessary to point out the reasons for delay in civil trial namely:

(i) Absence of strict compliance with the provisions of CPC;

(ii) Misuse of processes of the court;

(iii) Lengthy/prolix evidence and arguments. Nonutilization of provisions of the CPC namely Order X (examination of parties at the first hearing);

(v) Non-Awarding of realistic cost for frivolous and vexatious litigation;

(vi) Lack of adequate training and appropriate orientation course to judicial officers and lawyers;

(vii) Lack of prioritization of cases;

(viii) Lack of accountability and transparency.

28. Apart from the above reasons, the other vital reasons include the over-tolerant nature of the courts below while extending their olive branch to grant adjournment at the drop of the hat and thereby bringing the entire judicial process to a grinding halt. It is crucial to understand that the wheels of justice must not merely turn, they must turn without friction, without bringing it to a grinding halt due to unwarranted delay. It is for such reasons that the system itself is being ridiculed not only by the litigant public but also by the general public, thereby showing signs of constant fear of delay in the minds of public which might occur during the resolution of dispute, dissuading them from knocking at the doors of justice.

All the stakeholders of the system have to be alive to this alarming situation and should thwart any attempt to pollute the stream of judicial process and same requires to be dealt with iron hands and curbed by nipping them at the bud, as otherwise the confidence of the public in the system would slowly be eroded. Be it the litigant public or Member of the Bar or anyone connected in the process of dispensation of justice, should not be allowed to dilute the judicial processes by delaying the said process by in any manner whatsoever. As held by this Court in T. Arivandandam vs. T.V. Satyapal & Another AIR (1977) 4 SCC 467 the answer to an irresponsible suit or litigation would be a vigilant judge.

This analogy requires to be stretched in the instant case and to all the pending matters by necessarily holding that every stakeholder in the process of

dispensation of justice is required to act swiftly, diligently, without giving scope for any delay in dispensation of justice. Thus, an onerous responsibility rests on the shoulders of the presiding officer of every court, who should be cautious and vigilant against such indolent acts and persons who attempt to thwart quick dispensation of justice.

A response is expected from all parties involved, with a special emphasis on the presiding officer. The presiding officer must exercise due diligence to ensure that proceedings are conducted efficiently and without unnecessary delays. While it's important to maintain a friendly and cooperative atmosphere with the members of the Bar, this should not be misused as a pretext for frequent adjournment requests.

A word of caution to the learned members of the Bar, at this juncture, would also be necessary because of they being considered as another wheel of the chariot of dispensation of justice. They should be circumspect in seeking adjournments, that too in old matters or matters which have been pending for decades and desist from making request or prayer for grant of adjournments for any reason whatsoever and should not take the goodness of the presiding officer as his/her weakness.

29. In-fact, the utilization of the provision of CPC to the hilt would reduce the delays. It is on account of non-application of many provisions of the CPC by the presiding officers of the courts is one of the reason or cause for delay in the proceedings or disputes not reaching to its logical conclusion.

30. The very fact of the pendency of the present suit No. 2 of 1982, in the instant case, for the past 41 years is reflective of the fact, as to how some of the civil courts are functioning and also depicting how stakeholders are contributing to such delays either directly or indirectly. The procedure that is being adopted by the courts below or specifically the trial courts is contrary to the express provisions of the CPC. It can also be noticed that there are party induced delays.

It is laid down under Orders VIII Rule (1) that a defendant shall at or before the first hearing or within 30 days, or 90 days as the court may permit, present a written statement of his defence. In most cases, there would be no difficulty in presenting such a written statement on the date fixed, and no adjournment should be given for the said purpose except for a good cause shown, and in proper cases, costs should be awarded to the opposite side, namely realistic costs.

However, this is seldom found. Delay in filing the written statement and seeking adjournments is also another tactic used by the parties to litigation to delay the proceedings No doubt in catena of judgments including Kailash vs. Nanku 2005

(4) SCC 480, Serum Advocates Bar Association, Tamil Nadu vs Union of India, AIR 2005 SC 3353. Bharat Kalra vs. Raj Kishan Chhabra (2022) SCC OnLine SC 613 and Shoraj Singh vs Charan Singh (2018) SCC OnLine All 6613 the time limit prescribed under the CPC has been held to be directory and not mandatory which by itself does not mean that adjournments if sought should be granted for mere asking.

Only when such prayer being honest and prayer sought with a bona-fide intention, which we will have to be demonstrated in express terms, at least by way of an affidavit, such prayers should be entertained as otherwise the purpose of the legislative mandate would get defeated and the purpose of the amendment brought to CPC by Act 22 of 2002 would also become otiose.

In other words, it is high time that the presiding officers of all the trial courts across the country strictly enforce the time schedule prescribed under sub-rule (1) of Rule (1) of Order VIII in its letter and spirit rather than extending the olive branch on account of said provision being held directory to its illogical end even where circumstances of a particular case does not warrant time being enlarged.

Although Order XVII of the CPC indicate under the heading "adjournments", making it explicitly clear the procedure which requires to be adopted by the civil courts in the matter of trial, as evident from plain reading of the said provision would reveal, seems to have been completely lost sight of by all the stakeholders, which can be held as one of the root cause for delay in disposal of civil cases. It would be apt and appropriate to extract Order XVII of the CPC and it reads:

ORDER XVII

"1. Court may grant time and adjourn hearing"

(1) The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three time to a party during hearing of the suit.

(2) Costs of adjournment.- In every such case the Court shall fix a day for the further hearing of the suit, and [shall make such orders as to costs occasioned by the adjournment or such higher costs as the court deems fit:

Provided that, -

(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary.

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party,

(c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment,

(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

(e) 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 it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or crossexamination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid."

The High Court of Karnataka in the matter of M. Mahalingam vs. Shashikala reported in ILR Karnataka 4055 had an occasion to deal with this rule and it was observed as under:

"17. The proviso to sub-rule (2) of Rule 1 of Order XVII was introduced by the code of Civil Procedure (Amendment) Rules, 1976. The object and reason behind the introduction of this proviso was that, when hearing of evidence has once begun such hearing shall be continued from day to day. The said provision is being made more strict so that once such stage is reached, an adjournment should be granted only for unavoidable reasons. A few other restrictions were also being imposed on the grant of adjournments.

The intention in enacting the said proviso is that, when the hearing of the suit has commenced, it shall be continued from day-to-day, until all the witnesses in attendance have been examined. In other words, it provided that a suit being tried like a sessions case in a Criminal Court. Therefore, the Rule is, once trial begins, evidence should be recorded on day-to-day basis. Even in exceptional cases, if an adjournment becomes necessary, it has to be adjourned to the following day only. Clauses-(b) (c) and (d) were introduced restricting the power of the Court to grant adjournments on the grounds set out therein.

These clauses make it clear that, the fact that a pleader of a party is engaged in another Court, is not a ground for adjournment. Even the illness of the pleader and inability of a pleader to conduct a case is not a ground for adjournment, unless the Court is satisfied that the party applying for adjournment could not have engaged another pleader in time. It also provides for the Court to record the statement of witnesses who are present in Court, when the party who summoned him and the party who has to crossexamine, the said witnesses and their counsel being not present Therefore, it is clear that the Court can be liberal in granting adjournments before the commencement of the Trial.

But once the trial commences, there is an obligation cast on the Court to conduct the said trial day-to-day until all the witnesses in attendance have been examined. Unfortunately, this procedure which is in the statute book since 1976, is followed more in breach. Adjournments are sought for and granted by the Courts as a matter of course. The intention of the Parliament in enacting the said provision was not appreciated. In spite of introduction of the proviso, there was no marked change in the trial of suits. Adjournments continued to dominate and obstruct speedy trial. Therefore, the parliament amended the law once again and now an attempt is made to control the power of the courts in granting adjournments.

18. This time sub-rule (1) and (2) of Rule 1 of Order XVII was amended substantially by the code of Civil Procedure (Amendment) Act, 1999. The object and reason behind the amendment Act was that, every effort should be made to expedite the disposal of civil suits and proceedings so that justice may not be delayed. The committee on Subordinate Legislation (11th Lok Sabha) recommended that it should be made obligatory to record reasons for adjournment of cases as well as award of actual or higher cost and not merely notional cost against the parties seeking adjournment in favour of the opposite party. Further limit up to three adjournments has also been fixed in a case.

19. The amended Sub-rule (1) of Rule 1 provides that at any stage of the suit, if sufficient cause is shown, the Court may adjourn the hearing of the suit for the reasons to be recorded in writing. Therefore, an adjournment cannot be granted for a mere asking. There should be sufficient cause for such an adjournment. Before granting adjournment, the Court has to record in writing the reasons, which constituted sufficient cause for it to adjourn the case. The proviso to sub-rule (1) of Rule 1 puts an embargo on the Court's power to grant adjournments, in as much as, it restricts the said power to grant adjournments to three times to a party during the hearing of the suit.

Therefore, the Court cannot exercise its power of granting adjournments arbitrarily, whimsically and it should know its limitations. The amendment to

sub-rule (2) of Rule 1 makes it obligatory on the part of the Court to make an order as to costs occasioned by the adjournments. This rule is intended to see that the imposition of costs may act as a deterrent to the party seeking adjournment when there being no sufficient cause. By such costs, the cost of litigation would increase and it may dissuade the party from seeking adjournment on flimsy grounds.

20. In spite of the legislative mandate reflected in the aforesaid provision, the Courts and the Lawyers continue to ignore the said statutory provisions and the requirement of holding a continuous trial day to day. The Courts, in practice, have buried the rule fathoms deep and have been granting adjournments on the flimsiest grounds. In every case these provisions are honoured more in breach than in compliance with the spirit of providing justice expeditiously. It is rare indeed when a court holds a trial continuously in terms of this rule. If only the provisions of the Code are followed in letter and spirit, the grievance of delay in disposal of cases would have been reduced considerably.

The rule of law requires respect for the law by all the citizens of this country. The Judges and Lawyers who are the officers of the Court are No. exception. First, they should respect the rule of law, i.e., these statutory provisions. Without any exception they cannot plead any difficulty in implementing these provisions in letter and spirit. They are duty bound to act according to these statutory provisions. Without doing what we are legally expected to do, we are barking up at the wrong tree and by this process we are deceiving ourselves. Any number of amendments to the Code or any efforts to reform the law would have no effect, unless the Courts give effect to the statutory provisions contained in the Code.

If the Courts do not implement the law, one cannot find fault with the Advocates or the litigants. If these rules are implemented in letter and spirit, it may lead to some inconvenience and hardship as, for more than a century, the Judges, the lawyers and litigants are used to a particular atmosphere in Court. It is this atmosphere in Courts, which has no legal support and is the cause for delay in disposal of cases. Therefore, it is high time in the interest of speedy disposal of cases, these rules are implemented; once implemented, in course of time, lawyers and litigants would fall in line.

In order to implement these statutory provisions as amended, what is required is a change of mind set among the Judges and they must have the courage to depart from the practice which is in vogue. They must remind themselves that till now these provisions are not followed and the procedure which is adopted in Courts was totally different from what is provided under the statute and thus has no legal basis. That is the real cause for delay in disposal of cases.

Therefore, the need of the hour is a change of mental attitude, firstly, on the part of the judges and secondly, on the part of lawyers and litigants. A beginning has to be made. It has to be done by Judges and Judges alone. In spite of the criticism and the amendment to the law made by the Parliament, if the Judges are not sensitive and do not give effect to these provisions which are made with an avowed object of speedy disposal of cases, the Judges would be failing in their duty.

Therefore, one may not blame the Code for delay in disposal of cases. The delay is on account of not following the provisions of the Code and in not knowing the philosophy behind these statutory provisions. Even now it is not too late for the Judges and Lawyers to give effect to the statutory provisions and render speedy justice to the litigants. Time has come that this malady should be treated with even handed at all levels.

21. In fact this view finds support from the observations made by the Law Commission in the Reports on the Code of Civil Procedure:

"In the 14th Report of the Law Commission of India on "Reform of Judicial Administration", the Commission notes with concern the failure of the Courts to appreciate that Order 17 Rule 1 contemplates the continued hearing of a case, once it has started, from day to day until it is finished. It noted with concern that the judiciary seemed to think that the interrupted hearings should be a rule and day to day hearings the exception. Both the lawyers and the subordinate judiciary still persist in floating these provisions by refusing to have a continuous trial.

27th Law Commission Report reads as under:

"There is a popular belief that the technicalities of legal procedure can be exploited and a case continued almost indefinitely if so desired. In a weak case, apart from numerous applications for adjournment, frivolous interlocutory applications are made, e.g. applications for amendment of the pleadings or for amendment of issues, examination of witnesses on commission summoning unnecessary witnesses etc.,

These tactics do not succeed before an experienced and astute Judge. They succeed only before Judges who have no adequate experience. And such tactics succeed not because of the observance, but because of the non-observance, of the rules of procedure. Delay under this item is, therefore, not due to any defects in procedure. Rules of procedure are intended to subserve and not to delay or defeat justice."

22. Therefore, while considering the prayer for grant of adjournment, it is necessary to keep in mind the legislative intent. After the trial commences, the legislative mandate is, it shall be continued from day to day until all the witnesses in attendance have been examined. Even to grant an adjournment beyond the following day exceptional reasons should exist and it should be recorded in writing before adjourning the hearing beyond the following day. A reading of the proviso makes it clear that the limitation of three adjournments contained in proviso to sub-rule (1) apply where adjournment is to be granted on account of circumstances which are beyond the control of that party.

Even in cases which may not strictly fall within the category of circumstances beyond the control of a party, the Court by resorting to the provisions of higher cost which can also include punitive cost grant adjournment beyond three times, having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case and compensate the party who is inconvenienced by such adjournment. The said cost cannot be notional. It should be realistic.

As far as possible actual cost incurred by the other party shall be awarded where the adjournment is found to be avoidable but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the ease. Therefore, an attempt is made by the Parliament to enable the Court to have complete control over the litigant and prevent parties from controlling the course of the litigation. The whole object is to deter the parties from seeking adjournment for the sake of mere adjournment.

If a party wants to have the luxury of an adjournment, he should be made to pay for such luxury and the opposite party who is inconvenienced is to be compensated. In other words, the cost of litigation should be made high in so far as a party who is not interested in speedy trial. A person who wants to obstruct the course of justice, delay the disposal of cases, abuse the process of court and wants to harass his opponent by virtue of his money power, for him the litigation should become costly which is not so now.

Therefore, this provision of imposition of cost to prevent the litigant from seeking adjournment, thus, delay the disposal of cases, is to be given full effect. It is a weapon in the armory of the Judge to control the course of litigation and expedite trial. In spite of this provision if the Judges do not understand the significance and importance of these amendments and allow the parties to control the course of litigation, it only shows either lack of will on their part to implement these statutory provisions or their inability to give effect to these statutory provisions.

23. When the litigants complain of delay in disposal of cases, they cannot seek adjournments as a matter of right, as it is against their interest. An adjournment at the instance of one party, puts the other party to inconvenience, which in turn gives rise to such complaints. But an adjournment may become necessary for various reasons. Therefore, in such circumstances it would be in the interest of justice to grant adjournment, but at the same time the party inconvenienced has to be duly compensated.

It is in this background the provision of Rule 1 of order XVII of CPC as amended has to be understood and given effect to. A party to a litigation cannot have any grievance for day-to-day trial and on the contrary he should welcome it. It is only those litigants who want to abuse the judicial process and wants to use this legal machinery as a weapon of oppression against his opponents can have any grievance. It is there, these amended provisions come in handy to the courts to prevent such abuse of the judicial process.

The Case Flow Management System Rules: An Overlooked Lifesaver

31. On the recommendation of this Court in 'Salem Bar Association vs. Union of India AIR 2003 SC 189=2003 (1) SCC 49 a committee was appointed to study the application on implementation of Case Flow Management system in India, and in response, 'Case Flow Management Rules for High Courts and Subordinate Courts' were meticulously crafted. These guidelines mirrored the suggestions outlined in the 'National Mission for Delivery of Justice and Legal Reform,' which served as a comprehensive blueprint for judicial reforms through its strategic initiatives from 2009 to 2012.

Furthermore, the introduction of the Justice A.M. Khanwilkar Committee on Case Management System aimed to align with these efforts. On the basis of above recommendation most of the states have adopted the concept of Case Flow Management and have framed their own Rules for ensuring timely delivery of justice since 2005. However, some of the States are yet to frame the rules. We request the Hon'ble Chief Justices of those High Courts where said Rules are yet to be framed to take immediate steps to formulate such rules.

32. Be that as it may, mere framing of the rules would not suffice the problem on hand, until and unless the spirit underlying in the making of the such rules is effectively implemented. The mode, method and manner in which it requires to be implemented is in the hands of the respective High Courts. In this regard, although many High Courts have constituted committees (with different nomenclature) to monitor the same, the effective implementation seems to have gone into oblivion.

Thus, it would be imperative on the part of the High Courts to ensure the object with which such committees were constituted would not remain on paper but are implemented in its letter and spirit by constant monitoring, at least by securing the reports from trial courts through the District Judges once in two months and keeping a watch and vigil particularly, over the old cases. Such Committees should focus their attention through monitoring efforts so as to keep a check on matters being adjourned for no justifiable reason. When such exercise is carried out with utmost dedication, it would necessarily yield positive results.

Therefore, both the existing committees and any yet-to-be-constituted Committees by the respective High Courts should make all endeavours to achieve the object of making such rules. The Hon'ble Chief Justices of the High Courts are requested to activate these Committees and ensure the implementation of the rules. It is in this background, with utmost concern the observations were made in the Chief Justice's Conference, 2016 towards strengthening Case Flow Management Rules for the purposes of not only reducing arrears but also for ensuring speedy trial.

Numbers speak more than words: A closer look to the Statistics of the National Judicial Data Grid

33. One of the gravest Administrative and structural delay in litigation in whole, appears to be because of judicial delay. According to National Judicial Data Grid, the figures available for the contribution of judicial delay in pendency of cases is alarming. The State-wise pendency of cases before the respective High Courts and overall Civil Courts as on 16.10.2023 are as under:

S. No	**Name of the State & High Courts**	**High Courts**		**Civil Courts**	
		Civil	Criminal	Civil	Criminal
1	Andhra Pradesh	2,12,317	37,615	4,15,774	4,40,468
2	Arunachal Pradesh (Gauhati High Court)	47,941	13,817	2,911	14,378
3	Assam (Gauhati High Court)			98,763	3,38,828
4	4 Bihar (Patna High Court)	1,08,550	87,779	5,07,039	3,022,705
5	Chattisgarh (Chhatisgarh High Court)	59,640	32,342	23,419	76,331
6	Goa (Bombay High Court)	6,01,362	1,14,309	26,040	30,521
7	Gujarat (Gujarat High	1,10,403	56,267	4,02,283	12,70,278

	Court)				
8	Haryana (Punjab & Haryana High Court)	2,76,432	1,65,363	4,55,539	11,13,672
9	Himachal Pradesh (Himachal Pradesh High Court)	81,875	13,618	1,63,805	3,70,345
10	Jharkhand (Jharkhand High Court)	37,565	46,895	85,359	4,21,577
11	Karnataka (Karnataka High Court)	2,535,097	45,802	9,33,869	10,69,156
12	Kerala (Kerala High Court)	1,99,169	55,659	5,56,950	13,70,576
13	Madhya Pradesh (Madhya Pradesh High Court)	2,74,085	1,75,924	3,68,346	16,37,442
14	Maharashtra (Bombay High Court)			15,96,833	34,09,391
15	Manipur (Manipur High Court)	4,567	493	5,049	2,670
16	Meghalaya (Meghalaya High Court)	883	189	3,517	10,880
17	Mizoram (Gauhati High Court)			2,980	3,120
18	Nagaland (Gauhati High Court)			1421	2747
19	Odisha (Orissa High Court)	1,08,154	38,078	3,50,358	15,05,895
20	Punjab (Punjab and Haryana High Court)			3,93,004	5,24,061
21	Rajasthan (Rajasthan High Court)	4,86,248	1,78,745	5,50,742	18,19,230
22	Sikkim (Sikkim High Court)	119	39	522	1,126
23	23 Tamil Nadu (Madras High Court)	4,89,316	58,164	7,48,895	6,56,014
24	Telangana (Telangana High Court)	2,20,677	30,974	3,38,275	5,33,262
25	Tripura (Tripura High Court)	1,075	138	11,719	32,952
26	Uttarakhand (Uttarakhand High Court)	28,117	21,898	37,760	2,80,476

27	Uttar Pradesh (Allahabad High Court)	5,62,794	4,94,366	16,38,238	96,34,553
28	West Bengal (Calcutta High Court)	1,69,651	27,275	609910	20,09,011
29	National Capital Territory of Delhi (Delhi High Court)	78,890	32,770	2,40,118	11,44,038
30	Jammu & Kashmir and Ladakh (High Court of J&K)	36443	8195	78,981	1,95,903
31	Andaman & Nicobar Islands (Calcutta High Court)			4,757	4,923
32	Chandigarh (High Court of Punjab & Haryana)			23419	76331
33	33 Lakshadweep (Kerala High Court)			140	365
34	Dadra and Nagar Haveli and Daman and Diu (Bombay High Court)			1412	1572
35	Puducherry (Madras High Court)			13,196	19,015
	TOTAL	67,31,370	17,36,714	1,06,91,343	3,30,43,812

34. Further, according to National Judicial Data Grid, if we consider the stage-wise pendency, it is revealed that majority of the pendency in cases is at the Evidence/ Argument/ Judgement stage (43,22,478), within which the maximum pendency is caused at the stage of hearing and evidence. High pendency is also caused during the Appearance/Service stage (27,03,493), within which the maximum pendency is appearance and service/summons related. The reasons behind the maximum pendency as stated by the NJDC has been ruled to be matters which are stayed (9,69,262) unattended (8,31,076) and awaiting records (8,219,929).

35. It is important to acknowledge that while striving for the oftcited goal of expeditious justice, courts, litigants, staff, and lawyers may encounter some level of inconvenience. However, this inconvenience should take a backseat in light of the Fundamental Duties enshrined in the Constitution, specifically Article 51A(j) which obligates every 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.

Article 51A is to be understood to be in a positive form with a view to strive towards excellence. The people should not conduct themselves so as to enable anyone to point fingers at them or blame them. "Excellence" means honest performance. It is the vision of the founder of constitution makers that citizens of this great country India that is Bharat, should discharge duties in an exemplary manner rather than perform halfheartedly.

The duties envisaged under Article 51A are obligatory on citizens. No doubt the fundamental duties cannot be enforced by Writs and it is in this background it has to be understood that the duties which are required to be performed by the citizens in general and particularly by the stakeholders of judicial dispensation system should ensure that they do discharge the obligations prescribed under the law in an exemplified manner and not blame worthy.

36. In the hallowed halls of justice, where the rights and liberties of every citizen are protected, we find ourselves at a critical juncture. Our Judiciary, the cornerstone of our democratic system, stands as the beacon of hope for those who seek remedy. Yet, it is a solemn truth that we must confront with unwavering resolve-the spectre of delay and pendency has cast a long shadow upon the very dispensation of justice.

In this sacred realm, where the scales of justice are meant to balance with precision, the backlog of cases and the interminable delays have reached a disconcerting crescendo. The relentless march of time, while it may heal wounds for some, it deepens the chasm of despair for litigants who await the enforcement of their rights. Hence, It is here, in the chambers of jurisprudence, that we must heed the clarion call of reform with unwavering urgency.

37. It is undisputedly accepted that the significance of a swift and efficient judiciary cannot be overstated. It is a cornerstone of democracy, a bulwark against tyranny, and the guarantor of individual liberties. The voices of the oppressed, the rights of the marginalized, the claims of the aggrieved-all are rendered hollow when justice is deferred. Every pending case represents a soul in limbo, waiting for closure and vindication. Every delay is an affront to the very ideals that underpin our legal system. Sadly, the concept of justice delayed is justice denied is not a mere truism, but an irrefutable truth.

Thus, we stand at a crossroads, not of our choosing but of our duty where the urgency of legal reforms in our judiciary cannot be overstated, for the pendulum of justice must swing unimpeded. The edifice of our democracy depends on a judiciary that dispenses justice not as an afterthought but as a paramount mission. We must adapt, we must reform, and we must ensure that justice is not a mirage but a tangible reality for all.

38. Therefore, in this pursuit, we call upon all stakeholders-the legal fraternity, the legislature, the executive, and the citizens themselves-to join hands in a concerted effort to untangle the web of delay and pendency. We must streamline procedures, bolster infrastructure, invest in technology, and empower our judiciary to meet the demands of our time.

39. The time for procrastination is long past, for justice cannot be a casualty of bureaucratic inefficiency. We must act now, for the hour is late, and the call for justice is unwavering. Let us, as guardians of the law, restore the faith of our citizens in the promise of a just and equitable society.

Let us embark on a journey of legal reform with urgency, for the legacy we leave will shape the destiny of a nation. In the halls of justice, let not the echoes of delay and pendency drown out the clarion call of reform.

The time is now, and justice waits for no one. Hence, the following requests to Hon'ble the Chief Justices of the High Courts are made and directions are issued to the trial courts to ensure 'speedy justice' is delivered.

RE: POINT NO.3

For the reasons aforestated, we proceed to pass the following

ORDER

1. Civil Appeal is allowed and the order dated 28.11.2019 passed in Writ Petition (M/S) No.144 of 2013 by High Court of Uttarakhand at Nainital is set aside and the order dated 09.05.2012 passed by the Trial Court as affirmed in Civil Revision No.4 of 2012 dated 13.12.2012 stands affirmed.

2. The following directions are issued:

i. All courts at district and taluka levels shall ensure proper execution of the summons and in a time bound manner as prescribed under Order V Rule (2) of CPC and same shall be monitored by Principal District Judges and after collating the statistics they shall forward the same to be placed before the committee constituted by the High Court for its consideration and monitoring.

ii. All courts at District and Taluka level shall ensure that written statement is filed within the prescribed limit namely as prescribed under Order VIII Rule 1 and preferably within 30 days and to assign reasons in writing as to why the time limit is being extended beyond 30 days as indicated under proviso to sub-Rule (1) of Order VIII of CPC.

iii. All courts at Districts and Talukas shall ensure after the pleadings are complete, the parties should be called upon to appear on the day fixed as indicated in Order X and record the admissions and denials and the court shall direct the parties to the suit to opt for either mode of the settlement outside the court as specified in sub-Section (1) of Section 89 and at the option of the parties shall fix the date of appearance before such forum or authority and in the event of the parties opting to any one of the modes of settlement directions be issued to appear on the date, time and venue fixed and the parties shall so appear before such authority/forum without any further notice at such designated place and time and it shall also be made clear in the reference order that trial is fixed beyond the period of two months making it clear that in the event of ADR not being fruitful, the trial would commence on the next day so fixed and would proceed on day-to-day basis.

iv. In the event of the party's failure to opt for ADR namely resolution of dispute as prescribed under Section 89(1) the court should frame the issues for its determination within one week preferably, in the open court.

v. Fixing of the date of trial shall be in consultation with the learned advocates appearing for the parties to enable them to adjust their calendar. Once the date of trial is fixed, the trial should proceed accordingly to the extent possible, on day-to-day basis.

vi. Learned trial judges of District and Taluka Courts shall as far as possible maintain the diary for ensuring that only such number of cases as can be handled on any given day for trial and complete the recording of evidence so as to avoid overcrowding of the cases and as a sequence of it would result in adjournment being sought and thereby preventing any inconvenience being caused to the stakeholders.

vii. The counsels representing the parties may be enlightened of the provisions of Order XI and Order XII so as to narrow down the scope of dispute and it would be also the onerous responsibility of the Bar Associations and Bar Councils to have periodical refresher courses and preferably by virtual mode.

viii. The trial courts shall scrupulously, meticulously and without fail comply with the provisions of Rule 1 of Order XVII and once the trial has commenced it shall be proceeded from day to day as contemplated under the proviso to Rule (2).

ix. The courts shall give meaningful effect to the provisions for payment of cost for ensuring that no adjournment is sought for procrastination of the litigation

and the opposite party is suitably compensated in the event of such adjournment is being granted.

x. At conclusion of trial the oral arguments shall be heard immediately and continuously and judgment be pronounced within the period stipulated under Order XX of CPC.

xi. The statistics relating to the cases pending in each court beyond 5 years shall be forwarded by every presiding officer to the Principal District Judge once in a month who (Principal District Judge/District Judge) shall collate the same and forward it to the review committee constituted by the respective High Courts for enabling it to take further steps.

xii. The Committee so constituted by the Hon'ble Chief Justice of the respective States shall meet at least once in two months and direct such corrective measures to be taken by concerned court as deemed fit and shall also monitor the old cases (preferably which are pending for more than 05 years) constantly.

It is also made clear that further directions for implementation of the above directions would be issued from time to time, if necessary, and as may be directed by this Court.

3. The Secretary General is directed to circulate the copy of this judgment to the Registrar General of all the High Courts for being placed before the respective Chief Justices for a consideration and suitable steps being taken as opined herein above.

4. We make no order as to costs.

.....J. (S. Ravindra Bhat)

.....J. (Aravind Kumar)

New Delhi,

October 20, 2023

1 Civil Justice Committee, 1924

2 The Inspiration for the project was a remark by Justice M.N. Venkatachalaih (former CJI) in a conversation with Justice Ravindra Bhat, one of the members of the State Court Management System Committee (SCMS) of the Delhi HC.

IN THE SUPREME COURT OF INDIA

Pradeep Mehra
Vs.
Harijivan J. Jethwa

Civil Appeal No. 6375 of 2023
(Arising Out of SLP (C) No. 8943 of 2021)

HEADNOTE – Under Section 47 CPC, the Executing Court can only go into questions that are limited to the execution of decree and can never go behind the decree.

JUDGMENT

Sudhanshu Dhulia, J.

1. This appeal before us shows how the execution proceedings under Order XXI of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'), are being delayed, and the process is being abused in the execution proceedings, to the peril of the helpless decree holder. As long back as in 1872 (when the CPC of 1859 was in operation), it was observed by the Privy Council that, "the difficulties of a litigant in India begin when he has obtained a decree"1. The situation, we are afraid, is no better even today.

2.The appellant is the landlord and the respondents are the tenants in a premises measuring about 3240 sq. ft. bearing C.T.S. No(s). 691/2, 691/3, 691/6, 691/7 and 691/8, situated at Mehra Industrial Compound, Andheri-Kurla Road, Sakinaka, Mumbai (hereinafter referred to as 'suit property'). We will also be referring to them as the decree holder and the judgement debtors respectively. The landlord, who is more than 70 years of age as of now, had filed a suit for eviction which ultimately resulted in a consent decree on 11.06.2005 where inter alia, it was stipulated that in case the judgment debtors (i.e., tenants) fail to pay the rent for two consecutive months, they could be evicted as the decree would become liable for execution.

3. The tenants evidently committed a default in payment of rent, and on an application moved by the decree holder, the court vide its order dated 12.02.2013 allowed the application holding that the decree holder/appellant is entitled to execute the decree. Meanwhile, for one reason or another, the proceedings before the executing court were 1 Raj Durbhunga v. Maharajah Coomar Ramaput Sing, 1872 SCC OnLine PC 16 : (1871-72) 14 Moo IA 605 at page 612 delayed and then the respondents/judgment debtors moved an

application before the "executing court" on 19.01.2017 challenging the order dated 12.02.2013 by which the court had allowed the execution of the decree. This as we can see was done nearly four years after the order dated 12.02.2013.

The maintainability of this application was challenged by the appellant/landlord. The executing court vide its order dated 28.09.2017 allowed the objections of the appellant and held that under the garb of the provisions of Section 47 CPC, the respondents/judgment debtors were actually challenging the order of the court dated 12.02.2013, which had allowed the execution of the decree; and which had attained finality.

The order dated 28.09.2017 was challenged by the respondents in revision, where it was set aside by an order dated 22.12.2017. The landlord's writ petition before the Bombay High Court against the above order was dismissed vide the impugned order dated 08.01.2021, and this is how the decree holder is now before us.

The appellate court and the High Court (in exercise of its powers under Article 227 of the Constitution of India), have held that under Section 47 of the CPC, the executing court can decide the matter as to whether the decree can be executed or not.

4.Section 47 of the CPC reads as under:

Section 47. Questions to be determined by the Court executing decree.

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

***** (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation 1.-- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.-- (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

5.A bare perusal of the aforesaid provision shows that all questions between the parties can be decided by the executing court. But the important aspect to remember is that these questions are limited to the "execution of the decree". The executing court can never go behind the decree. Under Section 47, CPC the executing court cannot examine the validity of the order of the court which had allowed the execution of the decree in 2013, unless the court's order is itself without jurisdiction. More importantly this order (the order dated 12.02.2013), was never challenged by the tenants/judgment debtors before any forum. The multiple stages a civil suit invariably has to go through before it reaches finality, is to ensure that any error in law is cured by the higher court. The appellate court, the second appellate court and the revisional court do not have the same powers, as the powers of the executing court, which are extremely limited. This was explained by this Court in Dhurandhar Prasad Singh v. Jai Prakash University and Others (2001) 6 SCC 534, in para 24, it had stated thus:

"24. ……. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus, it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing." This Court noted further:

"……. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant absented himself from the proceeding of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.

6.The reality is that pure civil matters take a long time to be decided, and regretfully it does not end with a decision, as execution of a decree is an entirely new phase in the long life of a civil litigation. The inordinate delay, which is universally caused throughout India in the execution of a decree, has been a cause of concern with this Court for several years. In Rahul S. Shah v. Jinendra Kumar Gandhi and Others (2021) 6 SCC 418, this Court had observed that a remedy which is provided for preventing injustice (in the Civil Procedure Code) is in fact being misused to cause injustice by preventing timely implementation of orders and execution of decrees. Then, it had observed as under:

"23. ……. The execution proceedings which are supposed to be a handmaid of justice and subserve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice." The above judgment is an important judgment in respect of Section 47 as well as Order XXI, CPC as

the three Judge Bench decision of this Court not only condemned the abuse of process done in the garb of exercise of powers under Section 47 read with Order XXI, CPC, but also gave certain directions to be followed by all Civil Courts in their exercise of powers in the execution of a decree. It further directed all the High Courts to update and amend their Rules relating to the execution of decrees so that the decrees are executed in a timely manner. As far as Section 47 is concerned, this Court had stated as under:

"24. In respect of execution of a decree, Section 47 CPC contemplates adjudication of limited nature of issues relating to execution i.e. discharge or satisfaction of the decree and is aligned with the consequential provisions of Order 21 CPC. Section 47 is intended to prevent multiplicity of suits. It simply lays down the procedure and the form whereby the court reaches a decision. For the applicability of the section, two essential requisites have to be kept in mind. Firstly, the question must be the one arising between the parties and secondly, the dispute relates to the execution, discharge or satisfaction of the decree. Thus, the objective of Section 47 is to prevent unwanted litigation and dispose of all objections as expeditiously as possible.

25. These provisions contemplate that for execution of decrees, executing court must not go beyond the decree. However, there is steady rise of proceedings akin to a retrial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the executing court and the decree-holder is deprived of the fruits of the litigation and the judgment- debtor, in abuse of process of law, is allowed to benefit from the subject-matter which he is otherwise not entitled to.

26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the courts first issue show-cause notice asking the judgment-

debtor as to why the decree should not be executed as is given under Order 21 Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgment-debtor sometimes misuses the provisions of Order 21 Rule 2 and Order 21 Rule 11 to set up an oral plea, which invariably leaves no option with the court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely." This Court then gave certain directions, which were to be mandatorily followed by all Courts dealing with civil suits and execution proceedings. Two of its directions were as follows:

"42…….

…….

…….

…….

42.8. The court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

……..

…….

42.12. The executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

42.13. ……..” It further directed all the High Courts to update their Rules relating to execution of decrees. It was as under:

“43. We further direct all the High Courts to reconsider and update all the Rules relating to execution of decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 CPC, within one year of the date of this order. The High Courts must ensure that the Rules are in consonance with CPC and the above directions, with an endeavour to expedite the process of execution with the use of information technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable.” We have referred to the above decision of this Court only to highlight the slow process in the execution of a decree and the concern of this Court, and its efforts in the past, to improve this situation.

7. The respondents herein are the tenants in the suit property at least since 1996. The present appellant is the landlord. The dispute between them was of sub-letting which led to the eviction suit before the Small Causes Court. During the proceedings, a settlement was arrived at between the parties, inter alia stipulating that the tenants would be liable for eviction if they commit a default of payment of rent for two successive months. According to the appellant / landlord, the tenants committed a default which led to the filing of the application under Order XXI Rule 11, CPC for execution of the decree. The executing court vide its order dated 12.02.2013 held that the decree is liable to be executed. This order was admittedly never challenged in appeal by the judgement debtor and has attained finality.

On 19.01.2017, i.e., nearly four years later, the judgement debtors moved an application before the executing court to set aside the order dated 12.02.2013, reiterating their previous stand that the tenants had never committed any default in payment of rent. Objection to the very maintainability of such an application

was raised by the decree holder, inter alia on the grounds that the order dated 12.02.2013 has attained finality and cannot be reopened. The executing court, to our mind, took the correct decision in allowing the objections of the decree holder and dismissing the application filed by the judgement debtors on the ground of maintainability. The reasons given by the executing court are as follows:

"8. Admittedly, the judgment debtor no. 1(a) to 1(e) and judgment debtor no. 2 have contended through their reply Exh. 20 that they are objecting to the execution of decree dated 11.06.2005 by way of application Exh. 18. It is also true that this Court being the Executing Court can consider the objections relating to the execution of decree under Section 47 of The Code of Civil Procedure, 1908. However, it is also settled principle of law that, this Court being a Executing Court cannot go behind the decree and has to execute the decree as it is. It needs to be mentioned at the cost of repetition that, already the Misc. Notice no.

152 of 2006 is decided by my learned predecessor by way of order dt.

12.02.2013. The said notice was contested by the judgment debtor no. 1(a) to 1(e) and judgment debtor no. 2. It was held that the present decree holder is entitled to execute the decree against the judgment debtors. It needs to be mentioned that, the said order is not challenged by the judgment debtor no.

1(a) to 1(e) and judgment debtor no. 2 before the appropriate forum. If the said fact is taken into consideration, indeed there is considerable substance in the argument of the learned Advocate for the decree holder that, the said order dt. 12.02.2013 has attained finality and now it is open to the judgment debtor no. 1(a) to 1(e) and judgment debtor no. 2 to agitate the same point again under the pretext of objection to the execution of decree.

9. That apart, what is most important is that this Court is not sitting in appeal against its own order. Also, it is not the case of the judgment debtor no. 1(a) to 1(e) and judgment debtor no. 2, that the order dated 12.02.2013 passed by my learned predecessor in Misc. Notice no. 152 of 2006 was passed without jurisdiction. Also, the ground of fraud or ex-parte passing the order dt 12.02.2013 is not raised by the judgment debtor no. 1(a) to 1(e) and judgment debtor no. 2 in the application Exh. 18. The Misc. Notice No. 152 of 2006 was decided on merits after due hearing both sides and the said order is not challenged before the appropriate appellate/revisional forum. If the said fact is considered, there can be hardly any doubt that the application Exh. 18 taken out by the judgment debtor no. 1(a) to 1(e) and judgment debtor no. 2 is nothing but an attempt to re-open the order passed on 12.02.2013 in Misc. Notice no .152 of 2006 under the garb of objection to the execution of decree which is not

permissible particularly when already the said notice is decided on merit and is not challenged till date. Considering the said fact, I have no hesitation to hold that, the application Exh. 18 is not maintainable." As we have already referred above, this order was taken in revision by the judgment debtors, where the revision was allowed and the order dated 28.09.2017 was set aside. The decree holder moved a petition before the Bombay High Court under Article 226/227 of the Constitution of India and the main ground taken before the High Court was that the revisional court fell into an error in holding that the application moved by the judgment debtors for setting aside the order dated 12.02.2013 comes within the purview of the power of the executing court given to it under Section 47 of the CPC. It was submitted by the decree holder before the High Court that the order dated 12.02.2013 had attained finality and res judicata would apply against the judgment debtors. In support of the submission the decree holder relied upon a decision of this court given in Barkat Ali & Anr. vs. Badrinarain (D) by Lrs. 2008 (4) SCC 615, where this court reiterated the settled position of law that the principles of res judicata are not only applicable in respect of separate proceedings but the general principles of res judicata are also applicable at the subsequent stage of the same proceedings and therefore the same court will be precluded to go into that question which has already been decided, or deemed to have been decided by it in the earlier stage. In other words, it will be barred by the principle of res judicata, or at least by the principle of constructive res judicata. The logic here is that an execution proceeding works in different stages and if the judgment debtors have failed to take an objection and have allowed the preliminary stage to come to an end and the matter has moved to the next stage, the judgment debtors cannot raise the objection subsequently, and revert back to an earlier stage of the proceeding. This is exactly one of the reasons given by the executing court in its order dated 28.09.2017 which we have already referred above. Merely, because it has not specifically referred to the principle of res judicata will not make any difference. The High Court even though found substance in the arguments of res judicata, nevertheless refused to interfere in the petition.

"9. The fact remains that when Exhibit-18 or Exhibit 19 was dealt with by the executing court, the issue of operation of principle of res judicata was not at all addressed by either of the parties and even the executing court so also Appellate Bench has no occasion to deal with the said issue. True it is the issue of question of law can be raised at any stage. However, that by itself will not call for exercising extraordinary jurisdiction in the present matter when aforesaid issue was not addressed before the courts below.

10. In that view of the matter, in my opinion, Petition deserves to be disposed of with the observation that the issue of res judicata as is raised by the Petitioner be

also looked into while dealing with the issue raised in Applications- Exhibits-18 and 19."

8. The High Court, to our mind, committed an error by not interfering in the matter. To our mind this case has unnecessarily been dragging on for so long; which is for nearly two decades.

The order dated 22.12.2017 by the Appellate Court and the order dated 08.01.2021 by the High Court are not sustainable in the eyes of law. We therefore allow the appeal and set aside the order of the High Court dated 08.01.2021 and the order of the appellate court dated 22.12.2017, while we uphold the order of the executing court dated 28.09.2017.

The executing court is hereby directed to proceed with and complete the execution as expeditiously as possible, but at any event within a period of six months from the date a copy of this order is placed before the court. The interim order dated 27.07.2021 hereby stands vacated.

.....J. (Sanjay Kishan Kaul)

.....J. (Sudhanshu Dhulia)

New Delhi.

October 30, 2023.

2. Study Material-G.K.

India in Asian Games 2023

28 Golds, 38 Silver and 41 Bronze

Indian athletes achieved unprecedented success at the 19th Asian Games. With an unprecedented haul of 107 medals that included 28 gold, 38 silvers and 41 bronze medals, India set a new benchmark for themselves at the **Asian Games 2023** in Hangzhou, the People's Republic of China.

It was the **first time** in Asian Games history that India's medals tally **crossed the three-figure mark**. By doing so, they became the only fourth country after China, Japan and the Republic of Korea to win 100 or more medals in a single edition of the Asian Games.

India sent 655 athletes to compete in 41 disciplines at the Asian Games 2023 held from September 19 to October 8. It was India's largest representation at the Asian Games in the 19 editions held so far.

At the 2018 Asian Games in Jakarta, Indonesia, India had sent 570 athletes and returned with 70 medals, including a haul of 16 gold medals. It was India's previous best medal haul.

Indian shooters won seven gold medals and accounted for the most gold medals for the country at Hangzhou 2023. Four of the seven gold medals for India in shooting at the Asian Games 2023 came with world records.

The Indian men's 10m air rifle team of former world champion Rudrankksh Patil along with Olympians Aishwary Pratap Singh Tomar and Divyansh Singh Panwar struck gold in the 10m air rifle with a world record of 1893.7.

Aishwary Pratap Singh Tomar was also part of the gold medal-winning men's team in the 50m rifle 3 positions. That gold also came with a world record of 1769.

Manu Bhaker combined with Esha Singh and Rhythm Sangwan for gold in the 25m pistol with a junior world record of 1759 while Sift Kaur Samra smashed the world record in the women's 50m rifle 3 positions with a huge score of 469.6 points.

The 17-year-old Palak Gulia won the gold in the women's 10m air pistol with an Asian Games record of 242.1.

Athletics turned out to be the most productive sport for India at the Asian Games 2023 with a total of 29 medals - six gold, 14 silver and nine bronze. Athletics at the Asian Games 2023 saw Indian track and field stars rewrite three national records.

Vithya Ramraj equalled the legendary PT Usha's national record in the women's 400m hurdles after almost four decades. She topped the heats but settled for bronze in the final.

Vithya Ramraj was also part of the mixed 4x400m relay team that included Muhammad Ajmal, Rajesh Ramesh and Subha Venkatesan. The Indian quarter won the silver medal.

In the men's decathlon, Tejaswin Shankar won silver with 7666 points to reset a 12-year-old national record.

Avinash Sable, meanwhile, set an Asian Games record in men's 3000m steeplechase for gold. Parul Chaudhary in the women's 5000m race and Annu Rani in the women's javelin throw also claimed significant milestones for India in athletics. It was the first time that India topped the podium in these three events at the Asian Games.

India eclipsed past achievements in archery as well. Indian archers, led by Jyothi Surekha Vennam and Ojas Pravin Deotale, won nine medals in archery at the Asian Games 2023.

The nine medals won by Indian archers included five golds. India's previous best was one gold, one silver and one bronze from Incheon 2014. In fact, India had won only 10 medals in archery in the previous 18 editions of the Asian Games.

Aditi Gopichand Swami broke the Asian Games record twice in the women's compound archery competition which was equalled by Jyothi Surekha Vennam later in the competition.

Though Indian swimmers did not win any medals, they reset six national records in swimming at the Asian Games 2023.

Five national swimming records were broken in relay competitions while one came through Olympian Srihari Nataraj in the individual in the men's 200m freestyle.

In cycling, the Indian men's sprint team of Yanglem Rojit Singh, David Beckham Elkatohchoongo, Ronaldo Singh Laitonjam and Esow Alben clocked 44.609 for a national record but could not make it to the medal rounds.

The men's doubles pair of Chirag Shetty and Satwiksairaj Rankireddy claimed India's maiden gold medal in badminton. The men's and women's Indian cricket teams also won their first gold medals in the Asian Games on their tournament debuts.

Meanwhile, Sanjana Bathula became the youngest Indian to win a medal at the Asian Games after she won the bronze in the women's speed skating 3000m relay event. She was 15 years, three months and 11 days old when she won the medal.
Jaggy Shivdasani became the oldest Indian to win an Asian Games medal at 65 years, seven months and 20 days. He was part of the men's bridge team that won the silver medal in Hangzhou.

Asian Games 2023: Records set by India

Athletics

- **Tejaswin Shankar** - national record in men's decathlon (7666 points)
- **Vithya Ramraj -** equalled national record in women's 400m hurdles (55.42s)
- **Vithya Ramraj,** Muhammad Ajmal, Rajesh Ramesh and Subha Venkatesan - national record in mixed 4x400m relay (3:14.34)
- **Avinash Sable** - Asian Games record in men's 3000m steeplechase (8:19:53)

Shooting

- **Sift Kaur Samra** - world record in women's 50m rifle 3 positions final (469.6 points)
- **Sift Kaur Samra** - Asian Games record in women's 50m rifle 3 positions qualification (594)
- **Rudrankksh Patil, Aishwary Pratap Singh Tomar and Divyansh Singh -** world record in men's 10m air rifle team (1893.7)
- **Aishwary Pratap Singh Tomar, Swapnil Kusale and Akhil Sheoran** - world record in men's 50m rifle 3 positions team (1769)

- **Aishwary Pratap Singh Tomar** - Asian Games record in 50m rifle 3 positions men's qualification (591)
- **Manu Bhaker, Esha Singh and Rhythm Sangwan** - junior world record in women's 25m pistol (1759)
- **Palak Gulia -** Asian Games record in women's 10m air pistol (242.1)
- **Kynan Chenai, Zoravar Singh Sandhu and Prithviraj Toindaman** - Asian Games record in men's trap team (361)
- **Sarabjot Singh, Divya TS** - Asian Games record in 10m air pistol mixed team qualification (577)

Swimming

- **Srihari Nataraj** - national record in men's 200m freestyle (1:49.05)
- **Srihari Nataraj, Tanish George Mathew, Vishal Grewal and Anand Shylaja -** national record in men's 4x100m freestyle (3:21.22)
- **Aryan Nehra, Aneesh Gowda, Kushagra Rawat and Tanish George Mathew** - national record in men's 4x200m freestyle (7:29.04)
- **Srihari Nataraj, SP Likith, Sajan Prakash, Tanish George Matthew -** national record in men's 4x100m medley (3:40.20)
- **Maana Patel, Dhinidhi Desinghu, Janhvi Choudhary and Shivangi Sarma -** national record in women's 4x100m freestyle (3:53.80)
- **Dhinidhi Desinghu, Shivangi Sarma, Vritti Agarwal and Hashika Ramachandra** - national record in women's 4x200m freestyle (8:37.58)

Cycling

- **Men's sprint team (Yanglem Rojit Singh, David Beckham Elkatohchoongo, Ronaldo Singh Laitonjam and Esow Alben)** - national record (44.609)

Archery

- **Aditi Gopichand Swami** - Asian Games record in women's compound archery (149)
- **Jyothi Surekha Vennam** - equalled the Asian Games record in women's compound archery (149)
- **Ojas Pravin Deotale -** Asian Games record in men's individual compound archery (150-7x)
- **Ojas Pravin Deotale and Jyothi Surekha Vennam** - Asian Games record in mixed team compound ranking round (1413)
- **Ojas Pravin Deotale and Jyothi Surekha Vennam** - Asian Games record in mixed team compound match – 159

3. Study Material-Language

Words Confused and Misunderstood

S.N.	Words	Meaning
1.	**Acceptance**	Acceptance is used to express the active sense of the verb i.e. the act of accepting. It is a common word.
	Acceptation	Acceptation is used to express the passive sense (to be accepted). Acceptation is indicator of the state of being accepted.
2.	**Accident**	Accident means; (a) chance, fortune (b) untoward happening, mishappening
	Incident	Incident means event, occurrence or episode
3.	**Accord**	Accord means agreement
	Accordance	Accordance means conformity or compliance
4.	**Act**	An act is the single thing done, or what is done by a single effort, as that is your act or his act
	Action	An action may consist of more acts than one or embrace the causes or the consequence of the action, as a bold action, judge of actions etc.
5.	**Advice**	Advice is a noun, which means an opinion or recommendation offered as a guide to action, conduct, etc.
	Advise	Advise is a verb, which means "to give counsel to; offer an opinion or suggestion as worth following
6.	**Actuate**	Actuate means to move mechanical things to action
	Activate	Activate means to make active
7.	**Affect**	Affect is verb and stoats to influence; to have effect on.
	Effect	Effect means result or consequence
8.	**Allusion**	Allusion means reference
	Illusion	Illusion means deception
9.	**Alluvion**	Alluvion means "the flow or wash of water against a river bank"
	Alluvium	Alluvium means "a deposit of soil, clay, or the sock of such a deposit caused by an alluvion."
10.	**Ascent**	Ascent means the act of ascending
	Assent	Assent means to approve, to sanction or to put signature on
11.	**Bath**	Bath means a large open container for water, in which to wash the whole body while sitting in it or an act washing the body in a bath.
	Bathe	Bathe refers to swimming or to therapeutic washing
12.	**Beside**	Beside means next to, by the side of or near something or someone.
	Besides	Besides means in addition to, other than, as well as, apart from something or someone.
13.	**Beneficial**	Beneficial means advantageous, profitable, favourable, producing benefits

	Beneficent	Beneficent means doing good, charitable.
14.	**Blatant**	Blatant means done openly and unashamedly
	Flagrant	Flagrant means shocking
15.	**Breath**	The word "breath" is a noun. It is the act of breathing; the air that is inhaled and exhaled.
	Breathe	The word "breathe" is a verb. It means to take a breath by inhaling and exhaling.
16.	**Cannon**	Cannon means a big gun or the ear of a bell by which the bell hangs
	Canon	Canon means (a) a corpus of writings; (b) an accepted notion or principle; or (c) a law or regulation.
17.	**Canvass**	Canvas means (i) to examine in detail (ii) to discuss or debate (iii) to solicit orders or political support or (iv) to take stock of public opinion.
	Canvas	Canvas is the heavy cloth
18.	**Cast**	Cast means to throw, to give
	Caste	Caste is a form of social stratification characterized by endogamy, hereditary transmission of a style of life which often includes an occupation, ritual status in a hierarchy, and customary social interaction and exclusion based on cultural notions of purity and pollution.
19.	**Cause**	A thing that gives rise to an action, phenomenon, or condition
	Reason	Reason is the explanation of something, as the court gives reason for its judgment
20.	**Causality**	Causality shows the principle of causal relationship; the relation of cause and effect.
	Causation	Causation means the causing or producing effect.
21.	**Chasten**	Chasten means to discipline, punish, or subdue.
	Chastise	Chastise means to punish, thrash.
22.	**Centre**	Centre means the middle point of something
	Center	Center means a place or institution
23.	**Ceremonial**	Ceremonial relates to all manners of ceremonies and ritual or formal
	Ceremonious	Ceremonious represent lightly disparaging, suggests an overtone formality.
24.	**Childlike**	Childlike has positive connotations of simplicity; innocence and truthfulness
	Childish	Childish has negative connotations of puerility, peevishness and silliness
25.	**Chronic**	Chronic stands for old, lasting for considerable time like chronic Asthma, chronic phothisis etc.
	Acute	Acute indicates extreme intensity, as acute pain, acute inflammation etc.
26.	**Cleanliness**	Cleanliness is used of persons and their habits.
	Cleanness	Cleanness is used of things or places.

27.	**Clear**	Clear is used to show transparency; free from hindrance.
	Clean	Clean is used to express the opposite of dirty
28.	**Codicil**	Codicil is a testamentary instrument ancillary to a will that adds to, varies or revokes provisions in the will.
	Will	Will is a written or oral expression of one's intention regarding the disposition of one's property at death.
29.	**Collision**	Collision is when two vessels strike each other
	Allision	An allision occurs when a vessel strikes a stationary object, such as a bridge or dock
30.	**Collocate**	Collocate means to arrange in place to set side by side.
	Collate	Collate means to compare minutely and critically; to collect and compare for the purpose of arranging accurately; or to assemble in proper order.
31.	**Commendable**	Commendable means praiseworthy, laudable.
	Commendatory	Commendatory means 'expressing commendation, laudatory.
32.	**Comminate**	Comminate means "to denounce".
	Comminute	Comminute means "to pulverize".
33.	**Complacent**	Complacent means self-satisfied, smug, pleased with oneself.
	Complaisant	Complaisant means obliging, accommodating, polio.
34.	**Complement**	Complement means to supplement appropriately or adequately,
	Compliment	Compliment means to praise, pay tribute.
35.	**Comprehensive**	Comprehensive means large, extensive e.g., comprehensive account, comprehensive note.
	Comprehensible	Comprehensible means understandable.
36.	**Condemn**	Condemn means to render judgment against a person or a thing
	Contemn	Contemn means to hold in contempt, to despise.
37.	**Congruent**	Congruent is used in the sense "coincident throughout; in accordance with"
	Congruous	Congruous means "appropriate, fitting; marked by harmonious agreement."
38.	**Connote**	Connote implies in addition to the literal meaning.
	Denote	Denote signifies the literal meaning, to indicate.
39.	**Consensual**	Consensual means "having or expressing, or made with consent."
	Consentaneous	Consentaneous means unanimous or agreeing.
40.	**Consignment**	Consignment means "the act of delivering goods to a carrier to be transmitted to a designated agent."
	Consignation	Consignation means, "the act of formally paying over money, as into a bank, or to a person legally appointed to receive it, often because it is the subject of a dispute."
41.	**Contagious**	A contagious disease is communicable by contact or touch, as Eczema; Leprosy etc.
	Infectious	An infectious disease spread by contact with the germs, e.g., in air or water, as plague (air) cholera and typhoid (water) some contagious diseases are not infectious and vice-versa.
42.	**Contemporary**	Contemporary indicates modem, contemporary with us.
	Contemporaneous	Contemporaneous is usually used of actions or things.
43.	**Contemptible**	Contemptible means worthy of contempt, despisable.

	Contemptuous	Contemptuous means worthy of contempt or scorn.
44.	**Continual**	Continual means frequently recurring
	Continuous	Continuous means occurring without interruption. e.g., continuous use, in reference to a roadway, etc.,
45.	**Coarse**	Coarse is rough, vulgar; as coarse cloth, coarse manner; coarse (obscene) book.
	Course	Course means race course (ground); evil course (behaviour); course of studies or lectures; or in due course; etc.
46.	**Contravene**	Contravene means to transgress, infringe; to defy or to be contrary to, come in conflict with
	Controvert	Controvert means to dispute or contest; to debate; to contend against or oppose in argument,
47.	**Contributory**	Contributory means making contribution; that contributes to a common fund;
	Contributive	Contributive having the power of contributing; conducive (exercise is contributive to health).
	Contributorial	Contributorial relates to a contributor.
	Contributional	Contributional relates to a contribution.
48.	**Contumacious**	Contumacious means wilfully disobedient of a court order.
	Contemptuous	Contemptuous means showing contempt; scornful.
49.	**Contumacity**	Contumacy is a particular kind of contempt of court and contumacity is a long needless variant of contumacy
	Contumely	Contumely means rude and haughty language
50.	**Corporal**	Corporal means of or affecting human body.
	Corporeal	Corporeal means having a physical material body and
51.	**Corespondent**	Corespondent is a man charged with adultery and proceeded against together with wife or respondent;
	Correspondent	A correspondent is a letter-writer, an on-location news gatherer or a business representative.
52.	**Corrigendum**	Corrigendum means correction
	Erratum	Erratum means error
53.	**Corps**	Corps means singular and plural both; a division of any army, National Cadet
	Corpse	Corpse means a dead body
54.	**Council**	Council means an advisory or a deliberative body as Privy Council, the Council of State; the Executive Council.
	Counsel	Counsel means advice, advocate, barrister; as verb, it means to advice.
55.	**Credible**	Credible means worthy of credence or believable.
	Credulous	Credulous means tending to believe.
	Creditable	Creditable means worthy of credit, laudable.
56.	**Crevice**	A Crevice is a narrow crack or break, as in a side walk or a wall.
	Crevasse	A crevasse is a large split or rupture, as in a levee, glacier, or embankment;
57.	**Cultured**	Correctly cultured is used of a person
	Cultivated	Cultivated is used of the mind. A cultivated mind is well trained and highly developed.
58.	**Cursory**	Cursory means perfunctory; superficial.

	Cursorial	Cursorial means pertaining to running.
59.	**Dairy**	Dairy is a place where milk, cheese, butter etc, are kept or sold.
	Diary	Diary is a journal for recording daily memoranded
60.	**Debauch**	Debauch means "to defile, to seduce away from virtue, to corrupt".
	Debouch	Debouch means 'to emerge or cause to emerge", "to come out into open ground."
61.	**Debility**	Debility means weakness; feebleness etc.
	Debilitation	Debilitation means the action of making weak of feeble.
62.	**Declaim**	Declaim is done by lawyers in court.
	Disclaim	Disclaim is done by manufacturers in warranties.
63.	**Decry**	Decry means to disapprove of, to disparage.
	Descry	Descry means to see in the distance, to discern with the eye
64.	**Deduce**	Deduce means "to infer"
	Deduct	Deduct means "to substract"
65.	**Deducible**	Deducible means "inferable",
	Deductible	Deductible, means "capable of being (usually lawfully) substracted."
66.	**Defective**	Defective means faulty, imperfect, subnormal.
	Detectible	Detectible means likely to fail or become defective
	Deficient	Deficient means insufficient, lacking in quantity.
67.	**Defer**	Defer means "to postpone".
	Defer to	Defer to means "to give way", yields the toot deference.
68.	**Definite**	Definite means fixed, exact, explicit.
	Definitive	Definitive means authoritative; conclusive; exhaustive; providing it final solution.
69.	**Deliberate**	Deliberate means intentional, fully considered
	Deliberative	Deliberative means appointed for the purpose of, deliberation or debate.
70.	**Delivery**	Delivery means to transfer or conveyance something; utterance
	Deliverance	Deliverance means "rescue, release",
71.	**Delusive**	Delusive means tending to delude
	Delusional	Delusional applies in the nature of delusion
72.	**Dependent**	Dependent (adj.) means depending on another for maintenance.
	Dependant	Dependant (noun) is one who depends on another for maintenance
73.	**Deportation**	Deportation means the act of removing (a person) to another country; the expulsion of an alien from a country.
	Deportment	Deportment means the bearing, demeanor, or manners of a person.
74.	**Depone**	Depone means to testify.
	Depose	Depose means to bear witness or testify or to take deposition of some one.
75.	**Depravity**	Depravity shows the condition of being depraved or corrupt.
	Depravation	Depravation is the act or process of depraving or corrupting.
76.	**Depositary**	Depositary means a person with whom one deposits something, a custodian. a trustee like depositary bank

	Depository	Depository is store house, a place where you deposit something. It is used for places.
77.	**Depreciate**	Depreciate means "to belittle, disparage".
	Deprecate	Deprecate means to disapprove regretfully
78.	**Deprivation**	Deprivation the damaging lack of material benefits considered to be basic necessities in a society
	Privation	Privation means the loss or absence of a quality or attribute that is normally present.
79.	**Depute**	Depute means to delegate.
	Deputize	Deputize means to make another one's deputy or to act as deputy.
80.	**Derisive**	Derisive means scoffing; expressing derision.
	Derisory	Derisory means worthy of derision or of being scoffed at.
81.	**Desirable**	Desirable means wished for as being an attractive, useful, or necessary course of action.
	Desirous	Desirous is used in reference to people's emotions.
82.	**Desert**	Desert is a sandy waste like Sahara, Thar etc.
	Dessert	Dessert is the last course of a dinner and consists of fruits, sweat meats etc.
83.	**Deterrent**	A deterrent is that which deters.
	Deterrence	Deterrence is preventing by fear.
	Determent	Determent means the act or fact of deterring.
84.	**Detinuit**	Detinuit means an action of replevin in which the plaintiff already possesses the goods for which he sues.
	Detinet	Detinet means an action alleging simply that the defendant is wrongfully withholding money or chattels.
85.	**Devastavit**	Devastavit means the failure of a personal representative to administer a descendent; estate promptly or property.
	Devisavit	Devisavit is invariably used in the phrase devisavit vel non (he devises or not)
86.	**Deviser**	A deviser is one who invents or contrives.
	Devisor	A devisor is one who disposes property at will.
	Divisor	Divisor is a mathematical term referring to the number, by which another number is divided
87.	**Devisibility**	Devisibility means the capability of being devised or bequeathed
	Divisibility	Divisibility means the capability of being divided. 89.
88.	**Diagnosis**	A diagnosis is any analysis of one's present bodily condition with reference to disease or disorder.
	Prognosis	A prognosis is the projected future of a present diseases or disorder.
89.	**Dialogue**	Dialogue means a conversation between two or more persons; or the exchange of ideas
	Duologue	Duologue means "a conversation between two persons only
90.	**Disburse**	Disburse is used only in reference to distribution of money.
	Disperse	Disperse is used in reference to distribution of all other things, such as crowd or diseases.
91.	**Discrete**	Discrete means separate, distinct.

	Discreet	Discreet means cautious, judicious.
92.	**Discriminatory**	Discriminatory means applying discrimination in treatment, especially on ethnic ground.
	Discriminative	Discriminative is ambiguous and is a needless variation of both discriminatory and discriminating
	Discriminating	Discriminating means keen, discerning, judicious
	Discriminant	Discriminant is a needless variant of discriminating
93.	**Disincentive**	Disincentive provides an incentive not to do something.
	Non-incentive	Non-incentive is no incentive at all.
94.	**Disinterested**	Disinterest means impartiality or freedom from bias
	Uninterested	Uninterested means "lack of interest" or "having no interest."
95.	**Disorganized**	Disorganized means in confusion or disarmy; broken up.
	Unorganized	Unorganized means "not organized"
96.	**Disposal**	Disposal means the action or process of getting rid of something.
	Disposition	Disposition connotes a preconceived plan and an orderly arrangement
97.	**Disqualified**	Disqualified means disabled, debarred.
	Unqualified	Unqualified means not meeting the requirements.
98.	**Dissemble**	Dissemble means "to present a false appearance"
	Disassemble	Disassemble means "take apart"
99.	**Dissent**	Dissent refers to a difference of opinion
	Dissension	Dissension refers to contentious or partisan arguing
100.	**Dissentient**	Dissentient means in opposition to a majority or official opinion.
	Dissentious	Dissentious means given to dissension; quarrelsome
101.	**Distinct**	Distinct means well defined; discernibly separate
	Distinctive	Distinctive means serving to distinguish, set all by appearance
102.	**Divers**	Divers implies severalty, various, sundry.
	Diverse	Diverse implies difference. It means marked by different; unlike.
103.	**Doctrinal**	Doctrinal means of or relating to a doctrine.
	Doctrinaire	Doctrinaire means dogmatic; impractically adhering to dogma.
104.	**Dominance**	Dominance express the fact or position of being dominant
	Domination	Domination means the exercise of ruling power
105.	**Economic**	Economic refers to the study of economics
	Economical	Economical means 'thrifty' or in the current Jargon "cost-effective"
106.	**Educational**	Educational means having to do with education
	Educative	Educative means tending to educate; instructive
	Educatory	Educatory is a needless variant of educative
	Educable	Educable means capable of being educated
107.	**Educible**	Educible means capable of being educed, or drawn out.
	Educable	Educable means capable of being educated.
108.	**Effective**	Effective means having a high degree of effect, powerful, striking
	Effectual	Effectual means producing desired result.
	Efficacious	Efficacious means to have desired effect.

	Efficient	Efficient increasingly has economic connotations in law that are evident
109.	**Egress**	Egress means the right or liberty of going out (leave)
	Ingress	Ingress means the right or liberty of going in (enter)
	Regress	Regress means right or liberty to re-enter.
110.	**Elemental**	Elemental means "of or relating to the elements of something; essential; primal or primitive
	Elementary	Elementary means introductory, rudimentary; simple; fundamental.
111.	**Elocution**	Elocution means style in speaking: the art of speaking persuasively
	Locution	Locution means a word or phrase.
112.	**Eligible**	Eligible means legally qualified for selection.
	Illegible	Illegible means incapable of being read.
113.	**Emigrant**	Emigrant is one who goes out of his country to settle in another country.
	Immigrant	Immigrant is one who comes into a foreign country to settle there
114.	**Eminent**	Eminent means great, distinguished
	Imminent	Imminent means impending, threatening to occur immediately
115.	**Empanel** **Impanel**	Empanel and Impanel have the same meaning. It means to put name on panel of jury
116.	**Empathy**	Empathy is the ability to imagine oneself in another person's position and to experience all the sensations connected with it
	Sympathy	Sympathy is compassion for or commiseration with another
117.	**Emulate**	Emulate means to strike to equal or rival, to copy or imitate with the object of equalling
	Immolate	Immolate is to kill as a sacrifice
118.	**Envisage**	Envisage means to contemplate or view in a certain way
	Envision	Envision means to picture to oneself
119.	**Equitable**	Equitable derives from equity and has associations of justice and fairness or that which can be sustained in a court of equity
	Equable	Equable means even; tranquil; level.
120.	**Eruption**	Eruption is breaking out like volcanic eruption, eruption of war, revolution or disease etc.
	Irruption	Irruption means sudden and violent entry into a country of an invador in large numbers.
121.	**Especial**	Especial means distinctive, significant, peculiar
	Special	Special means specific, particular
122.	**Ethics**	Ethics relates to the field of moral science.
	Ethos	Ethos means the characteristic spirit or beliefs of a community, people, system, or person.
123.	**Euphuism**	Euphuism is the name given to highly affected and elaborate style.
	Euphemism	Euphemism is a mild or vague expression in place of a harsh and blunt one, as stout for fat, in exactitude for falsehood.
124.	**Exalt**	Exalt means to raise in rank, place in a high position or extol
	Exult	Exult means is to rejoice exceedingly
125.	**Exceptionable**	Exceptionable means open to exception and objectionable

	Exceptional	Exceptional means out of the ordinary; uncommon; rare; superior.
126.	**Excercise**	Exercise is familiar enough in physical exercise, mental exercise.
	Exorcise	Exorcise means to drive out an evil spirit by prayers.
127.	**Exlex**	Exlex is an adjective meaning "outside the law; without legal authority"
	Ex ege	Ex ege is an adverb meaning “as a matter of law”
128.	**Exhausting**	Exhausting is draining all one's energy, tiring.
	Exhaustive	Exhaustive is comprehensive or leaving out nothing of a subject.
129.	**Expatiate**	Expatiate means to wander; or to discourse on at length
	Expatriate	Expatriate means to leave one’s home country to live elsewhere; or to banish or exile.
130.	**Facility**	Facility means ease, the quality of being easily done.
	Felicity	Felicity means happiness or blessedness.
131.	**Factious**	Factious is related to faction or party and means turbulent.
	Factitious	Factitious means made up, false, artificial. It is indicative of man-made and not natural;
	Fictitious	Fictitious means imaginary, not real.
132.	**Fair**	Fair means a gathering to celebrate a holiday or a market held at stated time.
	Fare	Fare means price for conveyance by land, water or air.
133.	**Forceful**	Forceful means full of force, powerful, convincing.
	Forcible	Forcible means “effected by force against resistance.”
134.	**Foul**	Foul is the opposite of fair i.e., unfair and use familiarly in foul play
	Fowl	Fowl formerly meant a bird, but now is restricted to cock or hen.
135.	**Garnish**	Garnish means to take property; usually a portion of someone's salary, by legal authority.
	Garnishee	Garnishee is usually reserved for the nominal sense.
136.	**Generative**	Generative means procreative.
	Generational	Generational means relating to generations.
137.	**Gibe**	Gibe means a caustic remark or taunt
	Jibe	Jibe means to make things fit, uniform, or consistent.
138.	**Gilt**	Gilt means covered with a thin layer of gold as gilt edged paper; such as gilt-edged securities.
	Guilt	Guilt means crime, offence, neglect of duty.
139.	**Gratuitous**	Gratuitous means done or performed without obligation to do so (gratuitous promises); done unnecessarily (gratuitous criticisms).
	Fortuitous	Fortuitous means occurring by chance (fortuitous circumstances):
140.	**Hoard**	Hoard means a store or treasure.
	Horde	Horde is a contemptuous expression for gong, or mob.
141.	**Human**	Human pertaining to human being
	Humane	Humane means kind or compassionate.
	Humanitarian	Humanitarian is one who is full of sympathy for all living

		things
142.	**Humanism**	Humanism indicates study in human as opposed to divine interests.
	Humanities	Humanities was the name given to Roman and Greek classics (comprising literature, philosophy, history, oratory etc.).
	Humanist	Humanist means the students of these classics.
143.	**Illegible**	Illegible means not plain or clear enough to be read.
	Unreadable	Unreadable means too dull or obfuscatory to be read (used of bad writings)
144.	**Illusion**	An illusion exists in one's fancy or imagination.
	Delusion	A delusion is an idea or thing that deceives, or misleads a person.
145.	**Imaginary**	Imaginary is non-existent, fabricated by imagination.
	Imaginative	Imaginative is having the creative faculty of imagination.
146.	**Immoral**	Immoral means "evil depraved".
	Unmoral	Unmoral means merely "without moral sense, not moral, and is used, for example, of animals and inanimate objects.
147.	**Impartable**	Impartable means capable of being imparted.
	Impartible	Impartible means indivisible.
148.	**Impassible**	Impassible means incapable of feeling or suffering.
	Impassable	Impassable means not capable of being passed.
149.	**Imperial**	Imperial means of or belonging to an emperor or empire.
	Imperious	Imperious means overbearing; supercilious, tyrannical. Additionally it means urgent; absolute and imperative.
150.	**Imprudent**	Imprudent means rash, indiscreet.
	Impudent	Impudent means insolently disrespectful shamelessly presumptous
151.	**Incipient**	Incipient means 'beginning in an initigstage."
	Insipient	Insipient is an obsolete word meaning unwise and foolish.
152.	**Incredible**	Incredible means not believable.
	Incredulous	Incredulous means skeptical.
153.	**Ingenious**	Ingenious means clever, having ingenuity.
	Ingenuous	Ingenuous means honest, frank.
154.	**Insidious**	Insidious means things or persons lying in wait or seeking to entrap on ensnare, operating subtly or secretly so to not to excite suspicion.
	Invidious	Invidious means offensive; entailing odium or ill will upon the person performing, discharging or discussing; giving offense to others.
155.	**Insoluble**	Insoluble is used both for substances that will not dissolve in liquids and of problems that cannot be solved
	Insolvable	Insolvable is used only of problems that cannot be solved.
	Unsolvable	Unsolvable is needless variant and therefore should be avoided.
156.	**Interpretivism**	Interpretivism means a plea that judges can enforce only norms stated or clearly implicit in the Constitution
	Non-Interpretivism	Non-Interpretivism mean the view that courts can legitimately go beyond those sources.
157.	**Innovation**	Innovation is novelty, something new.

	Renovation	Renovation is indicative of making a new again.
158.	**Judgmental**	Judgmental means of or relating to judgment; or judging when uncalled for.
	Judgmatic	Judgmatic means facetious formation
159.	**Judicial**	Judicial means (1) of or relating to court or by the court (2) in court (judicial admission); (3) legal; (4) of or relining to a judgment.
	Judicious	Judicious means well considered; discreet; wisely circumspect.
160.	**Jural**	Jural means of or relating to law or its administration; legal : juristic; or of or pertaining to rights or obligations
	Juridical	Juridical means relating to judicial proceedings or to the law
161.	**Juratory**	Juratory is a rare term used today to mean of or pertaining to an oath or oaths; expressed or contained in an oath.
	Juratorial	Juratorial means "of or relating to a jury."
162.	**Jurisprudent**	Jurisprudent means a jurist or learned lawyer.
	Jurisprudential	Jurisprudential means "of or relating to jurisprudence".
163.	**Justiciable**	Justiciable means liable to be determined in a court of justice.
	Judicable	Judicable is a needless variant.
164.	**Levee**	Levee means a river embankment; alike; pier.
	Levy	Levy means (i) to impose (as a fine) by legal sanction, (ii) to conscript For service in military; (iii) to wage (a war); (4) to seize (the property).
165.	**Lightning**	Lightning means thunderbolt.
	Lightening	Lightening means (i) shining, brightening or making bright, illuminating; (ii) making (lighter, reducing weight or burden; giving or feeling relief.
166.	**Loath**	Loath means reluctant, unwilling.
	Loathe	Loathe means to detest, to hate intensely.
167.	**Lost Property**	Property is said to be lost when the owner has involuntarily relinquished possession of it, usually by accident or forgetfullness
	Abandoned Property	Property is abandoned if the owner has knowingly forsaken his interest in the property.
168.	**Lose**	Lose means to suffer the deprivation of; to part with;
	Loose	Loose means to release; unbind; as he loosed the dog.
169.	**Luxuriant**	Luxuriant means growing abundantly, lush.
	Luxurious	Luxurious means characterized by luxury or sensuous enjoyment.
170.	**Malevolent**	Malevolent is a person 'desirous of evil to others.'
	Maleficent	Maleficent is a person who is positively "hurtful or criminal to others.
171.	**Malfeasance**	Malfeasance means an unlawful act.
	Misfeasance	Misfeasance means the negligent or otherwise improper performance of lawful act.
172.	**Malignancy**	Malignancy should be confined to denoting any cancerous disease.
	Malignity	Malignity means wicked or deep rooted ill will or hatred;

		malignant feelings or actions.
173.	**Mean**	Mean means (i) small; (ii) obstreperous; or (iii) median - average.
	Median	The median is the 'point in a series of numbers above which is half the series and below which is the other half.
174.	**Mean**	Mean means average.
	Mien	Mien means general manner, demeanour, appearance, bearing or behaviour of a person
175.	**Mistreat**	Mistreat means to treat badly or wrongly.
	Maltreat	Maltreat mean to abuse, to handle roughly or cruelly.
176.	**Mitigate**	Mitigate means to take less severe or intense.
	Militate	Militate means to exert a strong influence.
177.	**Momentary**	Momentary means lasting a moment, short lived, fleeting; as momentary feeling of despair, relief, momentary pleasure.
	Momentous	Momentous means of great importance or significance.
178.	**Non-Constitutional**	Non-Constitutional means a issue relating to some legal basis or principle other than the Constitution.
	Unconstitutional	Unconstitutional means in violation of or not in accordance with principles enshrined in the Constitution.
179.	**Non feasance**	Non feasance implies the failure to act where a duty to act existed
	Non act	Non act means merely the failure to act
180.	**Observation**	Observation is the act of observing i.e., seeing, marking, examining alternatively, also a remark.
	Observance	Observance is obeying of a rule, keeping a custom or performing a ceremony.
181.	**Official**	Official means pertaining to office.
	Officious	Officious means servile, fussy in offering unwanted service.
182.	**Ordance**	Ordance means military supplies, cannon; artillery.
	Ordinance	Ordinance means a rule or law made to meet some emergent situation.
	Ordonnance	Ordonnance means the ordering of parts in a whole; arrangement.
183.	**Persecute**	Persecute means to harass.
	Prosecute	Prosecute means (i) to take legal proceedings against a person, (ii) to pursue or carry on study,
184.	**Personal**	Personal is one's own, private, individual
	Personnel	Personnel is used collectively for a body of persons engaged in any service or institution
185.	**Perspicuity**	Perspicuity is the quality of clear statement and is used of books, style, writing
	Perspicacity	Perspicacity is the quality of clear, sharp understanding or penetration and is used of persons
	Perspicuous	Perspicuous means clear; lucid; seen readily
	Perspicacious	Perspicacious means penetrating in thought: acutely discerning; keen, shrewd
186.	**Practical**	Practical means manifested in practice; capable of being put to good use.
	Practicable	Practicable means capable of being accomplished; feasible,

		possible.
187.	**Pray**	Pray means to offer prayer
	Prey	Prey means victim
188.	**Precautionary**	Precautionary means (i) suggesting or advising provident caution; (ii) of, relating to, or of the nature of a precaution.
	Precautions	Precautious means using precaution; displaying previous or provident caution or care.
189.	**Precede**	Precede means to go ahead of; to come before.
	Proceed	Proceed means to go ahead; to continue.
190.	**Precision**	Precision means accuracy.
	Precisian	Precisian means a person who adheres to rigidly high standards
	Precisionist	Precisionist means a person who prizes absolute correctness of expression and performance
191.	**Precipitate**	Precipitate means sudden; hasty; rash; showing violent or uncontrollable speed.
	Precipitous	Precipitous is like a precipice; steep.
192.	**Presumptive**	Presumptive means giving reasonable grounds for presumption or belief; warranting inferences; or based on presumption or inference.
	Presumptuous	Presumptuous means arrogant, presuming, bold, forward, impudent.
193.	**Presumptively**	Presumptively means by legal presumption
	Presumably	Presumably means may presume or reasonably suppose; by presumption or supposition.
194.	**Principal**	Principal is the head of the institution
	Principle	Principle means a truth, law, doctrine or course of action
195.	**Prophesy**	Prophesy means to predict or foretell.
	Prophecy	Prophecy means a prediction or foretelling
196.	**Proscribe**	Proscribe means to prohibit
	Prescribe	Prescribe means to impose authoritatively
197.	**Quaere**	Quaere means "question".
	Query	Query means to enquire.
198.	**Quantum Meruit**	Quantum Meruit means the reasonable value of the services as quasi-contract. Literally it means “as much as he deserved."
	Quantum Valebant	Quantum Valebant means the reasonable value of goods and materials.
199.	**Recital**	Recital means the formal statement, or setting forth, of some related matter of fact in any deed or writing,
	Recitation	Recitation connotes an oral delivery before an audience, whether in the classroom or an stage.
200.	**Recognizance**	Recognizance means a bond or obligation, entered into and recorded before a court or a magistrate, by which a person engages himself to perform some act or observe some condition (as to appear when called on, to pay a debt or to keep the peace)
	Reconnaissance	Reconnaissance means a preliminary survey, a military or intelligence gathering examination of a region.
	Reconnoisance	Reconnoisance is the older spelling of reconnaissance, it is

		also a needless variant of recognizance and of recognition
201.	**Recourse**	Recourse means application and is used in idiomatic phrases without recourse and have recourse to.
	Resort	Resort means that which one turns to for refuge or aid
202.	**Rejoinder**	A rejoinder is the pleading served by a defendant in answer to the plaintiff's reply
	Surrejoinder	Surrejoinder is a plaintiff's pleading in reply to a defendant's rejoinder
203.	**Remainder**	A remainder is defined as `what is left' of an entire grant of lands or tenements after the preceding part of the some grant or estate has been disposed of in possession, whose regular expiration the remainder must await
	Reversion	A reversion is the remnant of an estate continuing in the grantor, undisposed of, after the grant of a party of his interest."
204.	**Remediable**	Remediable means capable of being remedied
	Remedial	Remedial means providing a remedy; corrective; curative
205.	**Remittance**	Remission means either forgiveness or diminution of force, effect, degree, or violence.
	Remittal	Remittal is a needless variant.
	Remission	Remittance correspondence to transmit (as money) and means "money sent to a person or the sending of money to a person.
	Remitment	Remitment is a needless variant.
206.	**Remitter**	A remitter is one who sends a remittance
	Remittitur	A remittitur is the process by which the court reduces the damages awarded in a jury verdict.
207.	**Reprise**	Reprise means (i) an annual deduction, duty, or payment out of manor or estate; as an annuity or the like; or (ii) (in music) a repetition.
	Reprisal	Reprisal means an act of retaliation, usually, of one nation against another but short of war.
208.	**Rescission**	Rescission means an act of rescinding; annulling; vacating,' or cancelling
	Recision	Recision comes from the Latin verb recisio meaning "the cut back, lop off'.
209.	**Revalidate**	Revalidation consists in repetition of the formalities of execution of the will previously revoked.
	Revive	Revival consists in revocation of the superseding or revoking will i.e., the will that is displaced or invalidated the original will.
210.	**Right**	Right means correct, proper, just etc.
	Righteous	Righteous means morally upright, virtuous or law-abiding
	Rightful	Rightful means (i) (of an action) equitable; fair (ii) (of a person) legitimately entitled to a position (the rightful heir); or (iii) (of an office or piece of property) that one is entitled to (his rightful inheritance).
211.	**Sanitary**	Sanitary means of or relating to health or more usually, cleanliness.
	Sanative	Sanative means health-producing; healthful.

	Sanatory	Sanatory is a needless variant
212.	**Savable**	Savable means capable of being saved.
	Salvable	Salvable means admitting of salvation.
	Salvageable	Salvageable means "that can be salvaged."
213.	**Scarify**	Scarify means (i) "to make superficial incisions in, cut off skin from". (ii) "to pain by severe criticism"; or (iii) "to loosen soil by means of an agricultural machine (a sacrificer) with prongs for spiked road breaking".
	Scorify	Scorify means "to reduce or to dross or slag."
214.	**Sensuous**	Sensuous means of or relating to five senses or arousing any of the five senses.
	Sensual	Sensual means sexual; salacious; voluptuous (sexual desires).
215.	**Sequential**	Sequential means "forming a sequence or consequence".
	Sequacious	Sequacious means "intellectually servile."
216.	**Sequester**	Sequester means to remove (as property) from the possession of the owner temporarily; to seize and hold the effects of a debtor until the claims of creditors are satisfied.
	Sequestrate	Sequestrate means to divert the income of an estate or benefice, temporally or permanently, from its owner into other hands."
217.	**Sideswipe**	Sideswipe means to strike a glancing blow.
	Sidewipe	Sidewipe means an artificial form, has no valid standing.
218.	**Signatory**	Signatory means forming one of those persons or governments whose signatures are attached to a document.
	Signatural	Signatural means of or pertaining to signatures.
219.	**Significance**	Significance means (i) a subtly or indirectly conveyed meaning; suggestiveness; the quality of implying; (ii) the quality of being important or significant.
	Signification	Signification means (i) the act of signifying; as by symbols; or (ii) the purport or sense intended to be conveyed by a word or other symbol.
220.	**Sophistical**	Sophistical means "quibbling, specious, or captious in reasoning."
	Sophical	Sophical means learned; intellectual.
221.	**Specious**	Specious is used of arguments or reasoning and means having special appeal but false.
	Spurious	Spurious is used of things. It means not genuine.
222.	**Stationary**	Stationary means remaining in one place.
	Stationery	Stationery means materials for writing on or with.
223.	**Statutable**	Statutable means (i) prescribed, authorised, or permitted by statute; (ii) conformed to the requirements of the statutes as to quality, size, or amount; (iii) (of an offense) legally punishable.
	Statutory	Statutory means pertaining to or consisting in statutes, enacted, appointed, or created by statute; conformable to the provisions of a statute.
224.	**Staunch**	Staunch is preferable as the adjective i.e., trustworthy, loyal.
	Stanch	Stanch means to restrain the flow of blood.
225.	**Terminus**	Terminus means the city at the end of a rail road or bus line

	Terminal	Terminal means the station of a transportation line
226.	**Timbre**	Timbre is primarily a musical term meaning "tone quality".
	Timber	Timber means wood prepared for use in building and carpentry.
227.	**Treble**	Treble means consisting of three parts; threefold.
	Triple	Triple means having three times the usual size, quality, or strength.
228.	**Trustee**	Trustee means a person having a nominal title to property that he holds for the benefit of one or more others, the beneficiaries.
	Trusty	Trusty means trustworthy.
229.	**Turpid**	Turpid means "filthy; worthless".
	Turbid	Turbid means muddy, thick; disordered.
	Torpid	Torpid means dormant, sluggish, apathetic.
230.	**Urban**	Urban means city or town (as opposed to rural).
	Urbane	Urbane means cultured, polite.
231.	**Venal**	Venal means purchasable or for sale;
	Venial	Venial means slight (used of sin's); pardonable; excusable; trivial.
232.	**Void**	Void means completely null.
	Voidable	Voidable means capable of being voided or confined.
233.	**Vocation**	Vocation is sense of fitness or urge for some particular career or profession.
	Avocation	Avocation is occupation or profession.
234.	**Wave**	Wave is noun associated with water i.e., wave of the sea means to move
	Waive	Waive means to give up the claim; to forgo
235.	**Wrack**	Wrack means to destroy utterly; to wreck.
	Rack	Rack means to torture or oppress.

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4. Current Affairs

OCTOBER 2023

- Prime Minister Narendra Modi today led the nation in Swachhata Hi Seva Abhiyan by joining mega cleanliness drive.
- Dr. Mohamed Muizzu of the opposition PPM PNC coalition has won the Presidential elections in Maldives.
- In the Asian Para Games at Hangzhou in China, Indian contingent wrapped up the event with their best-ever medal haul after clinching a record-breaking 111 medals. They won 29 gold, 31 silver, and 51 bronze medals, placing the country fifth in the medal count.
- Tata Group will commence production of Apple iPhone in India for both domestic and global markets. This makes Tata India's first homegrown iPhone maker after it completed the acquisition of Wistron Corp's Bengaluru plant for $125 million.
- Australia star Glenn Maxwell slammed the fastest ever ODI World Cup century in just 40 balls in a Cricket World Cup match against Netherlands. Glenn Maxwell broke the record of fastest ton at the ODI Cricket World Cup set by Aiden Markram (49 balls), which the South African hit earlier in the 2023 edition.
- The 37th National Games officially inaugurated by Prime Minister Narendra Modi at the Pandit Jawaharlal Nehru stadium in Fatorda, South Goa. The 37th National Games, a first-time occurrence in Goa, will feature athletes from 28 states participating in over 43 different sports disciplines. These games will bring together over 10,000 athletes from across the country.
- Union Home Minister Amit Shah inaugurated India's first liquid nano di-ammonia phosphate (DAP) plant established by IFFCO at Kalol in Gandhinagar today.
- The World Development Information Day is celebrated today by the United Nations (UN).
- Indian cricket great Bishan Singh Bedi breathed his last at the age of 77 after a prolonged illness. Bedi was an active cricketer from 1967 to 1979, featuring for India in 67 Tests, taking 266 wickets.
- The third stealth destroyer of Project 15B Class Guided Missile Destroyer 'IMPHAL' was handed over to the Indian Navy by The Mazagon Dock Shipbuilders Limited in Mumbai.
- The fourth Asian Paralympic Games is held in Hangzhou City in China.
- Prime Minister Narendra Modi flagged off 'Namo Bharat', India's first semi-high speed regional rail service in Uttar Pradesh. The Prime Minister

inaugurated the 'Namo Bharat' train connecting Sahibabad and Duhai Depot stations in Uttar Pradesh.

- ISRO's unmanned test flight for its first human spaceflight mission 'Gaganyaan' today lifted off from Sriharikota, the first landmark in India's ambitious space mission.
- Former Jharkhand Chief Minister, Raghubar Das, has been appointed as the Governor of Odisha.
- President Droupadi Murmu has appointed Indra Sena Reddy Nallu as Governor of Tripura.
- Christopher Luxon has been elected as the 42nd Prime Minister of New Zealand.
- President Droupadi Murmu conferred the 69th National Film Awards in New Delhi. Allu Arjun received the Best Actor Award for Pushpa: The Rise.
- Alia Bhatt for Gangubai Kathiawadi and Kriti Sanon for Mimi shared the Best Actress Award. Waheeda Rehman received the Dadasaheb Phalke Lifetime Achievement Award.
- India aims to send an astronaut to the moon by 2040, as Prime Minister Narendra Modi issued instructions to the space department that include plans for a space station by 2035.
- India ranked 111th out of 125 countries in the Global Hunger Index 2023. India has a score of 28.7, indicating a serious level of hunger.
- Navratri celebrations begin with religious fervour and gaiety across the country and abroad.
- Australia decisively rejected a proposal to recognise Indigenous people in the constitution on Saturday.
- Cricket has been approved by the International Olympic Committee's executive for inclusion in the programme for the 2028 Games in Los Angeles.
- The Female Labour Force Participation Rate in the country has improved significantly by 4.2 percentage points to 37 per-cent this year. This was revealed in the data released by the Statistics and Programme Implementation Ministry in its Periodic Labour Force Survey Report 2022-23.
- World Athletics has nominated Neeraj Chopra for the Men's Athlete of the Year award 2023. Javelin thrower Neeraj is an Indian Olympic and World Championships Gold medallist.
- India batter Rohit Sharma broke the record for the most international sixes across formats, eclipsing Chris Gayle’s tally during the ICC World Cup 2023 match against Afghanistan in Delhi. West Indies batsman Chris Gayle had amassed a haul of 553 sixes (551 innings), which Rohit surpassed in just 473 innings.

- The assembly elections in Mizoram, Chhattisgarh, Madhya Pradesh, Rajasthan and Telangana will be held between 7th to 30th of next month, while the counting for all five states will take place on 3rd December.
- Harvard University professor Claudia Goldin, has won the 2023 Nobel economics prize. The Nobel Memorial Prize in Economic Sciences 2023, officially known as The Sveriges Riksbank Prize in Economic Sciences, has been awarded to Claudia Goldin "for having advanced our understanding of women's labour market outcomes."
- At the Hangzhou Asian Games in China, the Indian contingent finished its campaign by with a record haul of 107 medals comprised of 28 gold, 38 silver, and 41 bronze.
- In Afghanistan, the death toll from strong earthquakes rose to 2,000 after a 6.3 magnitude quake struck about 40km from the western city of Herat yesterday.

  Till now, around 500 people have been killed in both Israel and Palestine in the latest conflict that started after an unprecedented attack launched by the Palestinian militant group Hamas on Saturday morning.
- The death toll in the massive flash flood in Sikkim reached 56. So far, 26 bodies have been recovered from Sikkim, and 30 have been found in the basin of the Teesta River in West Bengal.
- The Israel Defence Forces (IDF) declared a State Of War alert today after Palestinian militants, Hamas, launched rocket attacks from the Gaza Strip.
- Iranian human rights activist **Narges Mohammadi** has been awarded the Nobel Peace Prize 2023.
- India men's hockey team outclassed 2018 champions Japan in the final to win the Gold medal for the 4th time in the country's history. India came up with a complete show to beat 2018 champions Japan 5-1. India also secured a direct berth for the Paris Olympics next year.
- RBI keeps repo rate unchanged at 6.5 percent fourth time in a row.
- Indian-origin professor Dr Joyeeta Gupta has received the Spinoza Prize, the highest distinction in Dutch science for her work in the field of climate change at a ceremony in the Netherlands.
- Norwegian author and dramatist Jon Fosse won the 2023 Nobel Prize in Literature. He was conferred with the award "for his innovative plays and prose which give voice to the unsayable."
- At least 23 Army personnel and 20 civilians are missing in Sikkim after a cloudburst triggered flash floods in the Teesta river.
- Moungi Bawendi, Louis Brus and Alexei Ekimov have been awarded Nobel Prize for Chemistry for "discovery and synthesis of quantum dots".
- Hindustan Aeronautics Limited today handed over the first LCA Tejas twin seater aircraft to the Indian Air Force. The LCA Tejas twin seater is a light weight, all weather multi-role 4.5 generation aircraft.

- The Royal Swedish Academy of Sciences today awarded the 2023 Physics Nobel Prize to Pierre Agostini, Ferenc Krausz and Anne L'Huillier for experimental methods that generate attosecond pulses of light for the study of electron dynamics in matter.
- The Bihar government made public the results of its caste-based survey.
- Also known as the Bihar Jaati Adharit Ganana, the census shows that Scheduled Castes account for over 19 per cent of the 13-crore population, while Scheduled Tribes make up 1.68 per cent. The upper castes, or 'savarnas', form 15.52 per cent of state's population.
- Katalin Kariko and Drew Weissman won the Nobel Medicine Prize for work on messenger RNA (mRNA) technology that paved the way for groundbreaking Covid-19 vaccines.
- India's first solar roof cycling track inaugurated in Hyderabad. This innovative track named Healthway is the second of its kind globally.

5. Nobel Prize 2023

S.No	Name	Work	Category
1.	Katalin Karikó Drew Weissman	Discoveries about nucleoside base changes, which allowed for the creation of COVID-19 mRNA vaccines	Physiology or Medicine
2.	Pierre Agostini Ferenc Krausz Anne L'Huillier	Attosecond pulses of light for the study of electron dynamics in matter.	Physics
3.	Moungi G. Bawendi Louis E. Brus Alexei I. Ekimo	Discovery and development of quantum dots. These tiny particles, which have special qualities, are now emitting light from LED lights and television displays. They accelerate chemical processes and can provide a surgeon with good illumination of tumour tissue.	Chemistry
4.	Jon Fosse	Motivation "for his innovative plays and prose which give voice to the unsayable"	Literature
5.	Narges Mohammadi	Fight against the oppression of women in Iran.	Peace
6.	Claudia Goldin	For having advanced our understanding of women's labour market outcomes	Economic Science

6. Prelims and Mains Notes Preparation Scheme

V.S. DREAM COACHING
FOR
HJS, PCS (J.) AND CLAT

Prelims and Mains Notes Preparation Scheme is going on. Prepare your own excellent study notes to crack HJS, PCS (J) and CLAT on the subjects mentioned below under the able guidance of Hon'ble Mr. Justice Vedpal (Former Judge), High Court of Judicature at Allahabad, Ex-Director of Judicial Training and Research Institute, U.P., Lucknow and resource person of various legal academies and institutions. Seek prior appointment to avoid despair. Subjects;-

1.General Knowledge	2.Law
1. Current Affairs 2. G.K.MCQs 3. History of India and Indian Culture 4. Geography of India 5. Indian Polity 6. Current National Issues 7. Topic of Social Relevance with special reference to newly added 9 Social Acts 8. India and the World 9. Indian Economy 10.International Affairs and Institutions 11. Development in the field of: (a) Science and Technology (b) Communications and Space	1. Constitutional Law 2. Law of Evidence 3. Criminal Procedure Code 4. Code of Civil Procedure, 5. Indian Panel Code 6. Law of Contract 7. Partnership Act 8. Easements Act 9. Law of Torts 10. Transfer of Property Act 11. Principles of Equity , 12. Law of Trust 13. Specific Relief Act 14. Hindu Law 15. Muslim Law 16. U.P. Revenue Code. 17. U.P. Municipalities Act 1916 18. U.P. Panchayat Raj Act 1947 19. U.P. Consolidation of Holdings Act, 1953 20. U.P. Urban (Planning and Development) Act, 1973
3.CLAT 1. General Knowledge 2. A Guide for CLAT	

7. About Coaching

V.S. Dream coaching is one of the premiere law institute that offers coaching for Judicial Services Examinations at all the three levels – Preliminary Test, Main Examination and Personality Test.

We started our journey the month of Sept. 2022 with a vision driven by the socialist ideology. Since its inception, the coaching is successfully conducting courses for Judicial Services Exams and has always worked by aligning itself to the best interest of its students. The coaching Institute is focused on providing comprehensive and reliable training and support to all its students, who plan to appear for the Judicial Services Exam and are in the search of highly qualified targeted and dedicated faculty to crack examinations successfully.

The teaching faculty of the Institute has been drawn from highly qualified persons having experience. We also guide the aspirant in preparing his own notes and quality study Material

Teaching pedagogy

Our faculty uses a teaching pedagogy which is easily understandable and is aspirant friendly. Our patron Hon'ble Mr. Justice Vedpal former Judge High Court Allahabad had been a Trainer of Trainers. Director of Judicial Training and Research institute U.P., Resource person of several Judicial Institutes and member of Law commission U.P. The faculty of the coaching Institutes consists of those who have several decade experience in teaching in the field of law.

8. About Director and faculty

Ms. Anshu Singh B.A., LL.B is the director of the coaching who remained associated with the law for more than two decades. The director of the coaching possess self-awareness, garner credibility, focus on relationship-building, exhibit humility, empower others, stay authentic, present themselves as constant and consistent, become role models and are fully present

The director aims to improve performance and focuses on the 'here and now' rather than on the distant past or future. The director is subject expert. And focuse on helping the individual to unlock their own potential

Regular Faculty

1. Ms. Anshu Singh, B.A. (English Literature) LL.B. The Director, herself
2. Shri Shantanu Baliyan, B.A. LL.B who is a Law graduate from C.C.S. University Campus. He has also received Certificate of Excellency from the

University. He has started teaching at a very young age and now with his teaching experience, he has developed innovative ways of teaching Law and general knowledge, which suites to the need of a law student, as well as an Judicial service aspirant. He has conducted many online and offline Courses. His notes on Law subjects as well as on general knowledge are masterly work

9. Resource persons/Guest Speakers

1. Hon'ble Mr. Justice Vedpal, Former Judge, High Court Allahabad -Mentor
2. Shri Soraj Singh, Ex-Director (Ag.), U.P. Government- Guest Speakers
3. Mrs. Kalpana Malik, B.Sc., LL.B., LL.M. (P) - Guest Speakers
4. Dr. Venu Agarwal M.A.(English), M.Com. M.Ed., PhD - Guest Speakers

10. Library with Research wing

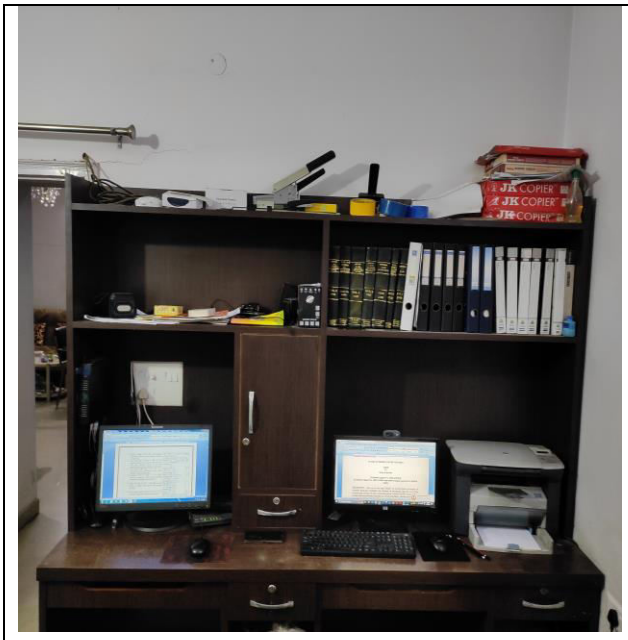
V.S. Dream Coaching has an excellent Library containing **about five thousand books, Journals, brochures, notes and guides**. The library in a coaching institute plays an important role in the life of students by serving as the store house of knowledge. It facilitates the work of the resource person and faculty also. The students have also access to library, after coaching hours. Our library changes as technology changes and remains updated in Course subjects. The coaching itself prepares study excellent and qualitative reading material.

Preparing a study material on a subject on Law and General Knowledge, is a herculean task. There is always a debatable question to be asked regarding what, and what not to include and how to differentiate the books and brochures from the ones already available in the market.

There should be a system for the verification of facts, data, etc. While preparing study material, we always keep in the mind the quality, so we hope that the book, brochures prove beneficial to all the aspirants taking examinations with law and General Knowledge..

A coaching should provide students with the fundamental knowledge base or foundation needed in order to be successful in their exam. Aspirants were surveyed to determine how they should be taught. The survey was developed based on course content. We encourage accredited programs to regularly evaluate current curricula for and develop new curricula that reflect changing construction technologies and management trends.

Library



Research wing