PAPER PRESENTATION OF THE JUDICIAL OFFICERS

ON THE EVE OF THIRD DISTRICT LEVEL WORKSHOP

ON

21.09.2024 (THIRD SATURDAY)

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DISTRICT JUDICIAL OFFICER'S WORK SHOP,
WEST GODAVARI DISTRICT, ELURU,dt.21.09.2024.

Paper presentation by D.Dhana Raju,II Additional Civil Judge, (Junior Division), Bhimavaram U/Sec. 138 of N.I.Act.

The Negotiable Instruments Act, 1881 governs Promissory Notes, Bills of Exchange, and Cheques. Despite previous amendments aimed at expediting cheque dishonour cases, delays caused by appeals and stay orders have led to significant pendency and injustice for payees. These delays undermine the effectiveness of cheque transactions. To address these issues, the NegotiableInstruments(Amendment) Bill,2017proposesnewprovisionstoexpedite the resolution of cheque dishonour cases. It introduces Section 143-A to mandate interim compensation payments by the drawer to the complainant during the trial and Section 148 to require deposit of a minimum of 20% of the fine or compensation awarded by the trial court during an appeal. These amendments aim to reduce delays, discourage frivolous litigation, and reinforce the credibility of cheques, thereby supporting trade and commerce and ensuring fairer treatment for payees.

Offence under Section 138 N.I.Act–Ingredients&Case-Law

Jugesh Sehgal v. Shamsher Singh Gogi, (2009) 14 SCC 683 : (2009) 5 SCC (Civ) 482 : (2010)2SCC(Cri)218atpage687,It is manifest that to constitute an offence under Section138 of the Act, the following ingredients are required to be fulfilled:

(i) a person must have drawn a cheque *on an account maintained by him* in a bank for payment of a certain amount of money to another person *from out of that account*;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand

for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.

Kanhaiya Lal v. State of U.P., 2010 SCC On Line All 495 : (2010) 2 MWN (Cri) DCC 118 : (2010) 3All LJ 645 : (2010) 69ACC 541 : 2010 Cri LJ 2769

For making out an offence under Section138of the Act following ingredients are essential.

In seriatim, they are registered here as:

(i) that a person must have an operative account in any bank

(ii) he owns some debt or liability to any other person whether juristic/legal,or not

(iii) a cheque is issued in the name of that person, to whom the debt or liability is owned by the account holder, from his such operative account in the bank, for the satisfaction of whole or part payment, for the said debt or liability. (Such person who issues the cheque is called “drawer” of the cheque and the person in whose name the cheque is issued is called the ‘drawee’of the cheque.)

(iv) the said cheque is presented by the person in whose name it is issued(drawee) or the holder of the cheque, in bank for it’s encashment with the period of it’s validity or within six months of the date of it’s issuance noted on the cheque

(vii) the notice of demand is served on the person who had issued, the cheque (drawer)

(viii) the drawer does not make the payment to the payee or drawee within fifteen days of the receipt of the said notice on him and the amount of cheque remains unpaid

(ix) the Complaint is laid in Court within one month, after expiry of period of fifteen days from the date of service of notice on the drawer/payer.

In ***Nishant Aggarwal v. Kailash Kumar Sharma*, (2013) 10 SCC 72 : (2013) 4 SCC (Civ) 627 : (2014)1SCC(Cri)189:2013SCC On Line SC 517 at page 78**,it was observed that it is clear that this Court in *K.Bhaskarancase*[(1999)7SCC510:1999SCC(Cri)1284] also discussed there levant provisions of the Code, particularly,Sections177,178and179andinthelightofthe language used, interpreted Section 138 of the NI Act and laid down that Section 138 has five components, namely:

(i) drawing of the cheque;

(ii) presentation of the cheque to the bank;

(iii) returning the cheque unpaid by the drawee bank;

(iv) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount; and

(v) failure of the drawer to make payment within 15 days of the receipt of the notice.

Legally enforceable debt:

In Sunil Todi v. State of Gujarat, (2022) 16 SCC 762, it was held that the Explanation to Section 138 of the NIAct provides that "debt or any other liability" means a legally enforceable debt or other liability. The proviso to Section 138 stipulates that the cheque must be presented to the bank within a period of six months from the date on which it is drawn or within its period of validity.Therefore,achequegivenasagiftandnotforthesatisfactionofadebtorotherliability, would not attract the penal consequences of the provision in the event of its being returned for insufficiency of funds.

Interpreting the provisions of Section 139 in *Kumar Exports* v. *Sharma Carpets* [*Kumar Exports* v. *Sharma Carpets*, (2009) 2 SCC 513 : (2009) 1 SCC (Civ) 629 : (2009) 1 SCC (Cri) 823] this Court has observed : (SCC p. 520, paras 18-19)

"*18*.Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisionsofSections118and139oftheAct,itbecomesevidentthatinatrialunderSection 138 of the Act a presumption will have to be made that every negotiable instrument wasmade or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary

is proved by the accused, that is, the cheque was not issued for considerationandindischargeofanydebtorliability.Apresumptionisnotinitselfevidence, but only makes a prima facie case for a party for whose benefit it exists.

The phrases "until the contrary is proved" in Section118 and "unless the contrary is proved" in Section 139 of the Act:-

The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.", *Kumar Exports* v. *Sharma Carpets* [*Kumar Exports* v. *Sharma Carpets*, (2009) 2 SCC 513. See also *Gimpex (P) Ltd. v. Manoj Goel*, (2022) 11 SCC 705.

Cognizance, Limitation, Jurisdiction-A Study

Cognizance of offence under Sec. 142 of NI Act:- The language used in the above section admits of no doubt that the Magistrate is forbidden from taking cognizance of the offence if the complaint was not filed within one month of the date on which the cause of action arose. Completion of the offence is the immediate forerunner of rising of cause of action. In other words cause of action would arise soon after completion of the offence, and the period of limitation for filing the complaint would simultaneously start running., *SIL Import, USA v. Exim Aides Silk Exporters*, (1999) 4 SCC 567.

Period of Limitation:-

In the present case, notice was sent under Section 138 of theAct on 4-1-1997, which was served on the accused on 10-1-1997, giving him 15 days' time for making payment, which expired on 25-1-1997.Cause of action to file the complaint accrued on 26-1-1997,whichdayhas to be excluded in computing the period of limitation, as required under Section 12(1) of the Limitation Act, 1963. Therefore, the limitation would be counted from 27-1-1997 and the complaintwasfiledon26-2-1997,within a period of one month from that date, as such, the same was filed well within time.We find that the point is concluded by a judgment of this Court in *Saketh India Ltd.* v. *India Securities Ltd.* [(1999) 3 SCC 1 : 1999 SCC (Cri) 329 : AIR 1999 SC

1090] in which case taking into consideration the provisions of Section 12(1) of the Limitation

Act, it was laid down that the day on which cause of action had accrued has to be excluded for reckoning the period of limitation for filing a complaint under Section 138 of the Act. In the present case, after excluding the day when cause of action accrued, the complaint was filed well within time; as such the High Court was not justified in holding that there was two days' delay in filing the complaint. For the foregoing reasons, we are of the view that the High Court was not justified in quashing prosecution of the respondents. See. *Jindal Steel and Power Ltd. v. Ashoka Alloy Steel Ltd.*, (2006) 9 SCC 340.

As is seen from the ruling in **Dattatraya v. Sharanappa , 2024 SCC OnLine SC 1899**, the NI Act, 1881 enlists three essential conditions that ought to be fulfilled before the said provision of law can be invoked. Firstly, the cheque ought to have been presented within the periodofitsvalidity.Secondly,ademandofpaymentoughttohavebeenmadebythepresenter of the cheque to the issuer, and lastly, the drawer ought to have had failed to pay the amount within a period of 15 days of the receipt of the demand.These principles and pre-requisites stand well established through Judgment of this Court in *Sadanandan Bhadran* v. *Madhavan Sunil Kumar*3. There is an explicit limitation of 30 days, beginning from period when the cause of action arose, prescribed by the statute vide Section 142 (b) of the NI Act, 1881to initiate proceedings under Section 138 of the NI Act, 1881.

Jurisdiction:-

In *Expeditious Trial of Cases Under Section 138 of NI Act, 1881, In re*, (2021) 16 SCC 116 : 2021 SCC On Line SC 325 at page 131, it was held that Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in *Meters & Instruments* [*Meters & Instruments (P) Ltd.* v. *Kanchan Mehta*, (2018) 1 SCC 560 : (2018) 1 SCC(Civ)405:(2018)1SCC(Cri)477] do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the trial courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10-3-2021 [*Expeditious Trial of Cases Under Section 138 of NI Act 1881, In re*, 2021 SCC On Line SC 354] .

Section 142(2)(*a*), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015 :-

In ***Bridgestone India (P) Ltd. v. Inderpal Singh*, (2016) 2 SCC 75,** it was held that "We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that Section 142(2)(*a*), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia, in the territorial jurisdiction of the court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account). We are also satisfied, based on Section142-A(1) to the effect,that the judgment rendered by this Court in***DashrathRupsinghRathodcase*[*DashrathRupsinghRathod*v.*StateofMaharashtra,***

(2014) 9 SCC 129 : (2014) 4 SCC (Civ) 676 : (2014) 3 SCC (Cri) 673] , would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonour of the cheque in the present case arises."

1. A First Class Magistrate may impose a fine exceeding Rs 5000 :-As was held in ***R. Vijayan v. Baby*, (2012)1SCC260:(2012) 1 SCC (Civ) 79:(2012) 1 SCC (Cri) 520:2011 SCC On Line SC 1363 at page 265**, it is of some interest to note,though may not be of any assistance in this case, that the difficulty caused by the ceiling imposed by Section 29(2) of the Code has been subsequently solved by insertion of Section 143 in the Act (by Amendment Act 55 of 2002) with effect from 6-2-2003. Section 143(1) provides that notwithstanding anything contained in the Code, all offences under Chapter XVII of theAct should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 of the Code (relating to summary trials)shall, as far as may be, apply to such trials. The proviso thereto provides that it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term extending one year and an amount of fine exceeding Rs 5000, in case of conviction in a summary trial under that section. In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the amount of fine stipulated in Section29(2) of the Code is removed. Consequently, ***in regard to any prosecution for offences punishable under Section 138 of the Act, a First Class Magistrate may impose a fine exceeding Rs5000, the ceiling being twice the amount of the cheque.***

2. **Sec.138 of the NI Act requires to be tried in a summary way:-**Section 138 of the NI Act, which requires to be tried in a summary way It was held in ***J.V. Baharuni v. State of Gujarat*, (2014) 10 SCC 494**, that a case under Section 138 of the NI Act, which requires to be tried in a summary way as contemplated under Section 143 of the Act, when in fact, was tried as regular summons case it would not come within the purview of Section 326(3) of the Code. In other words, if the case in substance was not

tried in a summary way, though was triable summarily, and was tried as a summons case, it need not be

heard de novo and the succeeding Magistrate can follow the procedure contemplated under Section326(1)of the Code.(See *Ramilaben Trikamlal Shah*v.*Tubeand Allied Products* [2006SCC On Line Bom 1272 : (2007) 2 Mah LJ 834 : 2007All MR (Cri) 1637] .)

3. Magistrate has the discretion under Section 143 of the NI Act:-The learned Magistrate has the discretion under Section 143 of the NIAct either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner provided under the second proviso to Section 143 of the NIAct. Such reasons should necessarily be recorded by the trial court so that further litigation arraigning the mode of trial can be avoided. See. ***J.V. Baharuni v. State of Gujarat,* (2014) 10 SCC 494.**

4. **De novo enquiry not necessary**:-But where even in a case that can be tried summarily, the court records the evidence elaborately and in verbatim and defence was given full scope to cross-examine, such procedure adopted is indicative that it was not summary procedure and therefore, succeeding Magistrate canrelyupontheevidenceonrecordanddenovoenquiryneednotbeconducted.(See*A.Krishna Reddy* v. *State* [(1999) 6ALD 279] .) See. *J.V. Baharuni's case (Supra).*

5. ***Evidence recorded by one Magistrate in such a case may be legally read in evidence by his successor:-****In Shivaji Sampat Jagtap v. Rajan Hiralal Arora [2007 Cri LJ 122 (Bom)] , the Bombay High Court observed thus : (Cri LJ p. 128, para 18)*

> "*18*.…a case, which is triable as summarily, and in which the record of the proceedings has been prepared in accordance with the provisions of Sections 263 and 264 of the Code could be stated to have been tried summarily for the purpose of Section326(3) and in that case the evidence recorded by one Magistrate cannot be read in evidence by succeeding Magistrate. *The succeeding Magistrate, however, in a case, where the procedure contemplated under Sections 263 and 264 of the Code in particular has not been followed, he need not hold a trial de novo*. In short, if no record as per Sections 263 and 264 has been or is being maintained by the Magistrate and the case has been or is being tried as a regular summons case and not tried in a summary way as contemplated under Sections 262 to 265 of the Code, such case shall not be considered as tried in summary way, though triable summarily as provided for under sub-section (1) of Section 143 of the Act, so as to attract the provisions of Section 326(3) of the Code. Therefore, *the evidence recorded by one Magistrate in such a case maybe legally read in evidence by his successor and no de novo trial shall be necessary*." See. *J.V.Baharuni'scase(Supra).*

Interim Compensation and its recovery:

Clause (*b*) of sub-section (1) of Section 143-A will apply only when the case is being tried as a warrant case:-

The power under sub-section (1) of Section 143-Ais to direct the payment of interim compensation in a summary trial or a summons case upon the recording of the plea of the accused that he was not guilty and, in other cases, upon framing of charge. As the maximum punishment under Section 138 of the NI Act is of imprisonment up to 2 years, in view of clause (*w*) read with clause (*x*) of Section 2 of the Code of Criminal Procedure, 1973 (for short "Cr.PC"), the cases under Section 138 of the NI Act are triable as summons cases.

However, sub-section (1) of Section 143 provides that notwithstanding anything contained in CrPC, the

learned Magistrate shall try the complaint by adopting a summary procedure under Sections 262 to 265CrPC. However, when at the commencement of the trial or during the course of a summary trial, it appears to the court that a sentence of imprisonment for a term exceeding one year may have to be passed or for any other reason it is undesirable to try the case summarily, the case shall be tried in the manner provided by Cr.P.C. Therefore, the complaint under Section 138 becomes a summons case in such a contingency. We may note here that under Section 259 Cr.P.C, subject to what is provided in the said section, the learned Magistrate has the discretion to convert a summons case into a warrant case. Only in a warrant case, there is a question of framing charge. Therefore, clause (*b*) of sub-section (1) of Section 143-Awill apply only when the case is being tried as a warrant case. In the case of a summary or summons trial, the power under sub-section (1) of Section 143- A can be exercised after the plea of the accused is recorded. See. ***Rakesh Ranjan Shrivastava v. State of Jharkhand*, (2024) 4 SCC 419** : 2024 SCC OnLine SC 309 at page 426.

Mandatory or directory:-

Thereisnodoubtthattheword"may"ordinarilydoesnotmean"must".Ordinarily,"may"willnotbe construed as "shall". But this is not an inflexible rule. The use of the word "may" in certain legislations can be construed as "shall", and the word "shall" can be construed as "may". It all depends on the nature of the power conferred by the relevant provision of the statute and the effect of the exercise of the power. The legislative intent also plays a role in the interpretation of such provisions. Even the context in which the word "may" has been used is also relevant.

Recovery of the interim compensation:-

For recovery of the interim compensation, the immovable or movable property of the accused can be sold by the Collector. Thus, non-payment of interim compensation fixed under Section 143-A has drastic consequences. To recover the same, the accused may be deprived of his immovable and movable property. If acquitted, he may get back the money along with the interest as provided in sub-section (4) of Section 143-A from the complainant. But, if his movable or immovable property has been sold for recovery of interim compensation, even if he is acquitted, he will not get back his property. ,***Rakesh Ranjan Shrivastava v. State of Jharkhand*, (2024) 4 SCC 419.**

AmountofinterimcompensationcanberecoveredasifitwereafineunderSection 421CrPC:-

Under sub-section (5) of Section 143-A, it is provided that the amount of interim compensation can be recovered as if it were a fine under Section 421CrPC.Therefore, by a legal fiction, the interim compensation is treated as a fine for the purposes of its recovery. Section 421CrPC deals with the recovery of the fine imposed by a criminal court while passing the sentence. Thus, recourse can be taken to Section 421CrPC for recoveryof interim compensation. See. ***Rakesh Ranjan Shrivastava v. State of Jharkhand*, (2024) 4 SCC 419.**

As was held in Rakesh Ranjan Shrivastava's case (2024) (supra), non-payment of interim compensationbytheaccuseddoesnottakeawayhisrighttodefendtheprosecution.Theinterimcompensation amount can be recovered from him treating it as fine. The interim compensation amount can be recovered by the trial court by issuing a warrant for attachment and sale of the movable property of the accused. There is also a power vested with the court to issue a warrant to the Collector of the District authorizing him to realize the interim compensation amount as arrears of land revenue from the movable or immovable property, or both, belonging to the accused.

Compounding of Offences–Execution of Lok Adalat Award.

Permission to compound the offence is not necessary:- Section 147 of N.I.Act makes itclearthatoffencepunishableundertheprovisionsofNIActiscompoundableinnature. In Rameshbhai Sombhai Patel v. DineshbhaiAchalanand Rathi, 2004 SCC Online Gujarath 469, it was held that No formal permission to compound the offence of section 138 of N.I.Act is required. If the Court satisfies that the complainant has been duly compensated, accused can be discharged in the cases of section 138 of N.I. Act. See.Meters and Instruments (P) Ltd.v.Kanchan Mehta,(2018)1SCC560.Aswasheld in Gunmala SalesPrivate Ltd. Versus Anu Mehta, (2015) 1 SCC 103, Sec. 482 of the Code of Criminal Procedure,1973 is applicable seeking quash the proceedings under section 138 of N.I.Act.

In ***Damodar S. Prabhu* v. *Sayed Babalal H. Damodar S. Prabhu* v. *Sayed Babalal H.*, (2010) 5 SCC 663,** it was held that is an important judgment of three Hon'ble Judges of this Court. This judgment dealt, in particular, with the compounding provision contained in Section 147 of the Negotiable Instruments Act.

Section147 N.I. Act overrides the effect of Section 320 (9) CrPC:-

In ***P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*, (2021) 6 SCC 258**it was held that "*since Section 147 was inserted by way of an amendment to a special law, the same will override the effect of Section320(9) CrPC, especially keeping in mind that Section 147 carries a non obstante clause*."

"Award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision-making process: -

It is useful to refer to the judgment of this Court in *State of Punjab* v. *Jalour Singh* [(2008) 2 SCC 660. The ratio of that decision was that the "award" of the Lok-Adalat does not mean any independent verdict or opinion arrived at by any decision-making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed upon by the parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.This judgment was followed in *B.P. Moideen Sevamandir* v. *A.M. Kutty Hassan* [(2009) 2 SCC 198. Further more, In ***P.T. Thomas* v. *Thomas Job* [(2005) 6 SCC 478]** , the LokAdalat, its benefits, award and its finality have been extensively discussed.

In *K.N. Govindan Kutty Menon* v. *C.D. Shaji* [*K.N. Govindan Kutty Menon* v. *C.D. Shaji*, (2012)2SCC51:(2012)1SCC(Civ)515:(2012)1SCC(Cri)732]citedbytheappellant complainant, this Court held:(SCCpp.55-56&59,paras11&23)

"*11*. … In the case on hand, the question posed for consideration before the High Court was that 'when a criminal case referred to by the Magistrate to a LokAdalat is settled by the parties and an award is passed recording the settlement, can it be considered as a decree of a civil court and thus executable by that court?' After highlighting the relevant provisions, namely, Section 21 of the Act, it was contended before the High Court that every award passed by the Lok Adalat has to be deemed to be a decree of a civil court and as such, executable by that court.

Complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail:-

In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act [cited from : *Arun Mohan, Some thoughtstowardslawreformsonthetopicof Section138,NegotiableInstrumentsAct—Tackling an avalanche of cases* (New Delhi : Universal Law Publishing Co. Pvt. Ltd., 2009) at p. 5]:

'… *Unlike that for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery*. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.

If we were to examine the number of complaints filed which were "compromised" or "settled" before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued.'(Observed in *P. Mohanraj's case (supra)).*

Lok-Adalat sasa decree of a civil court*:*

In K.N. Govindan Kutty Menon v. C.D. Shaji [K.N. Govindan Kutty Menon v. C.D. Shaji, (2012)2SCC51:(2012)1SCC(Civ)515:(2012)1SCC(Cri)732]hasheldthat:(SCCp.60, para26)

> "Even if a matter is referred by a criminal court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil court." See also. *Makwana Mangaldas Tulsidas v. State of Gujarat*, (2020) 4 SCC 695.

PAPER PRESENTATION

By
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Topic – Negotiable Instruments Act

a. **Offences under Section 138 NI Act and case law**
b. **Cognizance, Limitation, Jurisdiction-a study**
c. **Interim Compensation and its recovery**
d. **Compounding of offences – Execution of Lok Adalat**

Offence under Section 138 of N.I Act and case law -

Section 138 deals with the dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the bank unpaid, either because of the amount, of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank, such person shall be deemed to have committed an offence.

Provided that nothing contained under Section 138 shall apply unless-

a. The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of validity, whichever is earlier.
b. The payee or the holder in due course of the cheque as the case may be, makes the demand for the payment of the said amount of money by giving on notice, in writing, to the drawer of the cheque, within 30 days of receipt of information by him from the bank regarding the return of cheque as unpaid, and

c. The drawer of the cheque fails to make the payment of the said amount to the payee or, as the case may be, to the holder in due course of cheque within 15 days of the receipt of the said notice.

In **Gimpex Private Limited V. Manoj Goel** 2021 SCC OnLine SC 925, the Apex Court has enumerated the ingredients forming the basis of the offence under Section 138 of the NI Act in the following structure: (i).The drawing of a cheque by person on do account maintained by him with the banker for the payment of any amount of money to another from that account;

(ii) The cheque being drawn for the discharge in whole or in part of any debt or other liability;

(iii) Presentation of the cheque to the bank arranged to be paid from that account,

(iv) The return of the cheque by the drawee bank as unpaid either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount;

(v) A notice by the payee or the holder in due course making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and

(vi) The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice.

<u>Cognizance, Limitation, Jurisdiction-</u>

Section 142 (1) (c) clearly states that no Court inferior to that of a metropolitan magistrate or judicial magistrate of I class shall try any offence punishable under Section 138 NI Act. The Court shall take cognizance of offence

punishable under Section 138 only upon a complaint made in writing by the payee or the holder in due course of cheque, as the case may be.

Section 142(1)(b) clearly states that the complaint is to be made within one month of the date on which the cause of action arises to the jurisdictional court for taking cognizance. Provided that the cognizance of the complainant may be taken by the Court after the prescribed period if the complainant satisfies the Court that he had sufficient cause for not making complaint within such period.

In **K.Bhaskaran Vs.Sankaran Vaidhyan Balan and another,** (1999) 7SCC 510, the Hon'ble Apex Court held that *offence under Section 138 NI of Act has five components- 1.Drawing of the cheque, 2.Presentatino of the cheque to the bank, 3.Returning of the cheque unpaid by the drawee bank, 4.Giving notice in writing to the drawer demanding of payment of the cheque, and 5.Failure of the drawer to make payment within 15 days of the receipt of the notice.* Further, The Hon'ble Apex court stated that the court having jurisdiction over the territorial limits wherein any of the five acts that constitute the components of the offence occurred would have jurisdiction to deal with the case and if five acts were done in five different areas any one of the Courts will have jurisdiction as chosen by the complainant.

Whereas in the year, 2014, the Hon'ble Supreme Court in **Dashrath Rupsingh Rathod Vs. State of Maharashtra and another,** (2014) 9 SCC 129 a Three Judges Bench observed that the return of the cheque by the drawee bank would alone constitute commission of offence under Section 138 of NI Act and would indicate the place where the offence is committed. It was therefore stated that the place of the trial must logically be restricted to where the cheque is dishonoured upon presentation and not where the complainants bank is situated.

Likely, Section 142 of NI Act was amended in the year, 2015 and Sub Section 2 was inserted. As per Section 142(2), the jurisdiction of the offence under Section 138 is clearly stated asthe offence under Section 138 shall be inquired into and tried only by a Court within whose local jurisdiction-

a.If the cheque is delivered for collection through any account the branch of the bank where the payee or holder in due course, as the case may be maintains the account, is situated or

b.If the cheque is presented for payment by the payee or holder in due course, otherwise through account, the branch of the drawee bank where the drawer maintains the account, is situated.

Later, the Hon'ble Supreme Court in **Bridgestone India Private Limited Vs. Inderpal Singh,** (2016) 2SCC 75 affirmed the legal position obtaining after the amendment of the act of 1881 and endorsed that Section 142(2) (a) of the act vests jurisdiction for initiating proceedings of an offence under Section 138 in the Court where the cheque is delivered for collection.

Interim Compensation and its recovery

As per Section 143A of NI Act the Court trying an offence under Section 138 may order the drawer of the cheque to pay interim compensation to the complainant. The interim compensation may be granted only after the accused pleads not guilty to the accusation made in the complaint and the interim compensation shall not exceed 20% of the amount of the cheque. The interim compensation shall be paid within 60 days from the date of the Order or within such period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the accused.

The interim compensation payable by the accused may be recovered as if it were a fine under Section 421 of Code of Criminal Procedure (Cr.P.C.). whereas in case where the accused is acquitted the Court shall direct the complainant to repay the amount to the accused with interest within 60 days from the of Order or within such period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the complainant.

In **V.Krishnamurthy Vs. Dairy Classic Ice Cream Private Limited, (**2022) SCC OnLine Kar 1047 the Hon'ble High Court of Karnataka stated that application of mind and passing of reasoned order of grant of compensation becomes necessary in the light of penal consequences that ensue an accused who fails to comply the order as the complainant is given several remedies of recovery which result in the accused being taken into custody.

The Hon'ble Supreme Court in **Rakesh Ranjan Shrivastava V. The State of Jharkhand and another, (2024) 3 S.C.R. 438,** in Criminal Appeal No.741 of 2024 held that *non payment of interim compensation fixed under Section 143A has drastic consequences*. To recover the same, the accused may be deprived of his immovable and movable property. If acquitted he may get back the money along with the interest as provided in Sub section (4) of Section 143A from the complainant.

Further, the Hon'ble Apex Court held that *though NI Act does not prescribe any mode of recovery of the compensation amount from the complainant together with interest as Section 143A (4) provides for refund of interim compensation by the complainant to the accused and sub section (5) provides for mode of recovery of the interim compensation, obviously for recovery of interim compensation from the complainant the mode of recovery will be as provided in Section 421 of Cr.P.C.*

Compounding of offences – Execution of Lok Adalat Award

Section 147 of NI Act deals the offences to be compoundable. It is clearly contemplated in Section 147 that notwithstanding anything contained in Cr.P.C every offence punishable under NI Act shall be compoundable, which means the offence under Section 138 NI Act is compoundable and can be settled before the Lok Adalat Bench.

The award passed for offence under Section 138 NI Act in the Lok Adalat will be treated like any other award and will be executed same as a decree before the

civil court. The Hon'ble Supreme Court in **K.N.Govindan Kutty Menon Vs. C.D.Shaji,** 2012 (2) SCC 51 held that *even if a matter is referred by a criminal court under Section 138 of NI Act and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as decree capable of execution by a civil court*. As a reason all the modes of execution available for a decree are equally applicable for the execution of a Lok Adalat Award passed for offence under Section 138 NI Act.

Paper presentation for third district level workshop

Offence under section 138 of NI Act – Ingredients and case Law.

By,

Ms.B.Rachana

II Additional Civil Judge (JD), Eluru.

The Negotiable Instruments Act, 1881 was enacted as an attempt to consolidate the law relating to promissory notes, bills of exchange and cheques. The main object of the Act was to legalize negotiation of certain instruments like any other goods. The term negotiable instrument is defined under section 13 of Negotiable Instrument Act, the term Negotiable instrument is defined as under Section 13: Negotiable Instrument; (1) A "negotiable instrument" means a promissorynote, bill of exchange or cheque payable either to order or to bearer.

Explanation (i):- A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii):- A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank. Explanation (iii):- Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

Meaning Cheque:

Section 6 of NI Act defines cheque as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise then on demand and it includes the electronic image of a truncated cheque and a cheque in electronic form. Explanations further substantiate the meaning of electronic cheque and truncated form of cheque.

Ingredients under section 138 of NI Act:

An offence committed under Section 138 is a non-cognizable offence (a case in which a police officer cannot arrest the accused without an arrest warrant). Also, it is a bailable offence.

The ingredients of the offence as contemplated under Sec.138 of the Act are as under:

1. The cheque must have been drawn for discharge of existing debt or liability. That debt must be legally recoverable debt.

2. Cheque must be presented within 3 months or within validity period whichever is earlier.

3. Cheque must be returned unpaid due to insufficient funds or it exceeds the amount arranged.

4. Fact of dishonour be informed to the drawer by notice within 30 days.

5. Drawer of cheque must fail to make payment within 15 days of receipt of the notice.

The cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The Reserve Bank of India *vide* Notification No. DBOD.AML BC.No.47/14.01.001/201112 has made the period of validity of a cheque to be three months now. Hence, as of now, the cheque has to be presented within three months from the date on which it was drawn. The payee or holder in due course of the cheque has to make a demand for payment of the amount due by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding dishonour of the cheque. The drawer of the cheque has to fail to make the payment of the amount to the payee or holder in due course within 15 days of the receipt of the said notice. The complaint has to be filed within one month of the date on which the cause of action arises under clause (c) of the proviso to Sec. 138 N. I. Act as per section 142 of NI Act.

Conditions precedent for constituting an offence under S. 138

There are three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable.

(*i*) The cheque ought to have been presented to the bank within a period of 3 months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(*ii*) The payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

(*iii*) The drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within 15 days of the receipt of the said notice.

It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (*a*), (*b*) and (*c*) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque. This was observed in the case of *MSR Leathers* v. *S. Palaniappan*, (2013) 1 SCC 177.

Legally enforceable debt:

The term "debt or any other liability" is explained in Sunil Todi v. State of Gujarat, (2022) 16 SCC 762. The proviso to Section 138 stipulates that the cheque must be presented to the bank within a period of six months from the date on which it is drawn or within its period of validity. Therefore, a cheque given as a gift and not for the satisfaction of a debt or other liability, would not attract the penal consequences of the provision in the event of its being returned for insufficiency of funds.

Jurisdiction

In *Expeditious Trial of Cases Under Section 138 of NI Act, 1881, In re*, (2021) 16 SCC 116 it was held that Section 258 of the Code is not applicable to complaints under Section 138 of the Act. It was observed that the law laid down *Meters & Instruments (P) Ltd.* v. *Kanchan Mehta*, (2018) 1 SCC 560 do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the trial courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee.

"Stop payment" instructions by the drawer

A complaint under Section 138 can be made not only when the cheque is dishonoured for reason of funds being insufficient to honour the cheque or if the amount of the cheque exceeds the amount in the account, but also where the drawer of the cheque instructs its bank to "stop payment". If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque and that the stop-payment notice had been issued because of other valid causes, then offence under Section 138 would not be made out. This was observed in the case of *MMTC Ltd.* v. *Medchl Chemicals and Pharma (P) Ltd.*, (2002) 1 SCC 234.

"Account closed" by the drawer

Return of a cheque on account of account being closed would be similar to a situation where the cheque is returned on account of insufficiency of funds in the account of the drawer of the cheque which squarely brings the case within Section 138. This was held in the case of *NEPC Micon Ltd.* v. *Magma Leasing Ltd.*, (1999) 4 SCC 253.

“Signatures do not match”

The expression “amount of money … is insufficient” appearing in Section 138 of the Act is a genus and dishonour for reasons such as “account closed”, “payment stopped”, “referred to the drawer” are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the “signatures do not match” or that the “image is not found”, would constitute a dishonour within the meaning of Section 138 of the Act as per *Laxmi Dyechem* v. *State of Gujarat*, (2012) 13 SCC 375.

By,

Ms.B.Rachana

II Additional Civil Judge (JD), Eluru.

THIRD DISTRICT LEVEL WORK SHOP FOR THE YEAR 2024

Held on 21-09-2024

Paper Presentation by P.S.P.Chiranjneevi Rao,
Special Magistrate, Tanuku.

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Offences Under Section 138 of Negotiable Instruments Act-
Ingredients and case law

Pranams to My Lord Hon'ble Justice K.Suresh Reddy Garu, Judge, High Court of A.P. and Administrative Judge, West Godavari District.

Namaste to Sri Purushotham Kumar Chintalapudi, Principal District Judge, West Godavari, Eluru and other Additiional District Judges, Senior Civil Judges, Junior Civil Judges, West Godavari.

I am directed to submit paper presentation on Offence Under Sections 138 of Negotiable Instruments Act – Ingredients and case law. We are all know in recent time, there is abnormal increase in the cases filed before the courts, especially for the offence U/Sec. 138 of NI Act.

I want to submit the ingredients of the said offence, which are known to all of us but only by way of refreshing our memories.

As per Section 138 of NI Act, 1881 as amended by Act 20 of 2018 with effect from 01-09-2018, the offence be punished with imprisonment for a term which may extent to two years or with fine, which may extent to the twice of the amount and cheque or with both

As per Section 142(1) (a) of NI Act no courts shall take cognizance of offence punishable U/Sec. 138 of NI Act except upon a written complaint made by payee or holder or holder in due course.

As per Section 142 (1) (b) that such complaint shall be made within one month of the date on which cause of action arises.

As per Section 142(1) (c) no courts inferior to Metropolitan Magistrate or Judicial Magistrate of I Class shall try any of offence U/Sec. 138 of NI Act.

Now let us discuss about ingredients of the offence U/Sec.138 of NI Act. As per Section 138 of NI Act

> "Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence"

I am using the following words which means and includes.

THE PERSON, WHO CAN REPRESENT

Here, the "person" means and includes a human being (having contractual capacity as per Indian Contract Act) and also includes legal personality like Business name, Partnership Firm, Company or any other Legal Personality (include Agent, Surety Holder, Guarantor Holder, Holder in Due course Legal Representative, Transferee etc.)

The person having authority to operate the "Bank Account" means and includes the individual bank account of the person or the person having authority to operate the account or the person having control over operation of the account by operation of Law or by Order of the Court or the legal heir of the said account-holder, having an agreement made with the said bank is deemed to be a person liable for his acts.

THE DEBT OR LIABILITY

The debt or liability include debt or a money or value of Goods and Services other liabilities liable to be paid as per Law**,** agreement, mutual consent, contractual liability and by way of Court Decrees.

CHEQUE.

Cheque means a written order given to the bank either in the electronic form or in a physical form or truncated form of cheque to pay such amount to the bearer or Holder or Holder in due course from out of his account towards his legal liability.

ACCOUNT

Account means means and include bank account in which the Person/ Account-Holder is authorized to deposit or withdraw the amount in cash in-person or authorized person or authorizes to transfer the funds to the required by the Account-Holder to the others authorized accounts as per the agreement with the bank, duly authorized by the bank authority.

Now I want to try to explain the ingredients required to prove the offence U/Sec. 138 of NI Act.

(i) Person/Account-Holder/Drawer/Drawee
(ii) Legal Liability
(iii) Discharge
(iv) Cheque
(v) Return by the Bank
(vi) Notice
(vii) Receipt of notice
(viii) Liability

(i) PERSON OR ACCOUNT-HOLDER

Any person as mentioned above or Human being (having contractual capacity) or legal personality must have an account in the bank, who may be drawer or drawee having an account in any of the bank it may public sector or private bank having valid license from Reserve Bank of India, to do bank operations.

The Drawer is the person and maker of the cheque who is the person directed to pay the amount through a written order through the bank.

Drawee is the person who is authorized to receive the amount as directed by drawer.

The drawer must make a cheque either physically or through electronic form or truncated cheque and to deliver to drawee personally or through bank.

(ii) LEGAL LIABILITY

The drawer must have been issued cheque towards legal liability. The legal liability means and includes liable to pay as per agreement between parties, mutual consent or as a value of the Goods and Services taken and the debt borrowed in cash or kind or any other legal liability. Generally, most of the cases arises on business transactions and pronotes Hand-loans.

(iii) DISCHARGE

The drawer must issue cheque towards discharge of any legal liability as mentioned above either in part or in full or towards interest due or the value of the Goods and Services obtained from other persons or by way of rentals to the immovable properties or towards compensation or towards damages caused to the said persons

(iv) CHEQUE.

Cheque means a written order given to the bank either in the electronic form or in a physical form or truncated form of cheque to pay such amount to the bearer or holder in due course from out of his account towards his legal liability to the home branch where the account-holder got account or through any other branch of the same bank or through other bank.

(v) RETURN BY THE BANK

The bank either it may be the home branch where the account-holder got account or through any other branch of the same bank or through other bank may refuse to pay the amount as ordered by the drawer to the drawee due to various

reasons including (i) " Insufficient Funds", (ii) Account Closed, (iii) Exceed Arrangements, (iv) Refer to Drawer, (v) Consult Drawee bank and Present Again,(vi) Consult Drawer and present Again., (vii) Stop Payment, (viii) Signature not tallied, (IX) and on other several grounds.

Except on the ground that the signature is not tallied and stop payment order. The other grounds amounts to return of the cheque and can be treated as valid reason for non payment due to lapse on the part of the drawer. In the case of stop payment order the burden is on the drawer/accused on which ground he stopped the payment and issued the stop payment order. In the case of signature not tallied the burden is on the complainant to prove the signature is that of the drawer/accused and the difference is intentional on the part of the drawer/accused.

(vi) NOTICE

The notice of return of the cheque must be given in writing to the drawer so as to unable him to rectify his acts and to pay back the legal liability amount to the drawee, which is mandatory to prove the offence U/Sec. 138 of NI Act. If there is no notice is issued to the drawer, the drawer is not liable, as there is no opportunity for him to rectify his acts.

(vii) RECEIPT OF NOTICE

Generally receipt of notice is by way of acknowledgment in writing or to electronic form through message. But the notices are frequently returned as "Refused" or "Intimation given". The said postal endorsements are valid to prove service of notice, if the address mentioned on the cover is regular and notified address of the drawer is correct. But if it is disputed as the correct address or his address is to be proved by the drawer, that notice was sent to wrong address intentionally by the drawee to defeat his right to rectify his defective acts.

(viii) LIABILITY

The drawer is liable for the offence U/Sec. 138 of NI Act, if the above ingredients are proved by the drawee by adducing required evidence which also includes to answer given through oral and documentary evidence for the defences

raised by drawer/accused during trial like forgery, not supported by consideration, no capacity, cheating, mis-representation etc.,if the drawee fail to answer for the defences raised by the drawer, otherwise the drawee is not liable for the offence.

Generally the Facts of each case are different from each other. we have to decide that all the ingredients of the offence are proved or not, basing on the facts put forth before the court in that case by way of oral and documentary evidence adduced before the court.

I may be pardoned for taking much valuable time of your all authority to notify the fact, which are already known to all of you.

Thanking you for opportunity given to me to expressed my opinion regarding the offence U/Sec. 138 of NI Act without mentioning case law.

P.S.P.CHIRANJEEVI RAO
Special Magistrate,
Tanuku.

PAPER PRESENTATION

By
Ms.K.S.R.Tejaswi,
Judicial Magistrate of I Class
(Junior Division), Jangareddigudem

Topic – Protection of the women from Domestic Violence Act, 2005

a. **Parties by whom and against whom relief can be sought.**
b. **Types of relief**
c. **Execution of Orders**

Introduction:-

The protection of women from Domestic Violence Act is enacted to provide effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The Hon'ble Supreme Court in **Indra Sarma Vs. V.K.V.Sarma, (2013) 15 SCC 755** reiterated the *"legislative intent of the D.V.C.Act that the DVC Act was enacted to protect women from Domestic Violence and to prevent it from occurring in society."*

Parties by whom and against whom relief can be sought.

The word Domestic Violence is defend under Section 3 of DVC Act. Domestic Violence means any act omission or commission or conduct of the respondent which constitutes any harm, injury or endangers the health, safety, well being of aggrieved persons or any person related to her to meet any unlawful demand for dowry, or threatens the aggrieved person or any person related to her. The Domestic Violence includes the physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse.

An application under the DVC Act can be made by any aggrieved person seeking reliefs under the Act against the respondent. Section 2(a) defines the term aggrieved person as any women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

Further, the word respondent is also defined in the act under Section 2(q) as any adult male who is or has been in a domestic relationship with aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in her relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner. The Hon'ble Supreme Court in **Hiral P.Harsora and others V. Kusum Narottamdas Harsora and others, AIR 2016 SC 4774 r**uled that Section 2(q) is unconstitutional to the effect that it only defines respondents as adult males. The Court held that *legislature did not intend to exclude female a relatives from this scope of the complaint.*

Types of relief

When an application is made by the aggrieved person under Section 12 of DVC Act the Magistrate after due consideration and enquiry shall grant reliefs appropriate in the case. The types of relief which can be granted by Magistrate under the DVC Act are dealt from Sections 18 to 23.

i. Section 18- Protection Orders
ii. Section 19 -Residence Orders
iii. Section 20 -Monetary relief
iv. Section 21- Custody order
v. Section 22 -Compensation orders
vi. Section 23 -Power to grant interim and *ex parte* orders.

As aforesaid, the Magistrate is empowered to pass protection order, residence order which may include restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides etc., Further the Magistrate can grant monetary relief which includes loss of earnings, medical expenses, loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance of aggrieved person as well as her children.

Further more, custody can be decided by the magistrate which was granted under Section 21 of DVC Act, and magistrate is empowered to grant compensation and damages for injuries, including mental torture or emotional distress caused by the domestic violence.

Execution of Orders

For execution of the orders granted to the aggrieved person under the Act, the magistrate shall direct the protection officer as per Rule 10 (1) (e) to assist the court in enforcement of the orders made in the proceedings under the act, which includes the orders under Section 12, 18 to 21 or Section 23 in such manner as may be directed by the Court. Further, the magistrate while passing any residence orders under section 19 may pass order directing the officer in-charge of the nearest police station to give protection to the aggrieved person and also the magistrate may require the respondent to execute the bond with or without sureties for preventing the commission of the Domestic Violence.

For every violation of order granted under DVC Act, the aggrieved person shall take shelter under Section 31 of the Act and also as per Rule 15 of DVC Rules. It means under Section 31 the aggrieved person can file criminal case against the respondent for violation of the order.

The Hon'ble Supreme Court in **Kunapareddy @ Nookala Shanka Balaji Vs. Kunapareddy Swarna Kumari and another**, 2016(11) SCC 774 stated that all the reliefs granted by the magistrate under Section 18 to 23 are of civil nature. It is, thus, clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature at the same time when there is a breach of such orders passed by the magistrate, Section 31 terms such a breach to be a punishable offence.

Added to it, if the respondent failed to pay maintenance which was granted by the Court of law the aggrieved person can recover the same under section 20(6) of DVC Act i.e., the magistrate may direct the employer or a debtor of the respondent to directly pay to a aggrieved person or deposit with the court a portion of the wages or salaries or debt due to by the respondent.

Conclusion:

Finally, I would like to conclude by stating that the DVC Act was enacted for effective protection of women rights as, though the violence against women is made punishable no remedies were attributed to the women/ victim who suffered the violence. Under DVC Act any women irrespective of age shall come forward to report the violence caused against her unlike in Section 498-A IPC which sheltered only married women. Hence, the implementation of orders granted by the Court plays pivotal role in granting the object of the enactment.

DOMESTIC VIOLENCE ACT, 2005
PARTIES BY WHOM AND AGAINST WHOM RELIEFS CAN BE SOUGHT

Paper presented by
C. Madhubabu,
Civil Judge(Junior Division),
Chintalapudi.

Introduction:

Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Where a women is subjected to cruelty by her husband or his relatives, it is an offence under section 498-A IPC/Section 85 of BNS. The civil law does however does address this phenomenon in its entirety. Keeping in view of the rights guaranteed under Articles 14, 15 and 21 of the Constitutions of India so as to provide for a remedy under the civil law, in order to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence. Thus this Act provides civil remedies to the victims of violence and punishment can be given only if there is breach of order passed under the act (Mrs. Savita Bhanot vs Col.V.D.Bhanot, 2011 Cri LJ 2963 (Del). The Act only covers right to remedy to the wives and women in domestic relationship. This act is a complete Code in itself dealing with the entire gamut of family relationship between husband wife and children and rights available to an aggrieved person on account of domestic violence.

2. It indeed effects a classification between women and men, protecting only women from domestic violence, but this classification is founded on an intelligible differential, namely, gender, and also has a rational nexus with the object of the Act. Further, the Act is far from arbitrary, in that it is a well- thought and necessary attempt to curtail domestic violence and eventually vanquish it. It is to be remembered that it is generally women who are the victims of domestic violence, and not men. At this stage, it is also essential to keep in mind Article 15(3) which empowers the State to make legislation's like this for the benefit of women, thus creating an exception in their favour against the operation of Article 15(1).

Who is an aggrieved person?

• Any woman who is or has been in a relationship with the abuser, where both parties

have lived together in a shared household and is related by consanguinity, marriage or through a relationship in the nature of marriage or adoption with the abuser. (Section 2(a) of the protection of Women from Domestic Violence Act, 2005)

• In addition, relationships with family member living together as a joint family are also included.

• Even those woman who is sister, widow, mother or in live-in with the abuser is entitled to legal protection under this act.

Who can be a complainant under the Act?

• Any woman who is, or has been in a domestic or family relationship with the respondent and who has been subjected to domestic violence, can file a complaint under this act for redressal of her grievance.

• Any Police Officer, Protection Officer or service provider may also file a complaint with regard to Domestic Violence to be held to any women.

• Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer.

• The Act protects even those females who are sisters, widows or mothers, living together as a joint family with the respondent in a shared household.

• Even a women in "live-in- relationship" she has to get the benefit of D.V. Act, if she fulfills certain conditions

3. The Supreme Court in the case of **D. Veluswamy v. D.Patchaiammal, AIR 2011 SC 479,** wherein the Court enumerated five ingredients of a live- in-relationship as follows:

1. Both the parties must behave as husband and wife and are recognized as husband and wife in front of society.

2. They must be of a valid legal age of marriage.

3. They should qualify to enter into marriage eg. None of the partner should have a spouse living at the time of entering into relationship.

4. They must have voluntarily cohabited for a significant period of time.

5. They must have lived together in a shared household.

a. Whether divorced women is an "aggrieved person" or not?

In Amit Agarwal And Ors vs Sanjay Aggarwal And Ors (2016 SCC OnLine P&H 4200), the Hon'ble High Court of Punjab and Haryana held that the ex parte divorce was granted to the wife who subsequently after seeking ex-parte divorce roped in her ex husband and his relatives under the D.V. Act. The court held that a person cannot be made respondent on the ground of a past relationship.

In **Prabha Tyagi Vs. Kamalesh Devi (CRIMINAL APPEAL NO. 511 OF 2022)** the Hon'ble Apex court held that in the event of a divorce, marriage would be no longer be subsisting, but if a woman (wife) is subjected to any domestic violence either during marriage or even subsequent to a divorce decree being passed but relatable to the period of domestic relationship, the provisions of this D.V. Act would come to the rescue of such a divorced woman also. (Para 43).

b. Whether a woman marrying a person already married which was in her knowledge entitled to any relief under DV Act or not?

No, in Deepak @ Gajanan Vs State of Maharashtra (2015 (3) RCR (Crl) (BOM)) the Hon'ble High Court of Bombay held that a woman marrying a person already married which was in her knowledge; such woman is not entitled to any relief under DV Act although children were born to her. The said relationship cannot be termed as "Relationship in the Nature of Marriage".

c. Whether aggrieved person include the women who committed offence of adultery?

No, in Reshma Begum W/O. Gajanfar Kazi Vs The State Of Maharashtra And Anr (2018 SCC OnLine Bom 1827) the Hon'ble High court of Bombay held that a woman who was already married and without seeking divorce with first husband solemnized second marriage could not claim maintenance from her second husband as the act would amount to Offence of Adultery.

d. Can Husband initiate proceedings under DV Act?

No, the Hon'ble High Court of Karnataka in Mohammed Zakir Vs. Smt Shabana. (2017 SCC OnLine Kar 1681) observed that husband cannot initiate proceedings against wife under the Act.

e. Can we consider a woman in Live in relationship as an aggrieved person under DV Act?

Yes, this was held by the Hon'ble Apex court in **D. Veluswamy vs. Pachaiammal, (AIR 2011 SUPREME COURT 479)** The term domestic relationship includes not only relationship of marriage but also a relationship in the nature of marriage. A person who falls in either category is entitled to get the benefit of maintenance.

The Hon'ble Apex court in I**ndra Sarma v. V. K. V. Sarma.(2013 (15) SCC 755)** created an exception to the relationships that are in the nature of marriage. If a woman knowingly gets into a relationship with a man who is already married, and when the vital characteristics of marriage are missing, she will not be considered a wife; hence maintenance will not be given.

f. Whether grand-mother entitled to claim maintenance from grandsons?

Yes, in Ganesh S/O. Rajendra Kapratwar vs The State Of Maharashtra the Hon'ble High Court of Bombay held that Grandmother can claim maintenance from her sons and grandsons are not liable to pay maintenance during the life time of their father. However, the residence order under section 19 of the DV Act can be passed against all (sons and grandsons) as per section 17 of the Act which recognizes right to reside in a "shared house".

g. Whether a child is an aggrieved person or not under PWDVA?

Male child is not an aggrieved person, It was held by Hon'ble High Court of J&K in Renu Bhasin and Ors. Vs Nisha Rani and Ors. (Cr.P.C. No.507/2015, MP No.1/2015)A child does not fall in the definition of aggrieved person so he cannot file a petition u/s. 12 of Act. But he may be entitled to monetary relief u/s. 20 of Act.

Girl Child is an aggrieved person. The Hon'ble Apex court in Prabha Tyagi Vs. Kamalesh Devi (Criminal Appeal No. 511 of 2022) held that the D.V. Act is a piece of Civil Code which is applicable to every women in India irrespective of her religious affiliation or Social background. When a girl child or woman becomes an aggrieved person, the protection of Sub-Section (2) of Section 17 comes into play. (Para 36).

h. When parties having been judicial separated, the wife ceased to be an "aggrieved person" or not?

No, The Hon'ble Apex court in Krishna Bhatacharjee v. Sarathi Choudhury and Another 15 held there is a distinction between a decree for divorce and decree of judicial separation; in the former, there is a severance of status and the parties do not remain as husband and wife, whereas in the later, the relationship between husband and wife continues and the legal relationship continues as it has not been snapped. Thus judicially separated wife can file complaint under DV Act as the "domestic relationship" subsists.

As long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act. Once the decree of divorce is passed, the status of the parties becomes different, but that is not so when there is a decree for judicial separation. A decree or an order for judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage. It affords an opportunity for reconciliation and adjustment.

Though judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy.

i. Whether application under DV Act is maintainable if petition for divorce is rejected?

The Hon'be Apex court in Parkash Nagardas Dubal Shaha Vs Sou. Meena Prakash Dubal Shah and ors (Crl. Appeal No 320 of 2016 (SC): DOD April 26 20) , observed an unsuccessful divorce proceeding filed by the wife do not adversely affect her right to claim reliefs under the DV Act. Though wife filed divorce, which was rejected, she continues to be the legally wedded wife and her application under DV Act remains maintainable.

Who is Respondent under the Act?

• As per section 2(q) "Respondent" means any 'adult male person' who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought relief under the Act.

• In case of Hiralal P. Harsora Vs. Kusum Narottamdas Harsora, AIR 2016 SC 4774, it was held that words 'adult male person' contrary to object of affording protection to women who suffered from domestic violence of any kind and word expression 'adult male' is substituted by "any person".

a. Whether mother-in-law is a respondent under Protection of Women from Domestic Violence Act?

The Hon'ble High court Delhi in Varsha Kapoor vs Uoi & Ors (2010 SCC OnLine Del) held that Mother-in-law can be "respondent" under section 2(q) of the Act.

b. Whether Respondent includes female or not?

The Hon'be Apex court in Sou. Sandhya Manoj Wankhade vs Manoj Bhimrao Wankhade & Ors ((2011) 3 SCC 650) held that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being

provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only.

In Hiral P. Harsora And Ors vs Kusum Narottamdas Harsora And Ors (2016 SCC ONLine SC 1118) the Hon'ble Apex court discussed the Constitutional validity of section 2(q) and the words "adult male" in Section 2(q) of the 2005 Act stands deleted since these words did not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2(q), being rendered otiose, also stands deleted.

However, the Supreme Court in the case of **Sandhya Wankhede vs. Manoj Bhimrao Wankhede (2011) 3 SCC 650** put to rest the issue by holding that the proviso to Section 2(q) does not exclude female relatives of the husband or male partner from the ambit of a complaint that can be under the provisions the Domestic Violence Act. Therefore, complaints are not just maintainable against the adult male person but also the female relative of such adult male. **(Archana Hemant Naik vs. Urmilaben I. Naik & Anr., 2009 (3) Bom Cr 851)** Wife cannot implicate one and all in the family – Though the Domestic Violence Act is a beneficial legislation, the same has been many times reported to be misused by women. For instance, in several cases women register complaint under Domestic Violence Act against one and all relatives of husband even without any evidence of abuse against them.

In the case of **Ashish Dixit vs. State of UP & Anr. AIR 2013 SC 1077**, the Supreme Court has held that a wife cannot implicate one and all in a Domestic violence case. In this case, the complainant apart from carrying the husband and in-laws in the complaint, had also included all and sundry as parties to the case, of which the complainant didn't even know names. It is necessary to have a clear understanding of domestic relationship. "Domestic relationship" means a relationship

between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Thus, a person who is not in a domestic relationship, cannot be a respondent under this Act.

c. Whether husband's extra-marital partner can be made respondent in Domestic Violence Act proceedings ?

No, The Hon'ble High Court of Karnataka in Smt. Harini H vs. Smt. Kavya H and Ors ((CRIMINAL PETITION No.2148 OF 2021)) has held that a wife cannot make the woman with whom her husband is having an illegal relationship as a respondent in the application made by her under Section 12, of the Domestic Violence Act.

4. "Domestic Relationship":

As per section 2(f) of PWDV Act – 2005, "Domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

a. What is the meaning of Joint family in the definition of Domestic relationship?

The Hon'ble Supreme Court in the recent judgment in the case Prabha Tyagi vs Kamlesh Devi has given an expanded meaning to the expression "joint family" used in Section 2(f) of the Protection of Women from Domestic Violence Act 2005. Joint family" as "persons living together jointly as a family". The court held that joint family does not mean a joint family as understood in Hindu Law. It would also include those persons who are living together or jointly as a joint family such as foster children who live with other members who are related by consanguinity, marriage or by adoption.

b. Whether domestic relationship necessary to permit a party to occupy shared household?

The Hon'ble Supreme Court, in Manmohan Attavar vs Neelam Manmohan Attavar, (AIR 2017 SUPREME COURT 3345) has observed that to issue an order under the Domestic Violence Act permitting a party to occupy a household, it is necessary that the two parties had lived in a domestic relationship in the household.

c. Whether domestic relationship is mandatory to invoke DV Act?

Yes, In Sejal Dharmesh Ved Vs. The State of Maharashtra (Crl. Application number 160 of 2011) the Hon'ble High Court of Bombay has held that "domestic relationship" is necessary for maintainability of action under the Domestic Violence Act.

5. "Shared Household"

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

a. Whether a wife is also entitled to claim a right to residence in a shared household belonging to relatives of the husband?

In Satish Chander Ahuja vs. Sneha Ahuja ((2021) 1 SCC 414) the Hon'ble Apex Court over ruled the Judgment in S.R Batra and Ors. Vs. Taruna Batra (2007 (3) SCC

169) and has clearly espoused that a wife is also entitled to claim a right to residence in a shared household belonging to relatives of the husband. The definition uses both the expressions "means and includes". It is a settled law that whenever the use of the word "means" followed by the word "includes" is used in a definition, it is an exhaustive definition. And also the definition of shared household does not indicate that a shared household shall be one which belongs to or taken on rent by the husband. Also, the "respondent" in a proceeding under Domestic Violence Act can be any relative of the husband. If the shared household belongs to any relative of the husband with whom in a domestic relationship the woman has lived & the conditions mentioned in Section 2(s) are satisfied, the said house will become a shared household.

b. Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been leveled at the point of commission of violence?

In Prabha Tyagi Vs. Kamalesh Devi the Hon'ble apex court held that there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed vis-à-vis allegation of domestic violence. However, it is not necessary that at the time of filing of an application by an aggrieved person, the domestic relationship should be subsisting - Even if an aggrieved person is not in a domestic relationship with the respondent in a shared household at the time of filing of an application under Section 12 of the D.V. Act but has at any point of time lived so or had the right to live and has been subjected to domestic violence or is later subjected to domestic violence on account of the domestic relationship, is entitled to file an application under Section 12 of the D.V. Act.

c. Whether frequent visits to the household of the complainant without any permanency is sufficient to constitute residence in shared household?

No, In Kinjal Jayesh Mehta vs Disha Jimit Sanghvi And Anr the Hon'ble High court of Bombay quashed a domestic violence case against a woman's married sister-in-law observing that sister-in-law visiting frequently to the household of the complainant without any permanency is not sufficient to constitute residence in a shared household. Definition of "domestic relationship" under the DV Act necessitates a shared household and a certain degree of cohabitation. Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, the court noted.

d. Can old-aged parents-in-law be restrained from selling their house in light of shared household consequences?

In Vibhuti Wadhwa Sharma v. Krishna Sharma, (2021 SCC OnLine Del 2104) the Hon'ble High court of Delhi held that Short durational visits or stay of daughter-in-law at the house of the parents-in- law would not get the house a colour of being a shared household.

Conclusion:

While dealing with the complaints under the PWDV Act the court has to see the eligibility criterion whether a woman is competent to file the complaint as an aggrieved person and the reliefs sought by her against the persons are liable to be added as respondents by following the above law laid down in the aforesaid decisions to render speedy justice to the person aggrieved as per the provisions of the Act.

Thank you one and all.

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DOMESTIC VIOLENCE ACT, 2005

(a) Parties by whom and against whom reliefs can be sought

(b) Types of reliefs

(c) Execution of orders

by

Sri D.Dhana Raju,

II Additional Civil Judge, (Junior Division),
Bhimavaram.

Introduction:

The Protection of Women from Domestic Violence Act (or the Domestic Violence Act) is a laudable piece of legislation that was enacted in 2005 to tackle problem of women. The Act in theory goes a long way towards protection of women in the domestic setup. It is the first substantial step in the direction of vanquishing the questionable public/private distinction traditionallymaintained in the law, which has been challenged by feminists' time and again. Admittedly, women could earlier approach the Courts under the Indian Penal Code (IPC) in cases of domestic violence. However, the kinds of domestic violence contemplated by this Act, and the victims recognized by it,make it more expansive in scope than the IPC. The IPC never used the term domestic violence to refer to this objectionable practice. In fact, the only similar class of offences addressed by the IPC dealt with cruelty to married women. All other instances of domestic violence within the household had to be dealt with under the offences that the respective acts of violence constituted under the IPC without any regard to the gender of the victim.

This posed a problem especially where the victims were children or women who were dependent on the assailant. In fact, even where the victim was the wife of the assailant and could approach the Courts under S.498A of the IPC, she would presumably have to move out of her matrimonial home to ensure her safety or face further violence as retaliation. There was no measure in place to allow her to continue staying in her matrimonial home and yet raise her voice against the violence perpetrated against her. This, together with many other problems faced by women in the household, prompted this enactment.

Scope of the Act

The scope of this legislation has been expounded in many ofjudgments by the High Courts and the Supreme Court in India. For instance, in a recent judgment the High Court of Gujarat in the case of **Bhartiben Bipinbhai Tamboli vs. State of Gujrat and ors, 2018 (1) Crimes 11 (Guj)** while extensively discussing the provisions under the Domestic Violence Act remarked that:

The domestic violence in this country is rampant and several women encounter violence in some form or the other or almost every day. However, it is the least reported form of cruel behaviour. A woman resigns her fate to the never-ending cycle of enduring violence and discrimination as a daughter, a sister, a wife, a mother, a partner, a single woman in her lifetime. This non-retaliation by women coupled with the absence of laws addressing women's issues, ignorance of the existing laws enacted for women and societal attitude makes the women vulnerable. The reason why most cases of domestic violence are never reported is due to the social stigma of the society and the attitude of the women themselves, where women are expected to be subservient, not just to their male counterparts but also to the male relatives.

Till the year 2005, the remedies available to a victim of domestic violence were limited. The women either had to go to the civil court for a decree of divorce or initiate prosecution in the criminal court for the offence punishable under Section 498A of IPC. In both the proceedings, no emergencyrelief is available to the victim. Also, the relationships outside the marriage were not recognized. This set of circumstances ensured that a majority of women preferred to suffer in silence, not out of choice but of compulsion.

Having regard to all these facts, the parliament thought fit to enact Domestic Violence Act. The main Object of the Act is protection of women from violence inflicted by a man or/and a woman. It is a progressive Act; whose sole intention is to protect the women irrespective of the relationship she shares with the accused. The definition of an aggrieved person under the Act is so wide that it is taken within its purview even women who are living with their partners in a live-in relationship.

What is the Domestic Violence Act?

The Domestic Violence Act, officially known as the Protection of Women from Domestic Violence Act 2005, was brought into force by the Indian government from October of 2006. The Domestic Violence Act was originally passed by Parliament in August of 2005 and subsequently assented to by the President in September of the same year. In November of 2007, the Domestic Violence act was ratified by four of the twenty-

eight state governments in India.

The Domestic Violence Act, for the first time in the nation's history, formally defined an act of domestic violence. The definition has since been used in thousands of court cases, both of a civil and criminal nature, to prosecute those individuals who commit violent actions against their spousesor loved ones.

Review of Important Provisions

The Act, in a bold break from prior legislations, gives a very expansive definition to the term "domestic violence", a term hitherto not even used in

legal parlance. Domestic violence is defined in a comprehensive way in S.3 of the Act, comprising:

- Physical, mental, verbal, emotional, sexual and economic abuse,
- Harassment for dowry,
- Acts of threatening to abuse the victim or any other person related toher.

The Act thus deals with forms of abuse that were either not addressed earlier, or that were addressed in ways not as broad as done here. For instance, it includes in its ambit sexual abuse like marital rape which, though excluded under the IPC, can now be legally recognized as a form of abuse under the definition of sexual abuse in this Act. The definition also encompasses claims for compensation arising out of domestic violence and includes maintenance similar to that provided for under S.125 of the Code of Criminal Procedure (CrPC). Nevertheless, the claim for compensation is not limited to maintenance as allowed by that provision. It is noteworthy that the maintenance available under this section must be in correspondence with the lifestyle of the aggrieved party. Lastly, the Act identifies emotional abuse as a form of domestic violence, including insults on account of the victim"s not having any children or male children.

Protection of Women and Fundamental Rights

The Statement of Objects and Reasons declares that the Act was being passed keeping in view the fundamental rights guaranteed under Articles 14,

15 and 21. Article 21 confers the right to life and liberty in negative terms, stating that it may not be taken away except by procedure established by law,which is required, as a result of judicial decisions, to be fair, just and reasonable. The right to life has been held to include the following rights (which are reflected in the Act), among others:

1. The right to be free of violence: In **Francis Coralie Mullin v. Union Territory Delhi, Administrator, AIR 1981 SC 746**, the Supreme Court stated, any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, wouldbe within the inhibition of

Article 21.

This right is incorporated in the Act through the definition of physical abuse, which constitutes domestic violence (and is hence punishable under

the Act). Physical abuse is said to consist of acts or conduct of such nature that they cause bodily pain, harm, or danger to life, limb or health, or impair the health or development of the aggrieved person. Apart from this, the Act also includes similar acts of physical violence and certain acts of physical violence as envisaged in the Indian Penal Code within the definition of domestic violence. By adoption of such an expansive definition, the Act protects the right of women against violence.

2. The right to dignity: In **Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan, AIR 1997 SC 152**, the Supreme Court emphasized the fact that the right to life included in its ambit the right to live with human dignity, basing its opinion on a host of cases that had been decided in favour of this proposition. The right to dignity would include the right against being subjected to humiliating sexual acts. It would also include the right against being insulted. These two facets of the right to life find mention under the definitions of sexual abuse and emotional abuse,respectively. A praiseworthy aspect of the legislation is the very conception of emotional abuse as a form of domestic violence. The recognition of sexual abuse of the wife by the husband as a form of violation to the person is creditable, especially as such sexual abuse is not recognized by the IPC as an offence. These acts would fall within the confines of domestic violence as envisaged by the Act, though the definition would not be limited to it.
3. The right to shelter: In **Chameli Singh vs. State of U.P. ,1993 (22) ALR37**, it was held that the right to life would include the right to shelter, distinguishing the matter at hand from **Gauri Shankar vs. Union of India, 2003 (1) BLJR 535**,where the question had related to eviction of a tenant under a statute. Ss. 6 and 17 of the Domestic Violence Act reinforce this right. Under S.6, it is a duty of the Protection Officer to provide the aggrieved party accommodation where the party has no place of accommodation, on request by such party or otherwise. Under S.17, the party's right to continue staying in the shared household is protected. These provisions thereby enable women to use the various protections given to them without any fear of being left homeless.

Article 14 contains the equal protection clause. It affirms equality before the law and the equal protection of the laws. Article 14 prohibits class legislation, but permits classification for legislative purposes. A law does not become unconstitutional simply because it applies to one set of persons and not another. Where a law effects a classification and is challenged as being violative of this Article, the law may be declared validif it satisfies the following two conditions:

1. The classification must be based on some intelligible differentia,
2. There must be a rational nexus between this differentia and the object sought to be achieved by the law.

As a result of the ruling in cases such as **E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555,** any law that is arbitrary is considered violative of Article 14 as well. This provision is significant in putting a stop to arbitrariness in the exercise of State power and also in ensuring that no citizen is subjected to any discrimination. At the same time, it preserves the State's power to legislate for a specific category of people.

Article 15 disallows discrimination on the grounds of religion, caste, sex, race, etc., but permits the State to make special provisions for certain classes of persons, including women and children.

The Domestic Violence Act promotes the rights of women guaranteed under Articles 14 and 15. Domestic violence is one among several factors that hinder women in their progress, and this Act seeks to protect them from this evil. It indeed effects a classification between women and men, protecting only women from domestic violence, but this classification is founded on an intelligible differential, namely, gender, and also has a rational nexus with theobject of the Act. Further, the Act is far from arbitrary, in that it is a well- thought and necessary attempt to curtail domestic violence and eventually vanquish it. It is to be remembered that it is generally women who are the victims of domestic violence, and not men. At this stage, it is also essential tokeep in mind Article 15(3) which empowers the State to make legislations likethis for the benefit of women, thus creating an exception in their favour against the operation of Article 15(1).

What is the definition of Domestic Violence according to the DomesticViolence Act?

The Protection of Women from Domestic Violence Act defines domesticviolence in a series of steps or classifications. For the purpose of the domesticviolence act, domestic violence is defined as any conduct that is delivered in a habitual nature and encompasses various forms of assault, which make the life of the aggrieved or inflicted person miserable.

The domestic violence act states that the victimized party is impeded from his or her personal liberties through perpetual violence or belittlement; the nature of the definition constitutes a feeling of depression by the aggrieved party even the underlying conduct does not amount to physical ill-treatment.

The Domestic violence act further defines domestic violence as any action, committed in the constraints of a relationship or marriage, as any action, which forces the aggrieved part to lead an immoral life or any action that delivers harm or injuries to the aggrieved person.

The Domestic Violence Act also states that a domestic violence charged will not be heard if the pursuit of course of conduct by the responding party was reasonable for his or her own protection or for the protection of his or another party's property.

Why was the Domestic Violence Act Passed?

The Domestic Violence Act was meant to provide protection to the wife or female live-in partner from acts of domestic violence at the hands of her husband or male live-in partner. The laws within the act also extend to protect women who are widows, mothers or sisters from acts of domestic violence.

Under the act, domestic violence includes all actual abuse or the threat of abuse, regardless of whether the actions are of a physical, sexual, economic, verbal or emotional nature. Economic domestic abuse, according to the domestic abuse act, refers to any harassment by way of unlawful dowry demands to the women or her relatives.

One of the primary goals of the domestic violence act is to secure the woman's right to obtain housing. The domestic violence act provides for the woman's right to reside in a shared household, whether or not the individual

has any title or rights to the home. This right is secured by a residence order, which is passed by a coordinating court under the Domestic violence Act.

Types of abuse under the Domestic Violence Act

The Gujrat High Court in a recent case of **Bhartiben Bipinbhai Tamboli vs. State of Gujarat and ors. 2018(1) Crimes 11 (Guj)** elaborated on the types of abuse or domestic violence under the Act. The same is enumerated below:

Physical Abuse

Physical abuse is the use of physical force against a woman in a way that causes her bodily injury or hurt. Physical assault, criminal intimidation and criminal force are also forms of physical abuse like beating, kicking and punching, throwing objects, damaging property, punched walls, kicked doors, abandoning her in a dangerous or unfamiliar place, using weapon to threaten or to hurt her, forcing her to leave the matrimonial home, hurting her children, using physical force in sexual situations.

Sexual Abuse

This is also a form of physical abuse. Any situation in which a woman is forced to participate in unwanted safe or degrading sexual activity, calling her sexual names, hurting a woman with objects and weapons during sex is sexual abuse.

Verbal and Emotional Abuse

Many women suffer from emotional abuse, which is no less destructive. Unfortunately, emotional abuse is often minimized or overlooked- even by thewoman being abused. Emotional abuse includes verbal abuse such as yelling, name-calling, blaming and shaming. Isolation, intimidation and controlling behaviour also fall under emotional abuse.

Economic Abuse

Economic abuse is not a very recognized form of abuse among the women but it is very detrimental. It mainly includes a woman not been provided with enough money by her partner to maintain herself and her children, which may comprise money for food, clothing, medicines etc. and not allowing a woman to take up an employment. Forcing her out of the house where she lives and not providing her rent, in case of a rented share hold also amounts to abuse. Depriving her of all or any economic or financial resources to which the person is entitled under the law or custom, restricting the woman's access to the shared household. Disposing or alienating the assets of the women whether movable or immovable, valuables, shares, securities, bonds and like other property in which she may have an interest. However, seeking maintenance to unjustly enrich one and that too without providing thealleged act of domestic violence is a gross abuse of the process of law.

PARTIES BY WHOM AND AGAINST WHOM RELIEFS CAN BE SOUGHT:

Who can be a complainant under the Act?

Section 2(a) of the Domestic Violence Act defines "aggrieved person" asany woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

The Domestic Violence Act not only covers those women who are or have been in a relationship with the abuser but it also covers those women who have lived together in a shared household and are related by consanguinity, marriage of through a relationship in the nature of marriage oradoption.

- Any woman who is, or has been in a domestic or family relationship with the respondent and who has been subjected to domestic violence, can file a complaint under this act for redressal of her grievance.
- Any Police Officer, Protection Officer or service provider may also file acomplaint with regard to Domestic Violence to be held to any women.
- Any person who has reason to believe that an act of domestic violencehas been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer.
- The Act protects even those females who are sisters, widows ormothers, living together as a joint

family with the respondent in a shared household.

- Even a woman in "live-in-relationship" she has to get the benefit of D.V. Act, if she fulfils certain conditions.

Women in Live-in-relationships covered under the Act

A wider meaning to an "aggrieved person" under Section 2(a) of the Domestic Violence Act was conferred by the Supreme Court in the case of **D.Veluswamy vs. D.Patchaiammal, AIR 2011 SC 479**, wherein the Court enumerated five ingredients of a live-in-relationship as follows:

1. Both the parties must behave as husband and wife and are recognized as husband and wife in front of society.
2. They must be of a valid legal age of marriage.
3. They should qualify to enter into marriage e.g. None of the partner should have a spouse living at the time of entering into relationship.
4. They must have voluntarily cohabited for a significant period of time.
5. They must have lived together in a shared household.

The Supreme Court also observed that not all live-in-relationships will amount to a relationship in the nature of marriage to get the benefit of Domestic Violence Act. To get such benefit the conditions mentioned above shall be fulfilled and this has to be proved by evidence.

Status of a Keep- The Court in the case further stated that if a man has a "keep" whom he maintains financially and uses mainly for sexual purpose and/or a servant it would not be a relationship in the nature of marriage.

In this case, the Court also referred to the term "palimony" (The term Palimony was first used by the US Court in the case of Marvin Vs. Marvin (1976) which means grant of maintenance to a woman who has lived for a substantial period of time with a man without marrying and is then deserted by him.

What is shared household?

The term shared household is defined under the Domestic Violence Act as a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member,

irrespective of whether the respondent or the aggrieved person has any right,title or interest in the shared household.

In the case of **S.R.Batra & Another Vs. Smt.Taruna Batra, AIR 2007 SC 1118**, the Supreme Court with reference to definition of shared household under Section 2(s) of the Domestic Violence Act stated that the definition of "shared household" in Section 2(s) of the Act is not very happily worded, andappears to be the result of clumsy drafting requires to be interpreted in a sensible manner.

The Court held that under Section 17(1) of the Act wife is only entitled to claim a right to residence in a shared household, and a "shared household" would only mean the house belonging to or taken on rent by the husband, orthe house which belongs to the joint family of which the husband is a member. In the case, the property in question neither belonged to the husband nor was it taken on rent by him nor was it a joint family property ofwhich the husband was a member. It was the exclusive property of mother ofhusband and not a shared household.

Who is Respondent under the Act?

As per section **2(q) 'Respondent'** means any '**adult male person**' who is, or has been, in a domestic relationship with the aggrieved person andagainst whom the aggrieved person has sought relief under the Act. Providedthat an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

In case of **Hiralal P.Harsora Vs. Kusum Narottamdas Harsora, AIR 2016 SC 4774**, it was held that words 'adult male person' contrary to object of affording protection to women who suffered from domestic violence of anykind and word expression **'adult male'** is substituted by **'any person'.**

In view of the definition of the term respondent covering adult male person, the judiciary has time and again been confronted with the argument that an aggrieved person can file complain under the Domestic Violence Act against an adult male person only and not against the female relatives of thehusband i.e. mother-in-law, sister-in-law.

However, the Supreme Court in the case of **Sandhya Wankhede vs. Manoj Bhimrao Wankhede (2011) 3 SCC 650** put to rest the issue by holding that the proviso to Section 2(q) does not exclude female relatives of the husband or male partner from the ambit of a complaint that can be underthe provisions the Domestic Violence Act. Therefore, complaints are not just maintainable against the adult male person but also the female relative of such adult male. **(Archana Hemant Naik vs. Urmilaben I. Naik & Anr., 2009**

(3) Bom Cr 851)

Wife cannot implicate one and all in the family – Though the Domestic Violence Act

is a beneficial legislation, the same has been many times reported to be misused by women. For instance, in several cases women register complaint under Domestic Violence Act against one and all relatives ofhusband even without any evidence of abuse against them.

In the case of **Ashish Dixit vs. State of UP & Anr. AIR 2013 SC 1077**, the Supreme Court has held that a wife cannot implicate one and all in a Domestic violence case. In this case, the complainant apart from carrying thehusband and in-laws in the complaint, had also included all and sundry as parties to the case, of which the complainant didn't even know names.

It is necessary to have a clear understanding of domestic relationship. "Domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the natureof marriage, adoption or are family members living together as a joint family16. Thus, a person who is not in a domestic relationship, cannot be a respondent under this Act.

TYPES OF RELIEFS:

Different kinds of orders issued by the Magistrate Protection orders

The protection order is issued under section 18 of the Act to protect thewomen from any further incidents of violence by prohibiting the respondent from contacting, meeting, committing violence directly or indirectly to the victim, alienating assets, bank lockers and bank accounts owned jointly or separately by the respondent and any other act that is prohibited by the protection order.

After giving an opportunity to the aggrieved person and respondent of being heard and the magistrate is satisfied that a prima facie case of domesticviolence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person prohibiting the respondent from the followingacts such as committing any acts of domestic violence

- Aiding or abetting in the act of domestic violence
- Entering the place of employment of aggrieved person or if the person is child, its school or any other places
- Attempting to communicate in any form including personal, oral or written, electronic or telephonic contact
- Alienating any assets, operating bank account, bank locker held or enjoyed by both parties jointly or singly by the respondent including her stridhan
- Causing violence to the dependents, or other relative or any other person who give the assistance to the aggrieved person or

- Committing any other acts specified by the protection officer

In the case of **V.D. Bhanot Vs. Savita Bhanot (AIR 2012 SC 965),** which upheld the Delhi High Court's view that "even a wife who had shared a household before the Domestic Violence Act came into force would be entitledto the protection of the Domestic Violence Act. Hence, the Domestic Violence Act entitles the aggrieved person to file an Application under the Act even for the acts which have been committed prior to the commencement of the Domestic Violence Act.

Residence orders

The Magistrate may pass a residence order under section 19 of the Act if he is satisfied that domestic violence has taken place. The order can include restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, entering into the portion occupied by the aggrieved person, alienating or disposing of the shared household or encumbering the same, renouncing his rights in the shared household, and directing the respondent to remove himself from the shared household or arrange alternative accommodation forthe aggrieved person.

The magistrate being satisfied that a domestic violence has taken place,pass residence order-

- Restraining the respondent from dispossessing or in any manner disturbing the peaceful possession of the shared household
- Directing the respondent to remove himself from the shared household
- Restraining the respondent or his relatives from entering any portion ofthe shared house hold where the aggrieved person lives
- Restraining the respondent from alienating or disposing of the shared house hold or encumbering it
- Restraining the respondent from renouncing his right in the shared household
- Directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her or to pay rent for the same if the circumstances so require.

No order shall be made against women under this section. Magistrate may impose additional condition and pass any other order to protect the safety of the aggrieved person or her child. Magistrate is also empowered to order direction the concerned station house officer of the police station to give protection to the aggrieved person to assist in implementing his order.Magistrate may also impose on the respondent to direct stridhan or

any otherproperty or valuable security she is entitled.

Monetary relief

The magistrate may direct the respondent to pay monetary relief to meet the expenses of the aggrieved person and any child as a result of domestic violence and such relief includes:

- Loss of earnings
- Medical expenses
- Loss caused due to destruction or removal or damage of any property
- Pass order as to maintenance for the aggrieved person as well as her children if any

Including the order under or in addition to an order of maintenance under section 125 criminal procedure code or any other law. The quantum ofrelief shall be fair reasonable and consistent with the standard of living to which the aggrieved person is accustomed to. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent.

Custody orders

Magistrate can grant temporary custody of any child or children under section 21 of the Act to the aggrieved person or to the person making application on her behalf and specify the arrangements for visit of such child by the respondent. Magistrate can refuse the visit of such respondent in suchcase if it may harmful to the interest of the child.

Compensation order

Magistrate can order the respondent under section 22 of the Act, on an application made by the aggrieved person, to pay compensation and damages for the injuries, including mental torture and emotional distress caused by the acts of domestic violence committed by the respondent.

Copies of orders passed by the magistrate shall be supplied free of costto the parties concerned and police officer and service provider.

Any relief available under this Act may also be sought in any other legal proceedings before a civil court, family court or criminal court and such reliefmay be sought in addition

to and along with relief sought for in suit, or legal proceeding before civil or criminal court.

EXECUTION OF ORDERS:

The orders of the Magistrate are executed by the Magistrate himself and in the manner in which all such orders of the Magistrate are executed.

If the orders are prohibitory orders, the respondent is directed not to interfere with the freedom of the aggrieved woman.

(i) Protection order:

Section 31 of the DV Act states that a breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

While framing charges under sub-section (1), the Magistrates may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offenceunder those provisions.

In Kanaka Raj vs. State of Kerala and another, 2010 Crl.L.J (NOC) 447 (KERALA), the Hon'ble Kerala High Court held that only if the order passed by the Magistrate is a protection order or an interim protection order, the Magistrate can direct registration of case and investigate the same under Section 31 of the DV Act and even if award is passed by Lok-Adalath unless made in terms of section 18 of the DV Act, it cannot be a protection order or interim protection order and breach of it will not attract the offence U/sec.31of the DV Act.

(ii) Residence order: In order to implement the residence orders, the Magistrate is also empowered to order direction the concerned station house officer of the police station to give protection to the aggrieved person. Magistrate may also impose on the respondent to direct stridhan or any other property or valuable security she is entitled. Residence orders are passed to protect the aggrieved from the dispossession; therefore, a breach of residence order could also be an offence under section 31.

(iii) Monetary relief/Maintenance Order:

As per Rule 6 of the Protection of Women from Domestic Violence Rules, 2006, any application under section 12 of the D.V.Act shall be dealt withand the orders enforced in the same manner laid down U/s 125 of Cr.P.C. In **Renuka vs. Yelaguresh**, the Hon'ble Karnataka High Court held that orders passed under section 12 of the Protection of Women from domestic Violence Act, 2005 can be enforced in the same manner as laid down in Section 125 of Cr.P.C.

On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage dueto the respondent. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent.

If the order is for maintenance the same is executed by attachment of the movable properties of the respondent. If it still remains unfulfilled the order of maintenance may be sent to the District Collector for the recovery ofthe amount due as if it is an arrear of land revenue, in which proceedings the Collector may attach the immovable properties of the respondent.

In **Shalu Ojha vs. Prashant Ojha, 2014(4) RCR (Civil) 815 (SC)**, theHon'ble Supreme Court held that *where maintenance is granted by MagistrateU/s 20 of DV Act, on appeal to the court of Session, the Session Court ought not stay the execution of maintenance order. Power to grant interim orders are not always inherent in every court.*

In **Suneesh vs. State of Kerala & Anr,** the Kerala High Court held that breach of monetary relief order cannot be prosecuted under section 31, penalty attracted only for violation of protection orders.

A maintenance order including interim maintenance order passed under section 23, cannot be enforced through section 31 and it can be enforced in the same manner as laid down under section 125 Cr.P.C. Section 20(4) provides the mechanism for compliance with the maintenance order.

(iv) Custody orders:

If the order is for custody of children the Magistrate with the assistance of the police recovers their custody from the Respondent and hands them over to the aggrieved woman.

Duty of Courts while deciding cases under the Domestic Violence Act

In the case of Krishna **Bhatacharjee vs. Sarathi Choudhury and Another, (2016) 2 SCC 705,** the Apex Court while elucidating on the duty of courts while deciding complaints under the Domestic Violence Act stated that:

It is the duty of the Court to scrutinize the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct.

The principle "justice to the cause is equivalent to the salt of ocean" should be kept in mind. The Court of Law is bound to uphold the truth which sparkles when justice is done.

Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realization of the constitutional rights of women and to ensure that they do not become victims of any kind ofdomestic violence.

Husband's Obligation to maintain wife under the DV Act

In a case taken up by the Supreme Court i.e. **Vimlaben Ajitbhai Patelvs. Vatslaben Ashok Bhai Patel and Ors, (2008) 4 SCC 649**, it was held that when it comes to maintenance of wife under the Domestic Violence Act read with the Hindu Adoption and Maintenance Act, 1956 it is the personal obligation of the husband to maintain his wife. Property of mother-in-law can neither be subject matter of attachment nor during the life time of husband can his personal liability to maintain his wife be directed to be enforced against such property.

Application to the magistrate

An application regarding domestic violence can be presented to themagistrate seeking one or more reliefs mentioned in sections by:

- The aggrieved person,
- Protection officer on behalf of aggrieved person
- Any other person on behalf of aggrieved person

Jurisdiction of court

The first-class magistrate court or metropolitan court shall be thecompetent court within the local limits of which

- The aggrieved person permanently or temporary resides or carries onbusiness or is employed

- The respondent permanently or temporally resides or carries onbusiness or is employed or
- The cause of action arises.

Any order made under this Act shall be enforceable throughout India While disposing application the magistrate shall take in to consideration any domestic incident report received from the protection officer or serviceprovider. The relief sought under this section includes the issuance of order ofpayment or compensation or damages without prejudice to the right of such person to institute suit for compensation or damages for injuries caused by the act of domestic violence. If the magistrate is satisfied that application prima facie discloses that the respondent is committing or has committed an act of domestic violence or there is a likelihood of such violence, he may grantfollowing ex parte interim order against the respondent on the basis of affidavit of the aggrieved person. Magistrate can issue different orders such as Protection order, residence order, monetary relief, custody order or compensatory orders as per the circumstances of the case. In case of an earlier decree of compensation or damages passed by any other court, in favour of aggrieved person, the amount if any paid shall be set off against the order of amount payable under this act. The application to the magistrate shall be as nearly possible to the formats prescribed under this Act and Rules. After receiving the application, the Magistrate shall fix the date of first hearingwithin 3 days and the magistrate shall endeavour to dispose of every application be within a period of 60 days of the first hearing. The notice of the date of hearing shall be given by the magistrate to the protection officer whoshall get it served to the respondent. At any stage of the application, the magistrate may order, counseling of the respondent or aggrieved person either singly or jointly with any member of service provider. The magistrate may secure the service of suitable person preferably a woman including a person engaged in the welfare of women for assisting the court in the discharge of its function. If the circumstance of the case so warrants and if either party so desires the magistrate may conduct the proceedings on camera. In the case of Nasir Khan son of Shri Hazi Hasan Raja vs. Smt.Rizwana Sheikh wife of Shri Nasir Khan, 2018 3 RLW (Raj) 1842, It was held by the Hon'ble Rajasthan High Court that a victim of domestic violence cannot be compelled to invoke the jurisdiction of Family Court for seeking the reliefs provided by the Act of 2005.

Some other important legal principles:

(1) **Shared household & its meaning & claim of residence in the house owned by parent-in-laws (Sec. 23)**---*Mother-in-law's house or father-in-law's house is not covered with in the expression 'shared house hold accommodation'. Mother-in-law's house does not become shared house hold*

merely because applicant wife had shared that house with herhusband earlier. For that it has to be a house owned or taken on rent byhusband or a house which belongs to joint family of his husband is a member. See---

(i) **S.R.Batra Vs. Smt. Taruna Batra, AIR 2007 SC 11184**

(ii) **Vimla Ben Ajitbhai Patel Vs. Vatsalaben Ashokbhai Patel, (2008)4 SCC 649.**

(2) **Self acquired house of father-in-law or mother-in-law & right of residence of wife therein**-- *Daughter-in-law would have no right to claim residence in self-acquired house of parents-in-law i.e. father-in- law (or mother-in-law) u/s 17 & 26 of the PWDO Act, 2005. Parents-in- law being absolute owners of such house, injunction in their favour restraining the daughter-in-law from dispossessing parents-in-law from their house can be granted. See---* **Shubhwant Kaur Vs. Lt.col.Prithi Pal Singh Chugh, AIR 2010 (NOC) 638(P & H).**

(3) **Claim of wife to alternative accommodation---** U/s 19(1) of the PWDO Act, 2005, claim of right to alternative accommodation by wife canbe made to husband only. See--- **S.R.Batra Vs. Smt.Taruna Batra, AIR 2007 SC 1118.**

(4) **Retention of Stridhan by husband or his family amounts to continuing Offence under the Protection of Women from DomesticViolence Act, 2005:** Retention of Stridhan by husband or his family amounts to Continuing Offence under The Protection of Women from Domestic Violence Act, 2005. See--- **Krishna Bhattarjee Vs. Sarathi Choudhury, (2016) 2 SCC 705.**

(5) **Gay & Lesbians not recognized to constitute a relationship in the nature of marriage :** Domestic relationship between same sex partners(Gay and Lesbians) is not recognized by Act. Such a relationship cannot be termed as a relationship in the nature of marriage. Section 2(f) of theDV Act though uses the expression "any two persons" the expression "aggrieved person" under S. 2(a) takes in only a woman hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV ActSee--- **Indra Sarma Vs V.K.Sarma, AIR 2014 SC 309 (para 38).**

(6) **Divorce decree bars proceedings by Magistrate under the PWDV Act, 2005:** Where the decree of divorce passed by Civil Court was still subsisting, it has been ruled by the Hon'ble Supreme Court that permitting Magistrate to proceed further under the provisions of the PWDV Act, 2005 was not in consonance with the decree of divorce and the proceedings amounted to abuse of the process of the court. Even if the divorce decree is alleged to have been obtained by playing fraud upon the court, the party has to be approach the appropriate forum for cancellation of the same. See---

(i) **Inderjit Singh Grewal Vs. State of Punjab & another, 2011 (75) ACC 225.**

(ii) **Hitesh Bhatnagar Vs Deepa Bhatnagar, AIR 2011 SC 1637.**

(7) **No limitation period for filing complaint under PWDV Act, 2005:** There is no limitation period for filing complaint under PWDV Act, 2005. See--- **Inderjit Singh Grewal Vs. State of Punjab &**

another, 2011

(i) (75) ACC 225.

(8) Court can permit amendment in a complaint filed u/s 200 Cr.P.C r/w Sections 26 & 28 of PWDV Act: Court can permit amendment in a complaint filed u/s 200 Cr.P.C. r/w Sections 26 & 28 of PWDV Act for offence u/s 498 of the IPC**. Kunapareddy alias Nookala Shanka Balaji Vs. Kunapareddy Swarna Kumari, AIR 2016 SC 2519.**

Conclusion

The Protection of Women from Domestic Violence Act, 2005 is enactedwith a noble intention to provide effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family but protection of one must not result in harassment of other, therefore, while protecting the rights of aggrieved person courts has to make a balance between the conflicting interests. Courtshave to address the areas which are still untouched and issues can be settledonly by a positive approach so that we the people of India strive towards excellence.

I conclude my paper presentation with these submissions.

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PAPER PRESENTATION ON
THE PROTECTIO OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

Presented by

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INTRODUCTION :

Domestic violence is an evil prevailed in the society since time immemorial, which badly effects the health and safety and also empowerment of women in all forms.

In India the Domestic violence is governed by the protection of women from Domestic Violence Act, 2005.

The legislative intent of enacting the protection of women from Domestic Violence Act, 2005 is to provide protection of rights of women who are victims of violence of any type occurring in the family and for matter connected therewith or incidental thereto. This Act safeguards women from facing violence within the four walls of their home.

The word Domestic Violence is defined under Sec 3 of the Protection of Women from Domestic Violence Act, 2005, which states that any act, omission, commission or conduct of a person harms or injures or endangers the health or safety of an individual either mentally or physically amounts to Domestic Violence. If further Includes any harm, harassment or injury caused to an individual or any person related to that individual to meet any unlawful demand would also amount to domestic violence.

OBJECTIVES OF THE DOMESTIC VIDENCE ACT 2005:

1) To identify and determine that every act of Domestic Violence is unlawful and punishable by law.
2) To provide protection to victims of Domestic Violence.
3) To serve justice in a timely, cost effective and convenient manner to the aggrieved person.
4) To prevent the commission of offence and to take adequate steps.
5) To Enface punishment and must hold the culprits accountable for committing such acts of violence.
6) To lay down the low and govern it in accordance with the

International standards for the prevention of domestic violence.

PARTIES BY WHOM RELIEFS CAN BE SOUGHT

The aggrieved person under Sec 2(a) of the Protection of Women from Domestic Violence Act 2005, read follows,

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

In order to understand that who is aggrieved person under the Act (Supra), we have to understand the words domestic relationship, and the respondent.

The domestic relationship means, as per Sec-2(f) of The Act (Supra) read as follows,

Domestic relationship:- Means a relationship between two persons who live or have, at any point of time lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, shared house hold.

The questions arose while understanding the word domestic relationship,

1) What is consanguinity?
2) How could interprete the relationship in the nature of Marriage ?
3) Who are family members living together as a joint family?
4) Whether there should subsist a domestic relationship between the aggrieved person and the person against whom the relief is claimed.
5) If yes, at what point of time, there should be a subsisting domestic relationship between the aggrieved person and the respondent?

Consanguinity - Means a kinship with a relative who have common biological ancestors.

The persons related in the nature of marriage:- In order to interprete the relationship in the nature of marriage to avail the protection under the Protection of Woman from Domestic Violence Act -2005, referred the Judgement of the Honourable Supreme Court of India in,

Indra Sarma vs VKV Sarma 2013 (15) Sec 755 In which the Honourable Apex Court ***relied on the decision in D Veluswamy vs D Patchaiammal AIR 2011 SC 479***, laid down various criteria to determine what kind of relationships would fall within the ambit of

the Expression relationship in the nature of Marriage.

The relationship that should have some in inherent or essential characteristics of marriage though not a marriage legally recognised. such as

1) The parties must be of legal age to marry.
2) The couple must hold themselves out to society as being a kin to spouses.
3) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
4) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

In Prabha tyagi vs Kamlesh Devi Dated 12-05-2012

The Honourable Supreme Court clarified the issue that whether it is mandatory for the aggrieved person to reside with those persons against whom the allegation have been levelled at the point of Commission of Violence and whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed.

The Apex Court held that,

"(ii) Whether it is mandatory for the aggrieved person to reside with those persons against whom the allegations have been levied at the point of commission of violence?" It is held that it is not mandatory for the aggrieved person, when she is related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family, to actually reside with those persons against whom the allegations have been levelled at the time of commission of domestic violence. If a woman has the right to reside in the shared household under Section 17 of the D.V. Act and such a woman becomes an aggrieved person or victim of domestic violence, she can seek reliefs under the provisions of D.V. Act including enforcement of her right to live in a shared household.

"(iii) Whether there should be a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed?" It is held that there should be a subsisting domestic relationship between the aggrieved person and the person

against whom the relief is claimed vis-à-vis allegation of domestic violence. However, it is not necessary that at the time of filing of an application by an aggrieved person, the domestic relationship should be subsisting. In other words, even if an aggrieved person is not in a domestic relationship with the respondent in a shared household at the time of filing of an application under Section 12 of the D.V. Act but has at any point of time lived so or had the right to live and has been subjected to domestic violence or is later subjected to domestic violence on account of the domestic relationship, is entitled to file an application under Section 12 of the D.V. Act.

43. Further, the expression 'family members living together as a joint family' is not relatable only to relationship through consanguinity, marriage or adoption. As observed above, the expression 'joint family' does not mean a joint family as understood in Hindu Law. It would mean persons living together jointly as a family. It would include not only family members living together when they are related by consanguinity, marriage or adoption but also those persons who are living together or jointly as a joint family such as foster children who live with other members who are related by consanguinity, marriage or by adoption. Therefore, when any woman is in a domestic relationship as discussed above, is subjected to any act of domestic violence and becomes an aggrieved person, she is entitled to avail the remedies under the D.V. Act.

Any woman having domestic relationship as contemplated U/Sec R(f) of DV Act, who live or has been lived together with the respondent at any point of time in a shared household in which either the respondent or aggrieved person having any right, title, internet to reside in it or not can sough for reliefs of under the Act (Supra).

The persons against whom reliefs can be sought :-

As per see-2(q) of the Act (supra), The Respondent means read as follows

2(q):- Respondent - Means any adult male person who is, or has been in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act.

Provided that the aggrieved wife or female living in a relationship in the nature of

marriage may also file a Complaint against a relative of the husband or the male partner.

As per sec 2(q) of the Act (supra), the Complaint can be made against only a male adult person having domestic relationship with the aggrieved person

In Hiral P Harsora vs Kusum Narottem Das Hersora (2016) 10 Sec 165, The Honourable Apex court on considering the object of the Act (Supra), struck down a portion of sec 2(q) that is 'male' on the ground that it is violative of article by of the constitution of India and declare that the words adult male in ser 2(q) of the Act(supra) will stand deleted since these words do not square with article 14 of Constitution of India.

As per this judgement a complaint under the Act (Supra) can be made against any person either male of female who is in domestic relationship with the aggrieved person

In furtherance of the said Judgement, the Government of India introduced the protection of women from domestic, Violence (amendment) bill substituting the word any person in place of any adult male and the same is under consideration.

Due to the above said discussion a complaint under Sec-12 of the Act supra can be made against any person who is or has been, in domestic relationship with the aggrieved person as contemplated under Sec.2(f) of the Act (Supra).

Further clarified the Expression family members living together as a joint family is not relatable only to relationship through consanguinity, marriage of adoption.

CONCLUSION:-

The Protection of Woman from Domestic Violence Act is a beneficiary legislation for women aimed to protect them from subjecting violence in their families and for empowerment of women in all forms.

As per the enactment and Judgements of Honourable Supreme Court of India,

Any woman who is or has been in domestic relationship through consanguinity, adoption, marriage, related in the nature of marriage, living together as a joint family can sought for reliefs under the Protection of Woman from Domestic Violence Act 2005,

Against any adult person, not only any male adult person in domestic relationship with aggrieved person (including any women).

It is not mandatory that the aggrieved person live with the respondent at the time of filing complaint. It is sufficient that the aggrieved person lived together with the respondent at any point of time in a shared house hold.

******end*******

PAPER PRESENTATION ON

TYPES OF RELIEFS UNDER DOMESTIC VIOLENCE ACT, 2005

BY K. SRINIVAS,
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INTRODUCTION

Domestic Violence means any act of commission or omission or the conduct of the respondent as defined under section 3 of Prevention of Women from Domestic Violence Act, 2005. It is not only limited to physical cruelty, but also it includes mental cruelty, emotional and economical abuse. Before understanding the phenomenon of Domestic violence, one should know about the purpose of the act.

An act to provide more effective protection for rights of women guaranteed under the constitution who are victims of the violence of any kind occurring within the family and for matter connected there with or incidental thereto.

Where a woman has subjected to cruelty by her husband or his relatives, it is an offence under section 498-A IPC. No civil law does not to address the phenomenon of the Domestic Violence in its entirely. Therefore the Domestic Violence Act, 2005 was enacted to protect the rights guaranteed under Article 14,15 and 21 of Indian Constitution to provide for remedy under civil law, with an intention to protect the women from being victims of Domestic Violence. The act

came into force on 26.10.2006.

Section 12: Application to Magistrate, an aggrieved person or a protection officer or any other person on behalf of aggrieved person may present an application to the Magistrate seeking one or more reliefs under Domestic Violence Act.

Provided that before passing any order on such application, the Magistrate shall take into consideration of any domestic incident report received by him from the protection officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent.

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be

beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall Endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.

A petition under provisions under Domestic Violence Act, 2005 is maintainable. Even if the act of Domestic Violence had been committed prior to the came into force of the said act, notwithstanding the fact that in the past she had lived together with her husband in shade household, but was not more living with him, at the time when the act came into force. **V.D.Bhanot v. Savith Bhanot AIR 2012 SC 965.**

Various reliefs available under Domestic Violence Act, 2005 :

Section 18: Protection orders:-The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from

(a) committing any act of domestic violence;

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

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

(d) attempting to communicate in any form, whatsoever, with the aggrieved person,

including personal, oral or written or electronic or telephonic contact;

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

Section 19: Residence orders.—(1) The Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order

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

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

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

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

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

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

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

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 and shall be dealt with accordingly.

(5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to.

The wife is entitled to residence in the house, owned by her father in law or mother in law. Section 2(s) r/w section 17 and 19 of the Act enacted in favour of the women to protect the right of residence under shared household, irrespective of her having any legal interest in the same or not. The respondent in proceedings under Domestic Violence Act can be relative of the husband. If the shared household belongs to any of the relative of the husband with whom in Domestic relation of the women as lived. The conditions mentioned in section 2 (s) are satisfied and the said house will become a shared household. **Satish Chandra Ahuja v. Sneha Ahuja 2021 1 SCC 414.**

Section 19 deals with a multitude of directions or orders which may be passed against the respondent the shared household in favour of an aggrieved person, Section 17 confers a right on every woman in a domestic relationship to reside in the shared household irrespective of whether she has any right, title or beneficial interest in the same. This right to reside in a shared household which is conferred on every woman in a domestic relationship is a vital and significant right. It is an affirmation of the right of every woman in a domestic relationship to reside in a shared household. Sub-Section (2) of Section 17 protects an aggrieved person from being evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law. **Prabha Tyagi v. Kamlesh Devi (2022) 8 SCC 90**.

The right to residence under section 19 is not an indefeasible right, especially when a daughter-in-law is claiming a right against aged parents-in- laws. While granting relief under section 12 of the D.V. Act, or in any civil proceeding, the

court has to balance the rights between the aggrieved woman and the parents- in-law. **Rajnesh v. Neha AIR 2021 SCC 569.**

Section 20:- Monetary Relief : (1) The Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,

(a) the loss of earnings;

(b) the medical expenses;

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

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in charge of the police

station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

An aggrieved person, while filing an application under 12 (1) is also entitled under section 20 of the act to get monetary relief to meet the expenses incurred and loss suffered by aggrieved person and the child of aggrieved person as result of domestic violence. The monetary reliefs granted under section 20 shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed and the Magistrate has power to order an appropriate lumps payment or monthly payment of maintenance. **V.Chandrasekhar v. K.Bhavana 2014 2 ALD Crl. 669.**

Women in living in relationship also entitled to all reliefs under domestic violence act. **D.Veluswamy v. D.Patchaiammal AIR 2011 SC 479.**

Section 21. Custody orders:- The Magistrate can grant temporary custody in child or children under section 21 of Act to the aggrieved person or the person making application on her behalf of and specify if necessary the arrangement for

visit of such child or children by the respondent. The Magistrate may shall refused to allow such relief in case the visit of the respondent may be harmful to the interest of the child or children.

Section 22 Compensation orders:- The Magistrate may order the respondent under section 22, on an application made by the aggrieved person to pay compensation and damages for the injuries including the mental torture and emotional distress, caused by the act of Domestic Violence Act committed by the respondent.

The relief of compensation order, as claimed in Domestic Violence can't be denied on the ground of the husband in criminal case filed by wife under section 498-A IPC. The parameters in appreciation of evidence in criminal case are quite difference from the Domestic Violence Case. Therefore mere acquittal of husband in criminal case would not be disentitle wife to relief claiming in domestic violence case. **V.Chandrasekhar v. K.Bhavana 2014 2 ALD Crl. 669.**

Conclusion:

The protection of women from Domestic Violence Act was enacted with an intention to effective protection of rights of women guaranteed under Indian Constitution, which intend to prevent the occurrence of Domestic Violence in the society. The Magistrate may pass protection order or other reliefs in favour of aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act.

PAPER PRESENTATION ON VICTIM COMPENSATION TO VICTIMS AND ALSO PRESUMPTIONS IN POCSO CASES PREPARED BY SRI. M.A.SOMA SEKHAR, SPECIAL JUDGE, POCSO COURT, BHIMAVARAM

Before discussing the Victim Compensation and presumptions in POCSO Cases, it is appropriate on my part to discuss briefly about POCSO Act, 2012 (Protection of Children from Sexual Offences Act, 2012) and also about the Rules available under POCSO Rules.

The POCSO Act enacted in the year 2012. The main object of POCSO Act for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at early stage of judicial process incorporating child friendly the procedure for reporting, recording of offence, investigation and trial of offences and the provisions of establishment of special courts for speedy trial of such offences. There are total 46 Sections in POCSO Act. There are 9 Chapters covering Section 1 to Section 46 and also Judicial Armed Forces and Security Forces constituted.

The Protection of Children from Sexual Offences Rules, 2020 which is containing 13 Rules and also Form A and Form B. Form A speaks about entitlement of children who have suffered sexual abuse to receive information and service. Form-B speaks about preliminary assessment report. Form A is to be given by Duty Officer containing Serial No.1 to 15 and Form B containing serial No.1 to 11 which should be issued by Station House Officer. The rules are framed as per the powers conferred under Section 45 of POCSO Act by the Central Government which is w.e.f. 9.3.2020.

Now, I am confining to the topic entrusted to me i.e., victim compensation to the victims under POCSO Act. In all POCSO cases, victim must be child below the age of 18 Years and the same is defined as per Section 2(d) of POCSO Act. The word ‘Victim’ is not defined in POCSO Act, since Cr.P.C / B.N.S.S procedure is to be followed along with I.P.C / B.N.S, Juvenile Justice Care and Protection Act, 2015 and I.T. Act, 2020, since as per Section 2(2) of POCSO Act clearly speaks

that the words and expressions used in the aforesaid acts and procedural laws shall being the same meaning and as such, the same is not defined in POCSO Act.

So, I have to lean on Section 2(y) of newly enacted BNSS which gives definition, for the word 'Victim' for the fresh cases instituted after 1.7.2024 and Section 2(wa) for the cases registered under POCSO Act prior to 1.7.2024. On close perusal of both Sections 2(y) of BNSS, 2023 and 2(wa), there is no difference for the meaning of victim.

"Victim" means a person who has suffered any loss or injury caused by reason of the act or omission of the accused person and includes the guardian or legal heir of such victim.

As per Section 31 of POCSO Act, it is clearly held that Cr.P.C, 1973 shall apply to the proceedings before Special Court. So, the Special Judges who are dealing with POCSO cases are adopting the procedure of Cr.P.C for the cases registered before 1.7.2024 and now for the cases registered after 1.7.2024, shall apply BNSS, 2023.

Section 33(8) of POCSO Act speaks that in appropriate cases in addition to the punishment direct for the payment of compensation to the child for any physical or mental trauma caused to victim or for immediate rehabilitation of such child.

The corresponding rule for payment of compensation under POCSO Rules, 2020 is, Rule 9. The Special Court can on its own or on the application filed by the child or on behalf of the child passed an interim compensation to meet the needs of child for rehabilitation at any stage after registration of FIR and such interim compensation paid to the child shall be adjusted against the final compensation, if any.

Rule 9 Compensation:-

(1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the needs of the child for relief or rehabilitation at any stage after

registration of the First Information Report Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:--

(i) type of abuse, gravity of the offense and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offense, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offense, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offense;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offense;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offense;

(xi) financial condition of the child against whom the offense has been (committed so as to determine such child's need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357-A of the Code of Criminal Procedure, 1973 or any other law for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government.

The fine imposed by the Special Court under POCSO Act, it is the duty of CWC to coordinating with DLSA to ensure that any amount of fine imposed by the special court is to be paid to the victim is in fact paid to the child. The CWC has to facilitate for opening Bank Account of child or arranging identity proofs with the assistance of DCPU and support persons.

As per BNSS, Section 395 from Clause (1) to Clause (5) speaks about payment of compensation. In Cr.P.C, Section 357, 357(a) to 357(c), 357(A) speaks about payment of compensation. But in the newly enacted BNSS, Section 396 clearly speaks about victim compensation schemes, in which it is clearly discussed about the role of State Government. State Government shall prepare Victim

Compensation Scheme with the coordination of Central Government for providing funds for the purpose of compensation to the victim, or his dependants who have suffered loss or injury as a result of crime and who requires rehabilitation. Regarding other than POCSO cases and other courts for trial of other under other BNS and other enactments cases, has to recommend compensation and refer the matter to DLSA by mentioning in its Judgments to decide quantum of compensation to be awarded to the victim by conducting enquiry. The said compensation awarded under Section 395 is not adequate for such rehabilitation or where the cases end in acquittal or discharge, even then, the trial court can recommend for rehabilitation of victim as compensation, as per Section 396(3). As per Section 396 of BNSS, 2023, even the offender is not traced or identified and when no trial is taken place, the victim or his dependants can make an application to the State or DLSA for awarding compensation under Section 396(4) of BNSS, 2023. As per Section 396(5) of BNSS, 2023, the DLSA has to conduct enquiry and complete the enquiry within two months. As per 396(6) of BNSS, 2023, the DLS or the SLSA, may order for immediate First Aid facility or medical benefits at free of cost on certification by Police Officer not below the rank of SHO or Magistrate of that area concerned. The said compensation is in addition to Fine. Section 397 of BNSS, 2023 speaks about providing treatment to the victims in all private, public hospitals run by the State Government, Central Government, Local Bodies or any other person at free of cost to the victims covered under specific Sections mentioned in Section 397 of BNSS. Section 395 of BNSS relates to Order of payment of compensation which contains clause (i) to clause (v).

Section 33(8) of POCSO Act r/w Rule 9 of POCSO Rules, 2020 are relevant provisions to award compensation. Special Judges for trial of POCSO cases are empower to make a mention in the Judgments by awarding compensation directly without even enquiry necessitated by DLSAs and SLSAs and as already stated above, the DLSAs, in coordinating with Child Welfare Committees, shall provide compensation as ordered by the Special Judge, POCSO Court and there is no need of conducting any enquiry by DLSA or SLSA. In case of other offences covered under IPC/ BNS and other enactments, the concerned Presiding Officer

has to refer the matter to DLSA for fixing up adequate compensation and the Secretary, DLSA has to conduct enquiry and submit his report to the committee constituted at District Level headed by Hon'ble Principal District Judge and other two committee members who are District Collector and the S.P concerned and the said committee will decide the quantum of compensation.

The Government of Andhra Pradesh issued G.O.Ms.No.43 dated 15.4.2015 by issuing Notification preparing the A.P. Victim Compensation Scheme, 2015, to pay compensation as awarded by the DLSAs and SLSAs by specifically mentioning that who are eligible for compensation and also about victim compensation fund. As per special clause (5) of the said scheme speaks about eligibility for compensation and 6 of said Scheme speaks about interim relief to acid attack victims and 7 of said Scheme speaks about procedure of grant of compensation. Victim means, victim in all criminal cases, but not only in POCSO cases. As per Victim Compensation Scheme, 2015. Though there are three parts in Criminal Justice System which are criminology, penology and victimology. Courts are forgetting about victimology and concentrating mainly on criminology and penology. Though Section 357(A) Cr.P.C, mandates that every State Government has to prepare a scheme for providing funds to the victims as a compensation. Even as per the Victim Compensation Scheme, 2015, the DLSA can also condone the delay in filing victim compensation claims if the DLSA satisfied with the reasons to be recorded in writing. There are schedules under A.P. Victim Compensation Scheme, 2015 by satisfying the amounts for the age groups also with specific description of loss or injury and also schedule for special compensation to victims of acid attack and sexual exploitation for commercial purpose upto Rs.10,00,000/- in case of loss of life apart from awarding Rs.10,000/- for funeral expenses and Rs.15,000/- for medical expenses incurred before death supported by bills and vouchers due to non-awarding of the A.P. Victim Compensation Scheme, 2015. Most of the victims are not utilizing the A.P. Victim Compensation Scheme. The limitation for filing claims under A.P. Victim Compensation Scheme is Three Years from the date of occurrence of offence or conclusion of trial. Even an appeal can be made to the third person DLSA, if the

Secretary, DLSA has not awarded adequate quantum of compensation, within 30 days from the date of receipt of the order. Even with delay the appeal can be filed if sufficient reasons are mentioned can be considered and allowed by the Hon'ble Chairperson, DLSA. The relevant G.Os of A.P. Victim Compensation Scheme are G.O.Ms.No.132, dated 6.12.2016, G.O.Ms.No.43, dated 15.4.2015 and G.O.Ms.No.143, dated 25.9.2018 and the same are available with the District Legal Services Authority of every District.

The need of providing Victim Compensation is to take immediate rehabilitation measures by the State Government and urgent medical necessities and expenses of victims of POCSO cases.

The basis for enacting special enactment of child is, as per the Judgment reported in **1999(6) SCC page 591 in Sakshi Vs. Union of India**. It is further held in a decision repo9rted in **2017 SCC 703** that "POCSO case is not just a case."

The Protection Officer who is Head of District Protection Child Unit is to monitor the compensation to be paid to the victims of POCSO cases. While determining the compensation, the age of the victims is paramount consideration, since the Judge has to play active role but not as a umpire, since the sexual organs are not known by the child.

POCSO Act is more comprehensive having better benefits than the other Acts and POCSO Act prevails over other enactments like IPC, JJ Act, SC & ST Act, if it conflicts with POCSO Act and also prevails over general law.

PART - II

"Presumptions available in POCSO Act are Section 29 and 30 of POCSO Act"

Section 29 of POCSO Act defines, Where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such

person has committed or abetted or attempted to commit the offence as the case may be, unless the contrary is proved."

For damage the prosecution case, by over think Section 30 of POCSO Act. The presumption of acts generally rebuttable, unless they are conclusive. Section 29 and 30 of POCSO Act relates to section 4 of Indian Evidence Act, which speaks may presume, shall presume and conclusive proof.

Presumptions are obligatory. Court shall presume that unless and until it is disproved. In **Suresh Budnarmal Kaklani Vs. State of Maharastra**, it is held that "Presumption can be drawn only from facts and not from other presumptions by a process of probable and logical reasoning Section 29 of POCSO Act." The differences between Section 29 and 30 of POCSO Act are hereunder. In Section 29 of POCSO Act, the accused is to bring best evidence to disprove the case of prosecution. Section 30 of POCSO Act speaks that the accused has to bring the evidence to prove that has no mental state and court has to entertain statutory presumption.

Attorney General of India Vs. State of another in C.A.1410/2021, Section 29 and 30 of POCSO Act discussed. In **J.S.Chowdary Vs. Mahesh Bala S.B. in Criminal Revision Petition No.192/2014**, it is discussed about Section 29 of POCSO Act. The accused has to rebut the evidence by proving his innocence, he has no culpable mental state with respect to the charged offence and he has to lead the court to believe it to adjust beyond reasonable doubt and it is further discussed in the above said decision that conjoint reading of Section 29 and 30 of POCSO Act also. It is further discussed about the age of victim, limited understanding, motive of offence and vulnerability and rejection of rule of lenient view.

AIR I973 SC 2622 in Shivaji Sahebrao Babade Vs. State of Maharastra

"Proof beyond all reasonable doubt is discussed in the above said decision."

AIR 1983 SC 867 in State of U.P Vs. Pussu a Ramkishore

“Doctrine of Benefit of doubt, different pieces of circumstantial evidence discussed.”

1984 (4) SCC 116 in Sharad Birdhi Chand Sarda Vs. State of Maharastra

For relying circumstantial evidence.

1) AIR 1981 SC 559

2) 1996 (1) SCC 490

3) 1966 2 SCC 384

Corroboration is not a matter of law, but prudence.

2021 (1) SCC 596.

Shatrughna Baban Meshvan Vs. State of Maharastra

Lingering doubt theory

Residual doubt does not have any place.

Presumption of an electronic message.

Section 88-A of I.E. Act- Social Media

Photo app, Instagram posts, telegram to electronic measure from electronic device discussed.

2010 (4) SCC 329

In which it is held that Standard of proof in the form of electronic evidence should be move accurate and stringent compared to other documentary evidence.

2015 (3) SCC 123

Sanjay Sinha Rama Rao Chavan Vs. Dattareya Gulbroo

‘It is held in the above decision that Photos and source of authority are two key factors for electronic evidence.”

Source of Information- Best evidence Rule.

2014 10 SCC 473 Anwar's case speaks about

C.CT.V footage evidence

Mohammad Sharief Vs. State of Himachal Pradesh

In the above case, silent witnesses theory is discussed.

Since being a Presiding Officer who is dealing with POCSO cases for the last 3 years, it is appropriate on my part to supply decisions along with this paper presentation for the benefit of one and all who are handling rape cases and also POCSO cases now and also for the Officers who are going to deal with rape cases and POCSO cases in future.

The following are the decisions :

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES, 2020

RULE 9 TELLS OF ABOUT COMPENSATION

1] The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the needs of the child for relief or rehabilitation at any stage after registration of the First information report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

2] The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

3] Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of

compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(Viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine such child's need for rehabilitation:

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal

Procedure, 1973 or any other law for the time being in force, or where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government.

10. Procedure for imposition of fine and payment thereof

(1) The CWC shall coordinate with the DLSA to ensure that any amount of fine imposed by the Special Court under the Act which is to be paid to the victim, is in fact paid to the child.

(2) The CWC will also facilitate any procedure for opening a bank account, arranging for identity proofs, etc., with the assistance of DCPU and support person.

SECTION 2(Y) OF BNSS SPEAKS ABOUT

THE DEFENITION OF VICTIM

"Victim" means a person who has suffered any loss or injury caused by reason of the act or omission of the accused person and includes the guardian or legal heir of such victim;

395. Order to pay compensation.

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act. 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Notes: Section 395 of the Act relates to order to pay compensation.

It provides that when a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may. When passing judgment, order the whole or any part of the fine recovered to be applied in the given circumstances

96. Victim compensation scheme,

(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section ().

(3) If the trial Court, at the conclusion of the trial, is satisfied. That the compensation awarded under section 395 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

(7) The compensation payable by the State Government under this Section shall be in addition to the payment of fine to the victim under section 65, section 70 and sub-section () of section 124 of the Bharatiya Nyaya Sanhita, 2023.

Notes: Section 396 of the Act relates to Victim compensation scheme

It inter alia provides that every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered Joes or injury as a result of the crime and who require rehabilitation and any compensation paid by the State Government shall be in addition to the payments of fine to the victim under given offences.

397. Treatment of victims.– All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 64, section 65, section 66, section 67, section 68, section 70, section 71 or sub-section (/) of section 124 of the Bharatiya Nyaya Sanhita, 2023 or under sections 4, 6, 8 or section 10 of the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), and shall immediately inform the police of such incident.

Notes: Section 397 of the Act relates to treatment of victims.

It provides that all the Hospital shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of given offences and shall immediately inform the police of such incident.

398. Witness protection scheme. Every State Government shall prepare and notify a Witness Protection Scheme for the State with a view to ensure protection of the witnesses.

Notes: Section 398 of the Act relates to witness protection scheme.

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In **Prem Singh Vs., State of Haryana, Hon'ble Apex Court held in Para No.13 that:**

It is now well settled principle of law that the doctrine falsus in uno Falsus in omnibus has no application in India.

In Jayaseelan Vs., State of Tamil Nadu 2009 (2) SCALE 506, the Hon'ble Court held:

The maxim "falsus in uno falsus in omnibus' has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it not what may be called a mandatory rule of evidence".

In **Namdeo Vs., State of Maharashtra"**, Hon'ble Apex Court held in Para - 38 as follows:

"***It is clear that a close relative cannot be characterised as an interested witness. He is a natural witness. His evidence, however, must be scrutinized carefully. If no such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the sole testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be more reluctant to spare the real culprit and falsely implicate an innocent one***".

In **Mritujyoj Biswas Vs., Pranab alias Kuti Biswas** and another reported **in (2013) 12 Supreme Court Cases 796,** wherein it was observed that:

"Minor contradictions, inconsistencies or insignificant embellishments that do not affect core of prosecution case should not be taken to be a ground to reject the prosecution evidence".

AIR 2013 SC 1177, their Lordships discussed about rarest of the rare case which depends on the perception of socially and is not Judge's centric. Whether socially will approve. The award of death sentence to certain types of crimes.

AIR 2013 SC 3622, their Lordships discussed about Principle for awarding death sentence.

2003 (1) SCC 648 their Lordships discussed about Rarest of Rare case.

There is need of elaborate discussion to come to mathematical exactitude to weigh the evidence on record in right perspective, I would like to submit some of the factors which can determine aggravating circumstances:-

The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc., by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

In State of H.P Vs. Shree Kanti Shekari reported in (2004) 8 SCC 153: AIR 2004 SC 4404, wherein it was held as follows:- ***"Sexual violence apart from being dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e., her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article.21. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely***". Further, the offences against who are below the age of 12 years are increasing enormously taking advantage of their innocence and they are not in a position to assess the criminal Intensity of the accused and they are very much vulnerable to Indu the deceitful words of accused.

But in this case on hand, the accused committed rape and murder the Victim and screened the evidence.

In **Ravi Vs., State of Maharashtra reported in 2019 SCC online SC 1288) = 2019 (9) SCC 622**, the Hon'ble Apex Court while dealing with a similar case held as follows:-

It is equally apt at this stage to refer the recent amendments carried out by Parliament in the Protection of Children from Sexual Offences Act, 2012 by way of The Protection of Children from Sexual Offences (Amendment) Act, 2019 as notified on 6th August, 2019. The amended Act defines **"Aggravated Penetrative Sexual Assault" in Section.6, which included, "whoever commits aggravated penetrative sexual assault on a child below the age of 12 years**." Originally, the punishment for an aggravated sexual assault was rigorous imprisonment for a term not less than 10 years but which may extend for imprisonment for life with fine.

In **Manoharan's** case, the facts are that two accused kidnapped a minor girl aged 10 years and a minor boy aged 7 years in a Van, brutally raped and sodomized and administered poison and finally drowned them into a canal. In the said case, the death penalty imposed by the trial Court was confirmed by the Hon'ble High Court.

In Ravishankar @ Baba Vishwakarma Vs. The State of Madhya Pradesh (2019) 3 SCC (Cri) 768, their Lordships held as follows:-

"On a detailed examination of precedents, It appears to us that it would be totally imprudent to lay down an absolute principle of law that no death sentence can be awarded in a case where conviction is based on circumstantial evidence. Such a standard would be ripe for abuse by seasoned criminals who always make sure to destroy direct evidence. Further in many cases of rape and murder of children, the victims owing too their tender age can put up no resistance. In such cases it is extremely likely that there would be no ocular evidence. It cannot, therefore, be said that in every such case beyond reasonable doubt, the Court must not award capital punishment for the mere reason that the offender has not

been seen committing the crime by an eye witness. Such a reasoning, if applied uniformally and mechanically will have devastating effects on the society which is a dominant stakeholder in the administration of our criminal justice system".

In case of Mukesh Vs. State (Hon'ble Supreme Court, has held that (NCT of Delhi (2017) 6 SCC 1), the Hon'ble High Supreme Court, has held that:

"Where a crime is committed with extreme brutality and the collective sentence of the society is shocked, court must award death penalty, Irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the Courts may do injustice to the society at large. "Question of awarding sentence is a matter of discretion and has to be exercised of circumstances aggravating or mitigating in the Individual case. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment,, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large. It is further held that the heinous acts of Accused would out weight mitigating circumstances.

2019 SCC Online M.P.161:-

It is discussed in the above cited case by the Hon'ble Apex Court as follows:

"The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about the uncommonness. The crime speaks of depravity degradation and

uncommonality. It is diabolical and barbaric. The crime was committed in an Inhuman manner. Indubitably, these go a lony way to establish the aggravating circumstances".

In Kehar Singh Vs. State (Delhi Administration) reported in 1988 (3) SCC 609.

In Bachan Singh Vs. State of Punjab reported in (1980) 2 SCC 684 = AIR 1980 SC 898, the Apex Court held that:

"(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only, if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence, (b) while considering the question of sentence to the imposed for the offence of murder Under Section.302 I.P.C, the Court must have regard to ever relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally deprived and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence".

In Machhi Singh Vs. State of Punjab reported in 1983 (3) SCC 470., Hon'ble Supreme Court held that:

Section. 354(3) of the Code, 1973 marks a significant shift in the legislative policy of awarding death sentence. Now, the normal sentence for murder is Imprisonment for life and not sentence of death. The Court is required to give special reasons for awarding death sentence. Special reasons mean specific facts and circumstances, obtained in the case justifying the extreme penalty, but in this case on hand special reasons are given for awarding death penalty as this is rarest of rare case.

In the case of **(Mritunjoy Biswas Vs., Pranab @ Kuti Biswas: 2013 Crl.L.J., 4212 (S.C.),** it was observed by the Hon'ble Apex Court that it is well

settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidences in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, it needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or credit worthiness of a witness. It is only the serious contradictions and omissions which materially affect prosecution case but not every contradiction or omission.

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Rape and POCSO Citations

2021 (1) C.C.C. 750 Delhi

Section.6 of POCSO Act. Mere fact that penetrative sexual assault does not indicate that there was a complete penetrative sexual assault same does not absolve accused from committing penetrative assault as described by victim.

2021 (6) ALT (H.C) 382, Part – 23.

Choice of Pregnancy.

Article 21 of the constitution of India, include right of a woman to make a choice of pregnancy and terminate pregnancy, in case where pregnancy is caused by rape or sexual abuse.

2021 (1) ALD (SC) 393

Sections. 376 and 506 – Conviction – Allegations that Accused had sexual intercourse with prosecutrix aged 19 years and mentally, retarded, forcibly and without her consent, when she gone to jungle to graze goats and cattle – prosecutrix did not disclose same to anybody including her mother due to threat of

accused and her mental weakness- On being medically examined prosecutrix found carrying pregnancy of 31 weeks – And gave birth to female child and after D.N.A test the accused found to be biological father of child – No case of accused that it was a case of consent – Accused taken advantage of mental sickness and low I Q of Victim- Merely because Victim was in position to do some household works cannot discard medical evidence that she had mild mental retardation – And was not in position to understand good and bad aspect of sexual assault- Some contradictions with respect to language known by Victim, cannot be said to be major contradictions to disbelieve entire medical evidence – High Court justified in reversing order of acquittal and convicting accused for offences under Sections. 376 and 506 of I.P.C- Criminal Procedure Code 1973, Section.378 – Scope and ambit of Interference by High Court in appeal against acquittal.

Sections. 376 and 506 of I.P.C – Conviction – By High Court revising order of acquittal and imposing minimum sentence of seven years R.I taking lenient view – Plea of accused that considering that he has already undergone four years R.I out of seven years R.I awarded to him- And that he is married and has two children, lenient view may be taken – Case of sexual assault on Victim, who was mentally retarded and whose IQ was 62 – Person suffering from mental disorder / sickness deserves special care, love and affections – and not to be exploited – Accused/ Appellant exploited victim by taking undue advantage of mental sickness/ illness – therefore, no interference called for – Appeal dismissed.

2021 (1) ALD (SC) 412

Protection of Children from Sexual Offences Act, 2012.

Section.7 and 8 – Conviction- Challenge on ground of High Court not giving sufficient opportunity to accused before passing impugned Judgment and order contention that High Court passed order on 24.04.2019 providing services of legal aid counsel to represent case of appellant and thereafter heard legal aid counsel on 29.04.2019 i.e. within period of four days and passed impugned judgment and order on same day without considering appeal on merits – pressing into service. Order. 41, R.31 C.P.C and observation of court in (2015) 1 SCC 391, it is contended that it is duty of court to deal with all issues and evidence lead by

parties before recording its finding – and that as observed in AIR 2020 SC 232 failure to afford hearing to accused violate even minimum standards of due process of law- Held, there cannot be any dispute with respect to preposition of law laid down in decision of this court cited supra – However, in facts and circumstances of case and considering fact that High Court given partial relief to accused fact that High Court given partial relief to accused with regard to payment of compensation – And considering fact that out of sentence of three years R.I appellant already undergone two years and three months, instead of remanding matter to High Court for fresh decision court called upon counsel for respective parties to submit case on merits – Counsel on behalf of respective parties, accordingly, made their submissions on merits – and Appeal thus, heard by court on merits. Hence, said decision shall not be of any assistance to accused – Appeal dismissed.

Sections. 7 and 8 – Conviction compensation – Order of trial court directing accused to pay rupees one lakh to Victim Girl by way of compensation. Rule 7 (2) of Rules, 2012 – Modified by High Court directing state to pay compensation to Victim and thereafter to recovery same from accused under provisions of land revenue, if it finds that accused has sufficient means – case on behalf of accused that accused is very poor and has no property. If that be co-accused not to worry, as same has been taken care by High Court by notifying judgment and order passed by trial court. (Protection of Children from Sexual Offences Rules, 2012. rule 7 (2).

Sections. 7 and 8 – Conviction – On basis of sole testimony of Victim, aged 15 years at the time of deposition – Not erroneous, when she is absolutely trustworthy and reliable and her evidence is of sterling quality.

Section.7 and 8 – Conviction – Taking lenient view, trial court imposed sentences of three years R.I, which is minimum sentence provided Under Section.8 – Sentence imposed by trial court, as confirmed by High Court, therefore, warrants no interference.

2021 (1) ALD (TSHC) 466

Sexual Offences

Against Children / minors – Stand on different footing than offences like murder or attempt to murder, as these criminal acts are committed against specific individuals, while act of sexual offences against children minors shakes conscience of society and create sense of fear and insecurity – From great degree of punishment provided under POCSO Act, it can be presumed that means of sexual offences against children has reached enormous proportions – And some needs to be tackled with iron hand, so as to deterrent on offenders – (Penal Code 1860, Section.376-AB) and , Sections. 6 r/w.Sec.5 (m) of Protection of Children from Sexual Offences Act, 2012.

2023 (3) ALT (Crl.) 193 D.B

Podutur Appalanaidu Vs., P.P., Hyderabad.

Section.90 of I.P.C, 417 and 376 of I.P.C.

Accused having intention to deceive Victim from the very inception for not marrying her and had malafide intention and has not tried to explain his stand even during examination U/Sec.313 Cr.P.C Conviction proper. Accused is married and having a son, but kept that promise of marriage alive and obtained consent, but not married.

2024 (4) Am.L.J 497 H.C.,

By mentioning special reasons and adequate reasons court may impose below 10 years of sentence in rape cases.

2024 (4) Am. L.J S.C. 286

Presumption U/Sec.114 (a) of Indian Evidence Act must be drawn by considering other evidence on record. If no cogent or without corroboration it must not be drawn it isolation.

2023 (3) ALT (Crl.) 335

Mahankali Shyam Vs., State of A.P (S.B) + M.R.

Section.29 of POCSO Act, creates presumption is prosecuted for committing abetting or attempting certain offences. Minor contradiction or insignificant discrepancies in the state of prosecutrix should not be a ground for throwing out

otherwise reliable prosecution case. Unless there are compelling reasons for seeking corroboration and it does not require any corroboration.

Doctrine of Stare decision.

Binding effect of law declared by supreme court.

Supreme Court

Somai Vs., State of M.P.

Failure to send seized clothes to FSL, once court believes the Version of a survivor of sexual assault would not affect the out come Sec. 376 and 450 of I.P.C. sufficient to establish offence U/Sec.376 of I.P.C.

Sole testimony of Victim

2023 (1) ALT (Crl.) A.P.H.C. 193

When a case rest upon the evidence of solitary witness it must be unimpeachable, genuine, trustworthy free from doubt and be put in the category of whole reliable. Then only such evidence needs no corroboration.

2023 (1) ALT (Crl.) S.C 126 February

U/Sec.311 Cr.P.C to summon and examine or reexamine any material witness at any stage and the closing of prosecution evidence is not an absolute bar.

2023 (1) ALT (Crl.) A.P. H.C. 193

Non examining investigating officer in all case does not render the prosecution case vulnerable. Law provided that while those, who commits acts in a heat of the movement or fit of anger should also be punished, their punishment should be lesser than that of premeditated offences.

Suresh Kumar Yadav Allahabad High Court

Justice Rahul Chaturvedy

It is mandatory for Victim Women to under go medical check up. If she refuses to go for medical check up to prove rape charges which is not of her choice.

Santhosh Prasad @ Santhosh Kumar Vs., The state of Bihar

Criminal Appeal No.264/2020

Arising out of SLP (Criminal) No.3780/2018 Pai Sandeep Vs., State

The evidence of prosecutrix must be quality of sterling unblemished and absolutely trustworthy or otherwise the sole testimony of prosecutrix cannot be based for convicting the accused. Un reliable medical evidence material contradiction in the deposition of prosecutrix and delay in lodging F.I.R created serious doubts in the credibility of prosercutrix.

Ranjith Harika Vs., State of Assam

State of Punjab Vs., Gurmeet Sing and other.,

Sole testimony of prosecutrix is sufficient when the same is reliable and trustworthy even if medical report is in conclusion. No presence of accused can be drawn as no self respecting woman will came to the court just to make humiliating statement against her honour such as is involved in the commission of rape on her.

ALJ 2022 (1) Jan (94)

Rape is an offence against the society and it is not a matter to be left for the parties to compromise and settle.

2022 Telangana 12

The state of A.P Vs., Ajmeera Raghu

Non examination of child witness not fatal to the prosecution only when adult witnesses are there.

2022 (1) ALT Online SC 5534 D.B

Gangadhar Narayana Nayak Vs., State of Karnataka and others.

Section.23 of POCSO Act, Sec.199 POCSO Act. The offences under POCSO Act are cognizable is not correct.

AIR 2019 SC 1037

Hon'ble Justice Ranjan Gogio GJ Sanjay, Kisshore Kaur and K.M. Joseph

Prakash Chand Vs., State of Himachal Pradesh

Sec.3 of Indian evidence Act.

Rape on the point of knife delay of 7 months in lodging complaint.

Medical examination. Signs of any resistance or injuries could have been revealed. Testimony of prosecutrix not corroborated or other witnesses. Medical evidence is habituated to sexual intercourse. Prosecution fails short of test of reliability and acceptability conviction/set aside.

Criminal intimidation U/Sec.506 of I.P.C. No specific charge framed.

AIR 2003 S.C 2136

Justice Shaborwal and K.G. Bala Krishna

Sole testimony of prosecturix can be basis for conviction provided it is safe, reliable and worthy acceptance.

No rational explanation given what urgent to travel in the zeep of accused. Medical evidence not corroborating. No stains of bleed or semen on her clothes. She was ascertaining that she was virgin till she was committed rape, but medical evidence speaks that she was habituated to sex. Many loose ends in the prosecution evidence. Accused entitled for benefit of doubt.

AIR 2003 S.C 818

Conviction on sole evidence of prosecutrix. No residents of that locality heard the cries, when prosecutrix hear raped. Prosecutrix was loitering in the locality for about 2 hours after the incident. Not reporting to anybody for to her husband. Next day worked in Flats, but not reported.

Afternoon narrated the incident to her sister-in-law and lodge complaint prosecutrix had bath after the incident knowing well that it would caused disappearance of evidence of rape. False case to extract money in the defence case. Unreliable and uncorroborated testimony of prosecutrix. Highly unnatural conduct. No conviction.

Boddapati Venkata Ramaiah and other Vs., State of A.P.,

1996 (1) ALD (Crl.) 576

1996 (2) APLJ 4378 A.P.H.C (D.B)

1996 Crl.L.J 3749

Factional enmity between parties. Delay in Lodging F.I.R remained unexplained. Eyewitnesses not held reliable their presence at the spot. Over tact contributed to each accused by witnesses not corresponding with the injuries could contradiction between ocular and medical evidence as to Injuries caused to death. Accused entitled for acquittal.

AIR 2020 SC 985

Santhosh Prasad @ Santhosh Kumar Vs., State of Bihar

Sec.376(1) and 450 I.P.C Sec.3 of I.E. Act.

Jumped from broken compound wall and committed rape seen in the light of cell phone. No mobile recovered and not mentioned in the record about broken compensation prosecution failed pestering witness.

Absence of pathological physical evidence to support the case of prosecution. Enmity / disputes between both parties with respect to land admitted. No supportive evidence for the prosecutrix evidence. Not reliable.

Section. 376 (1) And Sec.3 and 4 of Protection of children from Sexual Offences Act, 2012 and Sec.3 (1) (w) (i) of Schedule casts and scheduled Tribes (Prevention of Atrocities) Act, 1989 – Acquittal – allegation that accused taken Victim to his house and when mother of Victim tried to forcibly open door which was locked from inside, accused opened door and ran away – On questioning Victim stated that accused used to take her to his house and rape her parents of Victim. However, turned hostile and did not support prosecution case. PW.1, father of Victim even disowned complaint and only identified his signature on complaint – scribe of complaint, examined as PW.7, stated that contents were written on information provided by a person- But did not mention that it was PW.1, on whose information was drafted -version of Victim, who is not mentally disabled, in chief and cross- examination, contradictory- Trial court erred in recording conviction only on basis of chief examination and based on presence of human semen on seized clothes of Victim, when medical evidence not conclusive that it was that of accused. During investigation, semen should have been subjected to D.N.A testing to pin point that semen and spermatozoa found was that of accused- In situation of hostility of PWs.1 and 2, parents of Victims and unreliable evidence of Victim, not safe to convict accused/ appellant – Criminal appeal allowed- Conviction, set aside. **(T.S.H.C) 398.**

Aman Sagotra & U.T of J & K 24.12.2020.

Post sexual relationship of prosecutrix with the accused if any would constitute offence of rape irrespective of consent if prosecutrix was minor at relevant point of time.

2022 GCTR 1421 S.CNawabuddin Vs., State of Uttarakhand

Message must be conveyed to the society at large that if anybody commits any POCSO Act offence of sexual assault, sexual harassment or use of child pornographic purpose they shall be punished suitability and no lenience shall be shown to them. Minor contradictions in prosecutrix statement should not be a ground for throwing out reliable case.

Delhi High Court

State Vs., Sandeep

D.O.J. 25.09.2019 Crl.L.P. 532/2019.

Not being induced by a promise of marriage. Not giving consent to engage in sexual Act.Acquittal of Accused for the offence U/Sec.376 of I.P.C.

Kerala High Court

Sree Kanth Vs., State of Kerala

D.O.J. 06.10.2022 Crl.M.C.No.9201/2019.

Sec.376 (2) – 376, 406, 420.

482 Cr.P.C. False promise to marry allegations of rape is so vague. There is no specific mention of date, time and other details of those alleged sexual acts under the pretext of marriage. The prosecution came to know that the accused was married. She confirmed the relationship. There was long relationship purely consensual sex. Further proceedings are quashed.

POCSO Court 08.12.2021

. The Hinduism Death sentence to a man, who committed rape and murder. The court observed the case as rarest of rare. Sec.376 AB and 302 I.P.C without showing leniency.

2017 (13) SCC 555

Rani Dudeja Vs., State of Haryana

Second bail petition Under Sec.438 of Cr.P.C is maintainable.

2008 Crl.L.J page 3253

Griru Umadapathi Anna Rao Vs., Satate of A.P.

Previous statement of witness under 164 Cr.P.C recorded by a Magistrate. It is a public document. Magistrate need not be summoned as a witness.

Justice J.K. Maheswari and Smt Indira Benergy.

Discrepancies in between F.I.R and U/Sec.164 Cr.P.C not a ground for discharge the accused. S.C say the said discrepancy may be advance in trial.

Amit Vs., State of Punjab

09.04.2013 Criminal Appeal No. 298-SB of 2010.

As per John J. Ressee's book on medical jurisprudence and toxicology Hymen rupture cannot be conclusive proof to establish rape as there can be various reasons for Hymen rupture other than rape. Section. 376 (2) (g) offence of Rape in Jevenile raped.

Criminal Petition 4449/2022

Mohammad Ali Akbar Vs., State of Karnataka Justice M. Naga Prasanna

rigorous of Section.33 (5) of POCSO Act.

Bar of repeated cross-examination of child survivor gets diluted such survivor turns 18.

2018 Crl.L.J. 502 = 2018 (2) Law

D.O.J. 06.04.2018.

Shiva Shankar @ Siva Vs., State of Karnataka

Rape false promise to marry lived together like married couple for 8 years. Appeal allowed by holding that sex has continued for a long period para 6 & 8.

M.P High Court

D.O.J. 29.06.2022

Hemendra Sing Vs., State of M.P.

Sec.376 (2) (n) (l) I.P.C and Sec.3, 4, 5, 6 of POCSO Act, 2012

Prosecutrix statement alone base. No record to support that prosecutrix is below 18 years. Accused house is infavour of house of prosecutrix and there is only record between their house. If loudly screamed it will be heard outside.

F.I.R and 161 Cr.P.C statement stated about committing rape thrice. Four months delay in lodging F.I.R and 164 Cr.P.C statement stated about specific date, time and place of rape. Hence conviction is set aside.

Bombaby H.C

Siddodan Vs., State of Maharastra

Crl. Appeal No. 2624/2019

D.O.J 10.12.2022

F.I.R lodged after 6 months Repeated favorable sex prosecutive herself handed over golden averments neighbours are not aware of the incident.

1) Ramesh Chandra Guptha Vs., State of U.P

SLP (Crl.) 39/ 2022 D.O.J. 28.11.2022

2) Haryana Vs., Bhajanlal

1992 S.C (1) 335, Para 16-20.

No Acts of Accused on their participation in commission of Accused Crime FIR quashed U/Sec.482 Cr.P.C.

Mumbai H.C

Women can also be hold guilty of outstanding women's modesty.

2019 (1) ALD (Crl.) 523 S.C

Consensual sex is not a rape.

1)2019 (2) ALD (Crl.) 404 S.C.

Anurag Soni Vs., State of Chathisgarh at Para No.12

2) 2019 AIR SC 1857

If deception at the inception who did not have intending to marry and the prosecutrix who gave content can be said to be given consent obtained on a misconception of fact as per Section.90 of I.P.C. In such cases the offender not entitled for excuse the offender, for the offence U/Sec. 376 of I.P.C the accused can be convicted.

2023 (1) ALT Online AP 12457 D.B

Potnuru Appala Naidu Vijayanagendram Vs., Public Prosecutor, Hyderabad.

Victim is best witness and he states is similar to an injured. If her evidence inspire the court as trustworthy, cogent believable and unbelievable and corroborated with the evidence of medical. Section. 417 and 376 of I.P.C and Section.90 of I.P.C discussed.

Naim Ahamed Vs., State (NCT of Delhi)

Supreme Court of India

Crl.Appeal NO.257/2023

D.O.J. 30.01.2023.

Rape U/Sec.376 of I.P.C promise to marry.

Appeal against acquittal. Married woman having three children could not be said to have acted under the alleged false promise given by continued for about 5 years. There is different between giving promise and committing breach of promise by the accused. In case of false promise the accused is not having intention right from the beginning to marry prosecutrix would have cheated would have decided the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust. In case of fails of promise one cannot deny the possibility that the accused might have given a promise with all seriousness to marry her. The accused deserves to be acquitted from the charges levelled against him.

Supreme Court of India

Somai Vs., State of Madhya Pradesh

Now Chattisgarh

Criminal Appeal No.497/2022

S.C of India 376 and 450 of I.P.C.

Mere not sending seized clothes of prosecutrix to FSL, if the court believed the version of survivor of sexual assault that is sufficient.

ALT 2023 (1) Vol. LXXIX (T.S.H.C) 356

Rape : since physical relation was not consignment of any false promise of any misconception of false, there can be no offence under Section.376 (2) (n) of I.P.C.

ALT 2023 (1) Vol.LXXIX (S.C) 33

Related witness:

Merely because they are also related witnesses in the absence of any material hold that they are interested, their testimonies cannot be rejected.

ALT 2023 (1) Vol. LXXIX (SCHC) 122

Rowdy Sheet:

The crimes under section.420 and 156 of I.P.C and allegations levelled against the petitioner herein do not quality to open and maintain a rowdy sheet against the petitioner herein.

ALT 2023 (1) Vol. LXXIX (TSHC) 42

Search and seizure:

If independent witnesses came up with a strong which creates a gaping hole in the prosecution theory, about the very search and seizure then the case of the prosecution collapse like a pack of cards.

ALT 2023 (1) Vol. LXXIX (SC) 278

Seize the weapon:

The failure/ neglect to seize the weapons of offence, on fact and in the circumstances of the preset case was the effect of denying the prosecution story.

ALT 2023 (1) Vol. LXXIX (SC) 5

Sexual Offences:

Non-reporting of sexual assault against a minor child dispute knowledge or a serious crime and more often than a lot it is an attempt to shield the offender of the crime of sexual offences.

ALT 2023 (1) Vol. LXXIX (SC) 5

Solitary witness (A.P.H.C) 193

When a case rests upon the evidence of a solitary witness it must be unimpeachable genuine trustworthy free from doubt and be put in the category of wholly reliable- then only such evidence needs no corroboration.

ALT 2023 (1) Vol. LXXIX (SC) 373

Suspicion:

A mere suspicious, however, strong it may be cannot be a substituted for acceptable evidence.

ALT 2023 (1) Vol. LXXIX (T.S.H.C) 505

Suspicious – Mere suspicion cannot be the basic for conviction.

ALT 2023 (1) Vol. LXXIX (SC) 177

Test identification parade:

In case where the witnesses have had ample opportunity to see the accused before the identification parade to be may adversely affect the trial- it is duty of the prosecution to establish before the court that right from the day of arrest the accused was kept bapada to rule out the possibility of their face being seen while in police custody.

ALT 2023 (1) Vol. LXXIX (SC) 249

Text and tenor of the evidence:

The text and tenor of the evidence and the demenos of witnesses in the court could be appreciated in the best manner only when the evidence is recorded in the language of witnesses.

ALT 2023 (I) LXXIX (T.S.H.C) 410

Time for final report:

It is incumbent on the part of the investigation agency, who investigates the offences under NDPS Act more particularly the offence punishable under Section. 36-A (v) of the NDPS Act to complete the investigation and submit final report within period of 180 days.

ALT 2023 (1) LXXIX (SC) 177

TIP to presence of police:

The conduct of the T.I.P coupled with the honoring presence of the police during the conduct of the TIP vitiated the entire process.

ALT 2023 (1) Vol. LXXIX (SC) 327

Transfer of investigation:

There is no inflexible guideline or a straight jacket formula laid down the power to transfer the investigation in an extraordinary powers- it is to be used very sparingly and in an exceptional circumstances.

ALT 2023 (i) Vol. LXIX (T.S.H.C) 134

Unbiased and fair investigation:

When accused are condemned publicity and branded as aspiration levelling serious allegations by none other than the Hon’ble Chief Ministry by conducting press meet and circulating the order to the important constitutional function even before charge sheet is filed and at the initial stages of the investigation, it cannot be said that investigation is being done in an unbiased and fair manner.

ALT 2023 (i) Vol. LXXIX (SC) 193

Consciousness of mind:

It remains trite that the burden of passing the existence of circumstances so as to bring the case within the purview of section 84 of I.P.C lies on the accused in terms of section.105 of the evidence Act.

ALT 2023 (I) Vol. LXXIX (SC) 116

Vexatious Criminal complaints:

In a number of cases, attempt made by parties to invoke jurisdiction of criminal courts by filing vexatious criminal complaints by camouflaging allegations which were ex facie outrageous or pure civil claims. These attempts are not be entertained and should be dismissed the threshold.

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PAPER PRESENTATION AND DISCUSSION ON THE TOPICS OF NATURE OF OFFENCES UNDER POCSO ACT, 2012 AND PROCEDURE IN POCSO CASES.

By Smt S.UMA SUNANDA , SPECIAL JUDGE, POCSO COURT, ELURU

The Preamble to the POCSO Act states that it was enacted with reference to Article 15(3) of the Constitution. The Preamble recognizes that the best interest of a child should be secured, a child being defined under Section 2(d) as any person below the age of 18 years. In fact, securing the best interest of the child is an obligation cast upon the Government of India having acceded to the Convention on the Rights of the Child (the CRC). The Preamble to the POCSO Act also recognizes that it is imperative that the law should operate —in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child‖. Finally, the Preamble also provides that —sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed‖.

This is directly in conflict with Exception 2 to Section 375 of the IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime – on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband. The protection of Children from Sexual Offences Act, 2012 —POCSO Act, 2012‖ is legislation which aims at protecting children from all types of sexual abuse. Although the Convention on the rights of the child was adopted by the United Nations in 1989, the offences against children were not redressed by way of any

legislation in India till the year 2012. It provides stringent deterrents for the commission of offences against children ranging from a minimum of 20 years of imprisonment to the death penalty in case of aggravated penetrative sexual assault.

Before the introduction of the POCSO Act, 2012, Under the Indian Penal Code 1860 , child sexual abuse accounted for an offence under sections 375, 354 and 377. These provisions neither protect male children from sexual abuse nor protect their modesty. Also, definitions of the terms like modesty‘ and ‗unnatural offence‘ are not provided in the Code. Owing to the lack of any specific legislation, it was pivotal to establish a statute that pointedly tackles the issue of growing child sexual abuse cases in the country. With the efforts of multifarious NGOs, activists and the Ministry of Women and Child Development, POCSO Act, 2012 was enforced on 14th November 2012.

The following offences mentioned under the POCSO Act can be heard by the Special Court:

Sexual offences: Penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, sexual harassment, use of a child for pornographic purposes, storage of pornographic materials involving a child are the seven types of sexual offences under this Act.

- Attempt/ Abetment:
- Media violation IPC 228 (A)
- False Complaints:3
- Failure to report:

- Failure to record cases:
- Offences under other Acts:
- Offence under Section 67B of the Information Technology Act, 2000: Overview of the POCSO Act, 2012. The POCSO Act, 2012 is comprehensive legislation containing 9 chapters dealing with the offences, punishment and procedure.

Child sexual abuses Penetrative sexual assault: Section 3 of the POCSO Act defines penetrative sexual assault and Section 4 lays down the punishment which was made more stringent by the 2019 amendment. In the case of Bandu vs The State of Maharashtra (2017), a person was committed under Sections 4 and 6 of the POCSO

Act along with some provisions under the Indian Penal Code, 1860 for having committed penetrative sexual assault on a physically and mentally challenged 10-year-old girl. In Pranil Gupta vs State of Sikkim (2015), the victim aged 15 years stayed with the accused and injuries were found in her genital area. The High Court relied on the statement of the accused that the accused opened her clothes and raped her 5 times in one night. The contention of the accused that he was not aware of the victim being a minor was not accepted and the accused was prosecuted under Section 3 of the POCSO Act.

Aggravated penetrative sexual assault: Section 5 of the POCSO Act lays down the cases in which penetrative sexual assault amounts to aggravated penetrative sexual assault. For 4 example, penetrative sexual assaults on a child by a police officer within the vicinity of a police station, by armed forces within the limits of their area, by a public servant, by the staff of jails, hospitals or educational institutions

are considered aggravated penetrative sexual assault and are punishable under Section 6 of the POCSO Act.

Sexual assault: Section 7 of the POCSO Act defines sexual assault as, “Whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault”. In Subhankar Sarkar v. State of West Bengal (2015), on medical examination of the victim, it was found that there was no evidence of penetrative sexual assault but scratch marks on the body of the victim were found which proved the use of force and thus, the accused was convicted under Section 8 and 12 of the POCSO Act.

Aggravated sexual assault: Sections 9 and 10 of the POCSO Act contain provisions regarding aggravated sexual assault on a child. In the case of Sofyan v. State (2017), the accused who was a plant operator in the swimming pool area was convicted by the Trial Court under Section 10 of the POCSO and Section 354 of the Indian Penal Code, 1860 for having sexually assaulted a girl of 8 years old. The facts of the case are that when the victim was wearing her swimming costume in the changing room area, the accused approached her and inserted his hand in her swimming costume and touched her with sexual intent. The Delhi High Court rejected the argument of the accused that he was implicated falsely and the conviction was upheld.

Sexual harassment: Section 11 of the POCSO Act defines sexual harassment. It includes six cases which constitute sexual harassment of a child.

- First, if anyone utters any word or makes any sound or exhibits any object with sexual intent to a child.
- Second, if anyone makes a child exhibits his body so that it is seen by the offender or any other person.
- Third, if any person shows any child any form or media for pornographic purposes.
- Fourth, if anyone constantly watches or stalks a child directly or online.
- Fifth, if anyone threatens to use a real or fabricated depiction of any part of the body of the child or the involvement of the child in a sexual act through electronic, film or digital.
- Sixth, if anyone entices a child for pornographic purposes.

Pornography: Section 13 of the POCSO Act states that anyone who uses a child for pornographic purposes by either representing the sexual organs of the child or using a child in real or simulated sexual acts or representing a child indecently or obscenely in programmes or advertisements on television or on internet, commits the offence under this section and is liable in accordance with Sections 14 and 15 of the POCSO Act. In the case of **Fatima A.S. v. State of Kerala (2020),** in a video on social media, a mother was seen being painted her naked body above the navel by her two minor children and she alleged that the motive of the video was to teach sex education to them. The Supreme Court of India observed in this case that, “in

the initial years, what the child learns from their mother will always have a lasting impression on their mind. It is usually said that the mother will be the window of the child's to the world". Hence the same was covered under Section 13**. NIPUN SAXENA VS UNION OF INDIA, 11 Dec 2018, 2019 2 SCC 703;2019 1 SCC(Cri) 772 (DB)**

Unfortunately, in our society, the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime. The victim is innocent. She has been subjected to forcible sexual abuse. However, for no fault of the victim, society instead of empathizing with the victim, starts treating her as an ‗untouchable'. Many times, even her family refuses to accept her back into their fold. The harsh reality is that many times cases of rape do not even get reported because of the false notions of so called ‗honour' which the family of the victim wants to uphold. The matter does not end here. Even after a case is lodged and FIR recorded, the police, more often than not, question the victim like an accused. If the victim is a young girl who has been dating and going around with a boy, she is asked in intimidating terms as to why she was dating a boy. The victim's first brush with justice is an unpleasant one where she is made to feel that she is at fault; she is the cause of the crime. If the victim is strong enough to deal with the recriminations and insinuations made against her by the police. In Court the victim is subjected to a harsh cross- examination wherein a lot of questions are raised about the victim's morals and character. The Presiding Judges sometimes sit like mute spectators and normally do not prevent the defence from asking such

defamatory and unnecessary questions. We want to make it clear that we do not,

in any manner, want to curtail the right of the defence to cross-examine the prosecutrix, but the same should be done with a certain level of decency and respect to women at large.

—228A. Disclosure of identity of the victim of certain offences etc.

(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E is alleged or found to have been committed shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in subsection (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is (a) by or under the order in writing of the officer incharge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorization in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim:

State of Punjab Vs Gurmeet singh (1996) 2 SCC 384 Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognized welfare institution or organization. Explanation for the purposes of this subsection, "recognized welfare

institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government. (3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in subsection (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

In Re: Alarming Rise in the Number of Reported Child Rape Incidents VS 2019 0 Supreme(SC) 871; It was held that , (i) In each district of the country, if there are more than 100 cases under the POCSO Act, an exclusive/ designated special Court will be set up, which will try no other offence except those under the POCSO Act. (ii) Such Courts will be set up under a Central scheme.

Re: Exploitation Of Children In Orphanages In The State Of Tamil Nadu V/S Union Of India (2017) 7 Scc 578 : (2017) 2 Sccrir 847 Writ Petition (Criminal) No. 102 Of 2007 Decided On : 05-05-2017. In this case, the Supreme Court took suo motu cognizance of a newspaper article that exposed the poor state of orphanages in Mahabalipuram (Tamil 9 Nadu) with several incidences of child sexual abuse within the institutions as well as incidences of children being used to provide sexual services to tourists. The article also exposed sexual abuse against children in educational institutions including government schools. While assessing who a ‗child in need of care and protection'included, the court observed that the definition in the JJ Act, 2015 excluded certain categories of children. The court in this regard opined that the definition must not be treated as an exhaustive list and be the basis of excluding certain children.

Sampurna Behura v. Union of India, (2018) 2 SCALE 209 Wherein it is held that —It is important for the police to appreciate their role as the first responder on issues pertaining to offences allegedly committed by children as well as offences committed against children. There is therefore a need to set up meaningful Special Juvenile Police Units and appoint Child Welfare Police Officers in terms of the JJ Act at the earliest and not only on paper. In this context, it is necessary to clearly identify the duties and responsibilities of such Units and Officers and wherever necessary, guidance from the available expertise, either theNational Police Academy or the Bureau of Police Research and Development or NGOs must be taken for the benefit of children.‖

Responsibilities of the Special Court:

Under the POCSO Act, the Special Court must take the following measures at the time of the trial.

> Permit frequent breaks for the child10

> Create a child-friendly atmosphere by allowing a family member or person the child trust to be present

> Ensure that the child is not summoned to testify time and again

> Ensure that the dignity of the child is maintained by disallowing aggressive questioning or character assassination of the child

> Ensure the identity of the child is not disclosed during the investigation or trial . As far as possible, ensure that the trial is completed within one year from the date of taking cognizance of the offence.

> The Special Court is also in a position to order interim compensation to meet the relief and rehabilitation needs of the child, any time after the FIR is registered. This order can be passed based on an application by or on behalf of the child, or by the court itself. The compensation that is awarded is payable by the State Government from the Victims Compensation Fund or other similar schemes that have been established for compensating victims under section 357 A of the Code of Criminal Procedure and is payable within 30 days of the receipt of the order.

Scope of the POCSO Act, 2012

In India, POCSO Act, 2012 is not the only legislation which deals with child sexual abuse cases. The POCSO Act cannot be called a complete code in itself and provisions of criminal Procedure 1973, Indian Penal Code, Juvenile Justice Act and Information Technology Act,2000 overlap and encapsulate the procedure and specify the offences.

Applicability of the POCSO Act, 2012

POCSO Act, 2012 is divided into 46 sections. It was published in the official gazette on 20th June 2012 but came into force on 14th November 2012 which raises the question of its applicability to the cases prior to its enforcement date.

In the case of **M. Loganathan v. State (2016),** the offence of rape was committed on 28.09.2012 i.e., before the Act was enforced, but the trial court convicted the accused under Section 4 of the POCSO Act. Consequently, the High Court of Madras declared that conviction being violative of Article 20(1) of the Constitution of India, 1950 was unconstitutional and it was modified to punishment under

Section 376(1) of the Indian Penal Code, 1860.

In another case of **Kanha v. State of Maharashtra (2017),** the accused was convicted under Section 376 of the Indian Penal Code and Section 6 of the POCSO Act for having committed aggravated penetrative sexual assault upon the victim which resulted in her pregnancy. The accused contended that unless there is proof of age of foetus, the date of the commission of offence was not in proximity with 14.11.2012 and thus, he cannot be prosecuted under Section 6 of the POCSO Act. The High Court of Bombay accepted the argument and acquitted the accused of all the charges. Therefore, it is apparent that when the applicability of the POCSO Act is questioned, the courts either alter the conviction of the accused or acquit them. The Act enunciates the punishment where the offences have been committed against a child.

Section 2(1)(d) of the POCSO Act contains the definition of child. It states that, " a child means 12 any person below the age of eighteen year". This implies that offences perpetrated against anyone of the age less than eighteen years are punishable under the POCSO Act.

Importance of the POCSO Act, 2012

POCSO Act, 2012 was enacted when the cases of sexual abuse against children were rising. It contains provisions regarding the protection of children from sexual assault and pornography and lays down the procedure for the implementation of these laws. Incidents of sexual abuse against children occur at schools, religious places, parks, hostels, etc and the security of children is not guaranteed anywhere. With such emerging dangers, it was significant to introduce separate legislation

which could provide a reliable system for mitigating the number of such offences and punishing the perpetrators. The Act has been instrumental in providing a robust justice mechanism for the victims of sexual abuse and has highlighted the significance of child rights and safety. The reporting of cases of child sexual abuse has also surged as a consequence of awareness. The Act covers punishment for both non-penetrative sexual assault and aggravated penetrative sexual assault.

Some of the salient features of the POCSO Act

Confidentiality of the victim‘s identity: section 23 of the POCSO Act provides for the procedure of media and imposes the duty to maintain the child victim‘s identity unless the Special Court has allowed the disclosure. Section 23(2) states, “no reports in any media shall disclose the identity of a child including his name, address, photograph, family details, school, neighbourhood and any other particulars which may lead to the disclosure of the identity of the child”. In the landmark case of Bijoy @ Guddu Das vs The State of West Bengal (2017), the Calcutta High Court reiterated the law made under Section 23 and declared that any person including a police officer shall be prosecuted if he/ she commits such a breach.

Gender-neutral provisions: Another glaring feature of the POCSO Act is that it does not create any distinction between the victim or the perpetrators on the basis of their gender. This overcomes one of the biggest shortcomings of the Indian Penal Code‘s provisions. The definition of child includes anyone below 18 years of age and in several cases, the courts have even convicted women for engaging in child sexual abuse incidents.

Procedures of the Special Court

Under the POCSO Act Section 28(1), the State Government in consultation with the Chief Justice of the High Court, should designate a Sessions Court to be a Special Court in every district to try offences under the Act. As per the provisions contained in POCSO Act, Section 28(2) the Special Court can try offences under the POCSO Act and offences with which the accused is charged under the I.P.C. at the same trial.

E. REGISTRATION OF FIR IS MANDATORY Lalita Kumari v. Govt. of U.P. and Ors., AIR 2014 SC 187

The following directions were laid down by a Constitutional Bench of the Honorable Supreme Court:

i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

ii) If the information received does not disclose a 14 cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the

complaint and not proceeding further.

iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under: (a) Matrimonial disputes/family disputes (b) Commercial offences

(c) Medical negligence cases (d) Corruption cases (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all

information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

Cognizance and Disposal:

Special Courts can take cognizance directly without committal.(Section 33(1), POCSO Act). The police should thus submit the charge-sheet to the Special Court under the POCSO Act. They must record the evidence of the child within 30 days of taking cognizance and record reasons for the delay.(Section 35(1), POCSO Act) They must complete the trial within one year of taking cognizance, as far as possible. (Section 35(2), POCSO Act). How to Ascertain if a Child Witness Understands the Difference between Truth and Lie In State v. Sujeet Kumar, the Delhi High Court was critical of the inappropriate questions posed by a Magistrate to assess the competence of a two- and-a-half year old child victim of a brutal rape before recording her statement under Section 164, Cr. P.C. It found the questions to the child about the school she went to and the class she studied in highly inappropriate as the child lived in a slum and did not attend any school. The Magistrate then asked her if she understood the term —truthǁ and the difference between truth and lie. The High Court observed: —How could a two and half year old child explain the meaning of word —truthǁ and state difference between truth and lie. It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between truth and lie. What to talk of a

two and half year old child.‖

Jarnail Singh v. State of Haryana, (AIR 2013 SC 3467)

The Honorable Supreme Court held that Rule 12 of the erstwhile Juvenile Justice (Care and Protection of Children) Rules, 2007, which detailed the age determination process for children in conflict with the law should be applied to determine the age of a child victim. It was held that:(—Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime.‖

State of M.P. v. Anoop Singh (2015) 7 SCC 773 : 2015 SCC OnLine SC 603 at page 776 —

We believe that the present case involves only one issue for this Court to be considered, which is regarding the determination of the age of the prosecutrix. In the present case, the central question is whether the prosecutrix was below 16 years of age at the time of the incident? The prosecution in support of their case adduced two certificates, which were the birth certificate and the Middle School Certificate. The date of birth of the prosecutrix has been shown as 29-8-1987 in the birth certificate (Ext.) P-5), while the date of birth is shown as 27-8-1987 in the Middle School Examination Certificate. There is a difference of just two days in the dates mentioned in the above mentioned exhibits. The trial court has rightly observed that the birth certificate, Ext.P-5 clearly shows that the registration

regarding the birth was made on 30-10-1987 and keeping in view the fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as under aged in view of the possibility of the incident in question. We are of the view that the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in presuming that the documents could not be relied upon in determining the age of the prosecutrix.14. In Mahadeo v. State of Maharashtra [(2013) 14 SCC 637 : (2014) 4 SCC (Cri) 306] it has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:—12.(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school first attended (other than a play school); and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the 18 Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or

the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii),(iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.‖ 15. This Court further held in para 12 of Mahadeo [(2013) 14 SCC 637 : (2014) 4 SCC (Cri) 306] , as under: (SCC p. 641)—12. ...Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.‖ This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In para 13, this Court observed: (Mahadeo case [(2013) 14 SCC 637 : (2014) 4 SCC (Cri) 306] , SCC p. 641) —13. In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the school under Ext. 54, the date of birth of the prosecutrix has been clearly noted as 20-5-1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School,19 Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20-5-1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any grounds to interfere with the same.

In the present case, we have before us two documents which support the

case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3) (b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P-5 and P-6 cannot be discarded. Therefore, the trial court was correct in relying on the documents. The High Court also relied on the statement of PW 11 Dr A.K. Saraf who took the x-ray of the prosecutrix and on the basis of the ossification test, came to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3) (b) and only in the absence, the medical opinion should have been sought. We find that the trial court has also dealt with this aspect of the ossification test. The trial court noted that the respondent had cited Lakhanlal v. State ofM.P. [2004 SCC OnLine MP 16 : 2004 Cri LJ 3962] , wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18½ years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the trial court rightly held that in the present case the ossification test is not the sole criterion for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed. 18. Thus,keeping in view the medical examination reports, the statements of the prosecution witnesses which inspire confidence and the certificates proving the age of the prosecutrix to be below 16 years of age on the date of the incident, we set aside the impugned judgment [Anoop Singh v. State of M.P., Criminal Appeal No. 924 of 2006, order dated 10-7- 2008 (MP)] passed by the High Court and uphold the judgment and order dated 24-4- 2006 passed by the Third Additional Sessions Judge, Satna in Special Case No. 123 of 2003.

Facilitation of Recording of Statement under Section 164, Cr.P.C., by the Magistrate. The POCSO Act does not mandate that a statement under Section 164, Cr.P.C. be recorded in every case. However, pursuant to the Criminal Law (Amendment) Act, 2013, Section 164(5- A)(a), the statement of victim against whom offences has been committed under Sections 354, 354-A, 354-B, 354-C, 354-D, 376(1), 376(2), 376-A, 376-B, 376-C, 376- D, 376-E or 509 of the IPC shall be recorded by a Judicial Magistrate. As per the provisions of Section 164(5-A)(a) Cr.P.C. The statement should be recorded as soon as the commission is brought to the notice of the police. In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/preferably Judicial Magistrate for recording the 164 statement and preferably to a Lady Magistrate. State of Karnataka v. Shivanna, (2014) 8 SCC 913.21

False complaint and False information under POCSO Act.

The POCSO Act under section 22 prohibits any person from making a false complaint or providing false information against a person in respect of an offence committed under section 3, 5, 7, and 9 of the POCSO Act dealing with penetrative sexual assault and sexual assault solely with the intention to humiliate, extort or threaten or defame him. No liability is incurred in respect of information given in good faith.

The POCSO Act prohibits the prosecution of a child for making a false complaint or providing false information regarding the commission of an offence under the POCSO Act. Tuka Ram And Anr vs State of Maharashtra, AIR 1979 SC 185 Mathura Case In Mathura rape case, a young tribal girl named Mathura was

allegedly raped by two policemen while she was in custody. It was the incident of custodial rape, took place on March 26th , 1972, where the girl was raped in Desai Gunj Police Station in Maharashtra.

Trial of offences under the POCSO Act, 2012

The POCSO Act specifies the provisions regarding the trial of a reported offence under Sections 33 to 38. Following are some glaring features provided under the POCSO Act regarding the conduct of trial:

Deposition of the victim

Section 33 specifies that the Special Court can take cognizance of the offence without the accused being committed to the trial. Section 36 mentions that the child should not be exposed to the accused at the time of giving evidence but this provision was not followed in the case of Vasudev v. The State of Karnataka (2018). The deposition sheet reflected that the victim was aggressively questioned and only when she had got emotional while narrating the incident, the accused was sent out. The Karnataka High Court dismissed the appeal of the accused who was convicted under Section 4 of the POCSO Act. Furthermore, in the case of Nar Bahadur Subba v. State of Sikkim (2017), in the appeal before the Honorable Sikkim High Court, the Court observed that in the trial court deposition, the teachers of the victim have stated, _It is true that I am not well acquainted with the character of the victim‘. To this, the Court noted that gauging the character of an 11- year-old girl is of no question and the cross-examination has violated provisions of Section 33 of the POCSO Act.

The time limit for disposal of cases

Section 35 of the POCSO Act stipulates the following timelines:

For recording the evidence of the child: 30 days from the date of taking cognizance of the offence,

For completing the trial: 1 year from the date of taking cognizance of the offence.

In the case of **Shubham Vilas Tayade v. The State of Maharashtra (2018),** the Special Court allowed the prosecution for recording evidence after 30 days of taking cognizance. This order was challenged by the accused, being violative of Section 35 of the POCSO Act. However, the high court agreed with the counter argument of the APP that as the accused did not challenge the application of the prosecution so he cannot challenge the order. Furthermore, it was observed that even otherwise, the Special Court can record evidence 23 after 30 days and the only rider provided by Section 35 is that the reasons for the delay have to be recorded.

Medical and forensic evidence

Child sexual abuse is rarely diagnosed merely on the basis of physical examination. In many instances, the scars or bruises on the body of the victim are not found either because the cases are not immediately reported or the sexual abuse does not result in such injuries. In the case of **Pintu v. State of U.P. (2020),** the conviction of the accused under Section 377 of the Indian Penal Code, 1860 and Section 6 of the POCSO Act were set aside and one of the reasons was that there was no mark of external injury around the anus of the victim and the

Allahabad High Court opined that in case of a sexual assault on a boy of 7 years old by a person aged 23 years, there should have been some kind of external injury. In the case of **State (NCT of Delhi) v. Anil (2016),** the Trial Court and the Delhi High Court acquitted the accused from the charges under POCSO Act due to the following points:

The victim refused her internal medical examination when she was brought to the hospital. The medical reports reflected that her menstrual cycle was regular and hence, her claim that she had gotten pregnant due to a physical relationship with the accused had failed. Moreover, no proof of hospitalization was provided to her. There were no injuries on her body.

Admissibility of the medical history of the victim

The medical history of the victim is not given much importance by the Indian judiciary. In the case of **Gangadhar Sethy v. State of Orissa (2015),** the doctor did not find any injury marks on the body of the victim but stated that based on her medical history, here is the possibility of an attempt to sexual assault cannot be ruled out. On the other hand, the Orissa High Court paid no emphasis on the medical history and held that one cannot interpret what the victim meant by the term ‗assault'. It cannot be extended to imply that she was talking about penetrative sexual assault. Moreover, the medical or other evidence did not justify such a conclusion.

Duties of a medical examiner

It is essential that the medical examination of a child is conducted with utmost care

and precaution. Rule 5(3) of the POCSO Rules, 2012 makes the provision that no medical facility or practitioner who renders emergency medical care to a child should ask for any kind of legal or other documentation before providing such care. Apart from this, Section 27 of the POCSO Act lays down certain laws regarding the conduct of medical examinations. These are as follows:

The medical examination has to be conducted in accordance with Section 164A of the Criminal Procedure Code, 1973. A medical examination of a girl is to be conducted by a woman practitioner. It should be conducted in the presence of a person in whom the child has trust, for example, his/ her parents, otherwise in the presence of a woman nominated by the head of the medical institution.

Conclusion

The need of the hour is to sensitize the public regarding child sexual abuse so that there is no reluctance in reporting these crimes. Moreover, the investigating agencies should be well trained and professionals such as medical practitioners involved in the stages of investigation and trial should be efficient so as to leave any scope of negligence on their part. The POCSO Act already makes the procedure child friendly and this approach should be followed by the judicial officers, magistrates, and police officers so that the child victims could repose trust in them.