The effectiveness of any legislation can be assessed to some extent from the judicial response to it. The Protection of Women from Domestic Violence Act 2005\(^1\), provides remedy in the civil law to the victims of domestic violence. On the one hand, the Act has made significant improvements to the existing laws pertaining to violence against women, and has effectively linked all forms of domestic violence to demands for dowry. On the other hand, the development of the Act through legal interpretation appears to be marred by confusion and inconsistency. The enactment has led to a flood gate of litigations raising issues of women’s rights within the precincts of the domestic domain. Very few cases have come up to the Apex Court. Each judgment passed by the High Courts has aided in clarifying, expanding and interpreting provisions of the Act. The judgments selected for examination under this chapter are those issues that have been frequently raised before the various courts and provide clarity on fundamental provisions of the Act.

The judgments from various High Courts are analysed through the lens of human rights norms in order to examine whether the objectives of Act are

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\(^1\)Hereinafter referred to as ‘the Act.’
being furthered by the courts. The Chapter presents a selection of judgments evaluated and categorized under five sub themes:

1. What are the Challenges posed as to the constitutionality of the Act?
2. How are rights of women in the relationships in the nature of marriage recognized?
3. How are the rights of women to matrimonial home and property acknowledged?
4. What is the scope of a woman being a respondent under the proceedings?
5. How are the procedural requirements interpreted?

### 7.1 Challenges to the Constitutionality of the Act

The Act takes into account the fact that women are disproportionately affected by domestic violence and hence falls under the category of legislation relating to protective discrimination. The law recognizes a woman’s right to a violence-free home and provides for remedies in cases of breach of this right. Therefore women alone are contemplated as per the legislative framework to avail the provisions of this Act. Article 13 of the Indian Constitution states that any law, which is in contravention of the Fundamental Rights shall, to the extent of such contravention, be void. The challenges against the Act have been filed, *inter alia* on the ground that the Act, by providing reliefs only to women, is in violation of the constitutional right to equality.

The Constitutionality of the Act was under test before the Delhi High Court in *Aruna Pramod Shah v. Union of India*. In this case a writ petition was filed by the mother-in-law seeking to quash proceedings under the Act initiated against her in a lower court. It was argued that the Act offended Article 14 of

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2 Protection of Women from Domestic Violence Act, 2005, s.2 (a) defines an ‘aggrieved person’ as *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.*

the Constitution of India because it provided protection only to women and not to men. The petition challenged the constitutionality of the Act on two grounds. Firstly, the gender-specific nature of the Act, i.e., by excluding men, is arbitrary and, hence, violative of Article 14 of the Constitution. The Court dismissed this contention on the grounds that, there is a difference between class legislation and reasonable classification. Secondly the petitioner contended that the placing of relationships in the nature of marriage on par with ‘married’ status in section 2(f) of the Act leads to the derogation of the rights of the legally-wedded wife. The Court rejected the second contention by holding that there was no reason why equal treatment should not be accorded to a wife as well as a woman who has been living with a man as his “common law” wife or even as a mistress.

The Court by referring to the International mandates opined:

“Domestic violence is a worldwide phenomenon and has been discussed in International fora, including the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995). The United Nations Committee Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) has recommended that States should act to protect women against violence of any kind, especially that occurring within the family. There is a perception, not unfounded or unjustified, that the lot and fate of women in India is an abjectly dismal one, which requires bringing into place, on an urgent basis, protective and ameliorative measures against exploitation of women. The argument that the Act is ultra-vires the Constitution of India because it accords protection only to women and not to men is therefore, wholly devoid of any merit. We do not rule out the possibility of a man becoming the victim of domestic violence, but such cases would be few and far between, thus not requiring or justifying the protection of Parliament.”

\[\text{Id., para 4. Emphasis added.}\]
This is the first case to address the issue of constitutionality of the law. More crucially, it serves as a model in the manner in which the object and spirit of the Act has been understood and treated by the court. In its judgment, the Delhi High Court clearly articulated the purpose and elements of formulating a law as a “special measure” under Article 15(3) of the Indian Constitution, and reaches the conclusion that the gender-specific nature of the Act is mandated in the context of the purpose of “achieving equality of status for women”.

The approach with regard to women who are in relationship in the nature of marriage under the Act is a progressive recognition of the fact that violence against women within the home cannot be given immunity just because the aggrieved person is not in a legally valid marriage with the perpetrator. This is a vindication of the fact that every woman, irrespective of her status and relationship, has the right to a violence-free home. Aruna Pramod Shah’s case went a step further and acknowledged the fact that, while it is the man who, in most cases establishes a “relationship in the nature of marriage”, it is the woman who bears the social stigma of such a relationship. The Court also clarified that the intention of the provision was not to derogate from the sanctity of marriage as what the Act did was to reiterate the right of every woman to be protected from violence. Hence the judgment of the Delhi High Court sets a progressive precedent, clarifies the intent of the law, and upholds that domestic violence is a violation of the right to equality.

Dennison Paulraj v. Union of India5, was another case that came up before the Madras High Court wherein the constitutionality of the Act was under challenge. The petitioner in this case challenged the constitutional validity of the Act on the basis that it was a discriminatory piece of legislation because it does not permit the husband to file a complaint under the Act and hence was violative of Articles 14 and 21 of the Constitution and also affects the life and liberty of the husband and his relatives. Aggrieved by the

5Dennison Paulraj v.Union of India, A.I.R.2009 (Noc) 2540 (Mad), per Venkataraman,J.
application filed by his wife a writ petition was filed by the husband and his family members challenging constitutionality of the Act and alleging that the proceedings initiated in the lower court was a complete abuse of process of law. Sections 4, 12, 18, 19, 23 & 29 of the Act were challenged as providing preferential treatment to the wife and hence, violated the right to life and liberty of the husband and his relatives. Section 23 of the Act in particular was challenged as arbitrary and conferring unrestricted powers on the Magistrate.

The High Court of Madras rejected those arguments and held that giving certain preferential treatment to the wife and treating them as a special category could not be termed as violative of either Article 14 or Article 16 of the Constitution of India. Following the case of Aruna Pramod Shah the Court further held:

“Though Article 15 of the Constitution of India prohibits discrimination on grounds of religion, race, caste, sex or place of birth, however, Article 15 (3) states nothing in this Article shall prevent the State from making any special provision for women and children. Thus, the Constitution itself provides special provision for women and children. It has been widely resorted to and the Courts have upheld the validity of the special measures in legislation and executive orders favouring women. Thus, when the Constitution itself provides for making special provision for women and children, the contention on the side of the petitioners that there could be no special treatment for women is totally untenable.”

The decision of the Madras High Court in upholding the validity of the Act is a pointer to the right direction. The approach to the issue of giving retrospective application becomes significant not only for the recognition that part of the cause of action arose after the commencement of the Act and that

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the penalty provided in the law is for breach of court orders, but also because the Court went on to reiterate that it is, competent to take cognizance of the act of domestic violence committed even prior to the Act came into force and pass necessary protection orders.

The explicit support of the constitutional validity of the Act by High Courts in these cases indicates recognition of the fact that domestic violence is a manifestation of the structural inequities between men and women, which derogates a woman’s ability to enjoy her fundamental and human right to equality. By upholding the constitutionality of the Act Courts have acknowledged the fact that the right to equality means not merely that men and women have exactly the same provisions under law, but that the actual realisation of the right to equality may require legal measures to redress the structural and historical roots of discrimination against women.

7.2 Recognition of Rights of Women in Relationships in the Nature of Marriage

The most significant feature of the Act is that it has widened the scope of protection against violence beyond the category of women in married or consanguineous domestic relationships, to include women in informal or unmarried relationships.

The requirement of proving the validity of marriage has been a major impediment in determining the rights of women to maintenance is pertinent in a country like India where pluralistic traditions of marriage exists. By taking away the necessity of strictly proving marriage, the Act addresses these concerns and lays down that even if a marriage is not valid or cannot be proved, the woman would still be entitled to her rights under the Act.

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7 Marriages are performed as per customary rights and there is seldom any clear-cut proof that a marriage ceremony has been performed. Furthermore, even if documentary proof of a marriage exists, once a woman initiates proceedings in court against her partner, it often becomes virtually impossible for her to return to her matrimonial household to reclaim such documentation.
The judiciary has provided a wise and tactful solution to the problem by acknowledging and upholding the right of maintenance of women victims in fake and bigamous marriages. Under the provision of this Act, any woman who claims relief such as protection orders, restraining orders or even maintenance, need not prove the validity of her marriage.

The Act seeks to define the concept of a *domestic relationship* as a relationship between 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. Under this definition live-in relationships are recognized in the phrase ‘relationships in the nature of marriage’. Women in live-in relationships are supposed to receive the same protection as wives when it comes to domestic violence. Domestic relationships protect women of fraudulent or bigamous marriages or in marriages invalid in law. This marks the beginning of the legislative recognition shown to couples choosing to cohabit rather than marry under Indian law. An array of judgments has come in the way of interpreting live in relationships by Indian judiciary.

Madras High Court in the case of *M. Palani v. Meenakshi* had discussed at length the need for granting maintenance to an illegally married wife taking into account the beneficial objective envisaged under the Act. Petitioner had filed a suit for declaration that he and the respondent were not married to each other and for a consequential order of injunction restraining her from representing and receiving the benefits as his wife and for costs. In the said proceedings, the respondent filed an interim application for maintenance under the Protection of Women from Domestic Violence Act, 2005, ss.2,2(f).

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9Protection of Women from Domestic Violence Act, 2005, ss.2,2(f).


10M. Palani v. Meenakshi, A.I.R 2008 Mad 162, per Venkataraman, J.
Women from Domestic Violence Act. The Family Court, Chennai, granted her Rs.1,000/- per month as interim maintenance.

This was challenged by the appellant, who contended that the woman was not entitled to any maintenance under the provisions of the Act since they had not lived together at any point of time as a husband and wife. However, he admitted that they had voluntary sexual contact but alleged that the woman had voluntarily submitted to sexual contact despite knowing fully well that he did not believe in the institution of marriage and that the woman herself had not insisted on a formal marriage. The mere proximity for the sake of mutual pleasure can never be called a domestic relationship, contended the appellant. The High Court rejected those contentions and held that:

“The provision does not say that they should have lived together for a particular period...the plaint and counter affidavit will make it clear that petitioner and respondent had a close relationship and had sex... one can infer that both of them seems to have shared household and lived together at least of the time having sex by them.”¹¹

The Court again emphasised that the Act applies even when there is consensual sex between a man and a woman, without promise of marriage. The Court here has taken note of the specific facts and circumstances of the case and in the process of beneficial interpretation has upheld the maintenance relief to the respondent to make sure that the interest of women victims of bigamous marriages are not at stake.

In Suresh Khullar v. Vijay Kumar Khullar¹², appellant was the second wife of the respondent based on an advertisement for a proposal of marriage initiated by respondent claiming that he was a divorcee, appellant married him and lived together as husband and wife. The husband had obtained an ex-parte

divorce from his first wife. After a few years, the parties filed separate proceedings, the husband for a divorce and the wife for maintenance under section 18 of the Hindu Adoptions and Maintenance Act, 1956. Under section 18, maintenance can only be claimed by a “Hindu wife”. During the course of the proceedings under the statute, it came to light that the ex-parte divorce granted to the husband for his first marriage had been set aside. The second wife’s petition for maintenance under the statute was, therefore, dismissed on the grounds that the marriage between the parties was not legally valid because the husband had an earlier subsisting marriage. The dismissal of this petition was appealed before the Delhi High Court by relying upon the provisions of the Act. The Court held that while existing case law under the statute excluded the granting of maintenance to the second wife where there was a subsisting legally valid first marriage, the trial court had, failed to recognise the fact that the decree of divorce was in operation on the day that the second marriage was solemnised, making the second marriage legally valid.

The Court went on to discuss the objective and intent behind section 18 of the Hindu Adoptions and Maintenance Act, 1956 and held:

“section 18 is a beneficial provision for the purpose of securing a decent living for a Hindu wife and to ameliorate the suffering of a deserted wife. They are to be construed in a manner which better serves the ends of fairness and justice. When such laws are made it is proper to assume that law makers enact laws which the society considers as honest, fair and reasonable and this justice and reason constitute the great general legislative intent in such a piece of legislation”.

The Court relied on the Mischief Rule and observed that if a liberal interpretation was not given in the case, it would amount to giving immunity to the husband for defrauding the appellant-wife. Therefore, the appellant-wife, at

\[\text{Id., para.15.}\]
least for the purposes of claiming maintenance under section 18 of the statute, was to be treated as legally wedded. In arriving at its decision, the Court also placed reliance upon sections 2(a), 18, 20 and 26 of the Act.

This judgment of the Delhi High Court marked an important step in recognizing the legitimate entitlements of a woman who had, in good faith, entered into a relationship in the nature of marriage. The court had tried to give effect to the beneficial construction of section 18 of the Hindu Adoptions and Maintenance Act, 1956 with the support of objective and provisions under the Act. And hence it becomes a judicious blend of judicial reasoning providing access to justice for the women victims. It must be emphasized that the Act, in including “relationships in the nature of marriage” within its purview, sought to ensure protection to women in similar situations. This decision reiterated the fact that no woman should be denied the protection of laws when facing domestic violence.

In the case of Narinder Pal Kaur Chawla v. Shri. Najeet Singh Chawla the facts were similar to that of Suresh Khullar’s case. The question to be decided was the maintenance right of a second wife. The husband in the case married the appellant without disclosing the factum of first marriage to the appellant. The court came up with same ideology as was laid down in Suresh Khullar’s case and took support from Savitha Ben’s case and observed that

“A man must not be allowed to take the advantage of his own wrongs and defeat the rights of a woman in good faith, not knowing the existence of the first marriage…The second wife must be afforded protection from violence within the home.”

14 Id., para.16.
17 Id., para 9 and 10.
In *Virendra Chanmuniya v. Chanmuniya Kumar Singh Kushwaha and Anr*\(^{18}\). The case was about a widow with two daughters, who had married her husband’s younger brother as per the custom of the community. In such marriages generally, *Saptapadi* was not performed. As per the custom of Kushwaha community, the marriage was performed through *katha* and *sindur*. When her husband deserted her, the wife filed for maintenance. The trial court upheld her plea but the High Court held that her marriage was not valid since *Saptapadi* was not performed. A Special Leave Petition was filed by the appellant against the judgment of the High Court upholding the respondent’s contention that he was not the husband of the appellant, and therefore, she was not entitled to maintenance from him, since only legally married women could claim this under the provisions of section 125 Criminal Procedure Code.

The Supreme Court examined in detail the provisions of the Act and noted that the Act had given expanded interpretation to the term *domestic relationship*. The wide coverage under the definition of domestic relationship, according to the judgment, is the most significant provision under the Act. The effect of such inclusion ensures that “women in live-in relationships are also entitled to all the reliefs given in the said Act”. The judgment concluded that “if monetary relief and compensation can be awarded in cases of live in relationships under the Act of 2005, they should also be allowed in proceedings under section 125 of Cr PC”. Thus the Court upheld the claim of maintenance sought on the ground that parties though not married, have lived together for a long period.

This decision is significant from the point of view of the Act as it draws directly on the relevant provisions from the Act to expand the category of relationships which could legitimately benefit from the maintenance provisions under section 125 Cr PC, by interpreting the basic social intent and purpose behind both enactments., The inclusion of relationship in the nature of

\(^{18}\) MANU/SC/0807/2010. (G.S.Singhvi and Asok Kumar Ganguly, J.)
marriage, within the definition of domestic relationship under the Act, has generated some debate and criticism.

In *Azimuddin Abdul Aziz v. State of UP* while interpreting the word ‘have at any point lived together’, the Allahabad High Court opined that as per the expression ‘have at any point lived together’, immediate residence of the two parties is not required. Prior acts of violence will be taken into account for filing an application under the Act.

Despite the fact that the Act recognises the rights of women in informal or unmarried relationships, the validity of marriage continues to be raised as a delay or harassment tactic by many respondents under the Act. A holding of the High Court of Kerala in the case of *Thanseel v. Sini* is an example of the Court’s firm stance against using the issue of the validity of a marriage as a delaying tactic in the proceedings. In this case, the petitioner contended that there was no valid marriage subsisting between him and the respondent and that to be addressed as a preliminary issue in the proceedings. Rejecting his contentions, the Court ruled that, the request to decide questions as preliminary issues based on disputed facts could not obviously be entertained and the Magistrate has to consider the entire question and give decision as mandated under section 12 (5) of the Act within a period of 60 days from the date of the first hearing.”

In both the above judgments, the Delhi High Court has clearly intended to establish the jurisprudence that women who are not considered to be ‘lawfully wedded’ or who are referred to as ‘second wife’ are entitled to the same legal protection insofar as there is fraud committed or where the nature of the relationship clearly warrants legal entitlements. These judgments strengthen the statutory protection provided to women in a “relationship in the

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21*Suresh Khullar’s and Narinder Pal Kaur Chawla’s* decisions.
nature of marriage” under the Act and offer comprehensive guidelines to courts on one of the ways in which the provision is to be interpreted.

The Bombay High Court in Sau Manda R. Thaore, W/o Sh. Ramaji Ghanshyam Thaore v. Sh. Ramaji Ghanshyam Thaore discussed the issue as to whether the petitioner, who was by the respondent’s own admission, living with him as his second wife, could be entitled to maintenance under section 125 Criminal Procedure Code in view of the fact that no divorce had been obtained from the first wife. After taking note of the husband’s own admission that the petitioner is his wife and that she was cheated by the respondent who established a sexual relationship and started living with her, the court held that she was not entitled to maintenance under section 125 Criminal Procedure Code in view of the settled legal position that a second wife could not claim maintenance under this provision. Recognizing the vulnerability of the woman and the fact that the court is unable to help in such unfortunate instances, it was suggested that this is an appropriate case for the petitioner to take recourse to the Act. The Court awarded compensatory costs to her, explicitly stating that this would help her in pursuing proceedings under the Act.

The judgment referred to the right of maintenance under the Act which is significant and it indicates an acknowledgment by the court that the Act addressed such situations where the woman was admittedly vulnerable but had no recourse to legal remedies under other existing laws.

The scope of the right of maintenance of women in “relationship in the nature of marriage” under the Act was discussed by its two Judge bench of Supreme Court in D Veluswamy v. D. Patchaiammal. Respondent claimed maintenance from the appellant under Section 125 Criminal Procedure Code and it was upheld by the family court and High Court. Aggrieved by the decision appellant had filed the appeal to Supreme Court. The provisions

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22 Criminal Revision Application No. 317/2006.
relating to economic abuse, aggrieved party, domestic relationship and shared household under the Act came for discussion before the Court in this case. The court clarified that relationship of marriage and relationship in marriage and said that persons who enter into either of them is entitled to the get benefits under the Act. The Court further held that:

“Relationship in the nature of marriage” is akin to common law marriage to the effect that: (a) The couple must hold themselves out to society as being akin to spouses, (b) They must be of legal age to marry, (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. Common Law marriage require although not being formally married must also fulfill the above requirements. In our opinion relationship in the nature of marriage under the 2005 Act must also fulfill the above requirements and in addition the parties must have lived together in a shared household as defined in s.2(s) of the Act. Merely spending weekends together or a night stand would not make it a domestic relationship.

However, in doing so, the court sought to discuss sexual mores and the amoral nature of live-in relationships “In a feudal society, sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror…” At the same time Court acknowledged that: “However Indian society is changing and this change has been reflected and recognized

24 Protection of Women from Domestic Violence Act, 2005, s.3(a).
25 Id., s.2(a).
26 Id., s.2(f).
27 Id., s.2(s).
28 Id., para 20.
29 Id., para 31.
30 Id., para 34.
by Parliament by enacting the Protection of Women from Domestic Violence Act, 2005.”\(^{31}\)

Making an attempt to iron out certain ambiguous situations, in order to be eligible for ‘palimony’, a relationship must comply with certain conditions, above referred. Court in referring to the concept of palimony that existed in other jurisdiction made passing remarks as to the popular cases in U.S.A\(^{32}\). As to the interpretation of object of section 125 Criminal Procedure Code the Court relied on certain Indian cases\(^{33}\) and held that social purpose and object of the provision is to prevent vagrancy and destitution. Conscious that the judgment would exclude many women in live-in relationships from the benefit of the Domestic Violence Act, 2005, the apex court said it is not for this court to legislate or amend the law. The parliament has used the expression ‘relationship in the nature of marriage’ and not ‘live-in relationship’. The court cannot change the language of the statute, it said.

The Supreme court observed:

“Not all Live-in relationships will amount to a relationship in the nature of marriage to get the benefit of Act of 2005. To get such benefits the conditions named above must be satisfied ad this has to be proved by evidence. *If a man has a ‘keep’ whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not be a relationship in the nature of marriage.*”\(^{34}\)

This decision is intended to restrict the abuse of the provision However there is an apprehension that it will leave the ground open to men to enter into bigamous relationships without any civil or criminal liability and sends out wrong signals to younger generations in India. The ruling shifts the burden on

\(^{31}\) *Id.*, para 35.


women to prove that their relationship is not bigamous, disregarding community practices.

The ruling in *Veluswamy case* is devoid of the cautious approach adopted in *Chamuniya Case*. It appears to be based on a moral high ground and western ethos that disregards Indian social reality. Such types of reckless and insensitive ruling violate the constitutional mandate of protecting the dignity of women rather than protecting women against domestic violence within homes.

A live-in relationship can neither be equated nor be substituted with marriage in India. All the trends that lean towards the interest of the people’s very civil and fundamental right to live according to their wish needs to be welcomed. But the true spirit of such trends needs to be assimilated by the stakeholders or else it will lead to usurpation of ethical and moral values embedded in the rich cultural heritage of our country. If granted legal recognition to such middle way relationships, the most crucial question to be answered would be firstly whether it goes out of track from the existing social norms i.e. compatibility and secondly, whether the law has adequate provisions to deal with the peculiar arrangement that these couples exist in. There is need for greater legal clarity on some of the common disputes that arise out of these relationships, while at the same time keeping these legal provisions to a minimum, based on their indispensability in the present liberalised society.

In the USA, as in India, sufficient proof with regard to intention of parties and a certain degree of commitment is necessary to be shown in order to make a legal claim for maintenance. Family is the centre piece of Indian culture and it is adequately cherished as the basic cell of the society. Philosophically, marriage was a sacred commitment and was treated as a tie which continued not only for one life, but for other lives also after death. Living together without the social sanction before marriage was looked upon as sin. Democratisation of moral and ethical values in the concepts of

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35 Manu 5, 160-161.
autonomy and living has led to a floodgate of debates and discussions on the liberalized alternate marital institutions within the country.

A lawfully married woman who is supported both by formal and non-formal support systems of a society needs to be differentiated and treated differently from other women who are vulnerable and have entered into such mid-way arrangements in living. To protect the interests of women and their children who have fallen prey to the abuse of male folk, such decisions are helpful and rejuvenating to lead a life of dignity in the society. Whether they are considered at par with legally wedded wives in India or is the Act giving a back door entry to the concept of live-in-relationships in Indian culture is a debatable issue. Living together without the social sanction before marriage was looked upon as sin.

*S. Khushboo v. Kaniammal* was a case wherein the concept of relationships outside the marriage came for discussion (totally unrelated to the context under the Act) in the context of freedom of speech and expression under the Constitution of India. The Court while disposing of the appeals took a bold step in recognising the new trends in the present world. The court observed “While it is true that the mainstream view in our society is that sexual contact takes place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting with the exception of ‘adultery’ as defined under Section 497 IPC.”

The interpretations suggestive of contradictory outcomes had lead to inconsistency and thereby aggravate the skepticism as against the Act which is understood as mere western apism. Simultaneously a deliberate attempt has been made by the Court to introduce a culture of tolerance to our age old beliefs and values. Legislations and its interpretation unless it is in tune with the pulse of the society are likely to fail in achieving its purpose.

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7.3 Right to Matrimonial Residence and Property

The right to residence provision has been hailed as one of the most unique and important provisions of the Act. It enables a victim of domestic violence to take recourse to independent relief that provides for protective injunctions against violence, dispossessing from the matrimonial home and alternate residence. While the Act does not create any new rights which were not available to women prior to this enactment through statutory or judge made laws, it provides a single window and simple procedures for claiming rights which were scattered under different statutes and legal provisions.

The Act widens the scope of protection against violence beyond the category of wives and extends it not only to mothers, daughters, and sisters, but even to women in informal relationships. An entire gamut of women like aged women, unmarried girls, widows, women whose marriages are suspect due to legal defect on the ground that essential ceremonies were not performed or that the man or the woman has an earlier subsisting marriage, are able to seek relief under this Act.

In the landmark judgment of B. P. Achala Anand v. Appi Reddy, the Supreme Court had clearly upheld this right of residence in the matrimonial home. Supreme Court opined:

“A Hindu wife is entitled to be maintained by her husband. She is also entitled to separate residence if by reason of the husband’s conduct or by his refusal to maintain her in his own residence of other just cause she is compelled to live apart from him. Right to residence is a part and parcel of wife’s right to maintenance. The right to maintenance cannot be defeated by the husband executing a will to defeat such a right. The right has come to be statutorily recognized with the enactment of the Hindu Adoption and

37(2005) 3 S.CC. 313, per Lahoti, J.
Judicial Decisions on the Protection of Women from Domestic Violence Act, 2005 - A Critique

Maintenance Act, 1956. Section 18 of the Act provides for maintenance of wife. Maintenance has been so defined in clause (b) of section 3 of the Hindu Adoption and Maintenance Act, 1956 as to include therein provision for residence amongst other things. For the purpose of maintenance the term ‘wife includes a divorced wife.’

On clarifying the role of deserted woman occupying the tenanted premises Court has expressed the optimism of co-existence of rights. The Supreme Court has further clarified the issue and stated as follows:

“We are also of the opinion that a deserted wife in occupation of the tenanted premises cannot be placed in a position worse than that of a sub-tenant contesting a claim for eviction on the ground of sub-letting. ‘Having been deserted by the tenant-husband, she cannot be deprived of the roof over her head where the tenant has conveniently left her to face the peril of eviction attributable to default or neglect of himself. We are inclined to hold and we do so that a deserted wife continuing in occupation of the premises obtained on lease by her husband, and which was their matrimonial home, occupies a position akin to that of an heir of the tenant husband if the right to residence of such wife has not come to an end. The tenant having lost interest in protecting his tenancy rights as available to him under the law, the same right would devolve upon and inhere in the wife so long as she continues in occupation of the premises.’

The right to residence provision under the Act had evolved in the Indian courts largely within the framework of the Supreme Court’s judgment in the case of S.R Batra v. Taruna Batra in 2007. Respondent had married

38 Id., para 33. Emphasis added.
appellant’s son and started living together at the appellant’s mother’s house. Appellant filed divorce petition later on. As a counterblast respondent lodged FIR under section 498A along with other provisions of Indian Penal Code. In the present case the daughter in law had sought an order to allow her to re-enter her matrimonial home. The Appellant’s retaliated by contending that their son had shifted his residence to a new flat prior to the starting of proceedings. Temporary Injunction was granted in favour of the respondent by the trial court. Senior Civil Judge on appeal held that respondent had no right to the property of appellant other than that of her husband. Respondent filed petition under Article.227 and High Court gave a judgment in her favour to continue to reside at the appellant’s house. Aggrieved by the decision of the High Court, appellants preferred appeal to Supreme Court.

While ruling against her, the Supreme Court based its judgment on its interpretation of the term ‘shared household’ in the Act\textsuperscript{40} and held:

“The wife is entitled to claim right under Section 17(1) to reside in a shared household and shared household would only mean a house belonging to or taken on rent by the husband or a house belonging to a joint family in which the husband is a member”\textsuperscript{41}.

Since the house in question was owned by the mother-in-law, the Supreme Court held that the aggrieved could not claim any rights to residence in this shared household. Furthermore, the Court observed that “The respondent’s any claim for alternate accommodation in terms of section19(1) (f) can only be made against the husband and not against the in-laws\textsuperscript{42}.

The apex court desisted from giving an expansive interpretation to the definition of right to residence in a shared household as it apprehended that to include every single household where the victim lives or at any stage had lived

\textsuperscript{40}\textit{Protection of Women from Domestic Violence Act,2005, s.2(s).}
\textsuperscript{41} \textit{Supra} n. 37 para 29.
\textsuperscript{42} \textit{Id.}, para 28.
in a domestic relationship would ultimately imply that every property where the victim and respondent have lived in the past, including all the houses of the respondents relatives, would fall within the purview of it, effectively allowing the victim to claim right of residence in all those houses. Such a wider interpretation may lead to an absurdity not intended by the legislature and would be inequitable.

In addition, the Court clarified that there is no such law in India like the British Matrimonial Homes Act 1967, and had cautioned against equating a shared household with a ‘matrimonial home’ as has been interpreted by the English Courts. The Supreme Court’s narrow interpretation of this otherwise expansive definition is significant has, to some degree, curbed the potential misuse of this provision.

The Court further confirmed and acknowledged the obiter dicta in *B.R.Mehta v. Atma Devi*\(^{43}\) as to the present need in changing situation that it is high time to give wife or the spouse right of occupation in a matrimonial home in case of marriage break up or in case of strained relationship between husband and wife. Alongside Court cautioned itself that the abovementioned obiter dicta was only an expression of hope and not the law laid down and added courts do not legislate and whatever may be the personal view of a judge he cannot create or amend law and must maintain judicial restraint.

Allowing the appeal Court acknowledged the fact that definition under s.2(s) as to shared household under the Act was not happily worded and attributed the fault to the clumsy drafting of the legislation and justified their standpoint by saying that an interpretation best possible to prevent chaos in the society was resorted to by them\(^{44}\).

If one strictly adheres to the definition of *shared household* under the Act then aggrieved person is entitled to live within the space shared earlier by

\(^{44}\) *Supra* n. 38 para 30.
her and her husband. The petitioner had lived in the property in question in the past; hence the said property was her shared household. But the court overlooked all of that and decided that the property in question neither belonged to the husband nor was it taken on rent by him nor was it a joint property of which the husband was a member. It was the exclusive property of the mother-in-law. Hence according to the Apex Court it cannot be called a shared household as it was not fulfilling the criteria of the section. In this case\textsuperscript{45} a statutory guarantee of the right to reside in the shared household was linked to the ownership of the home, rather than the fact of residence in the joint household. This judgment has curtailed the scope of right to residence envisaged under the Act.

Judicial emasculation of a law may blunt the social message which the law conveys, thereby diluting its social impact\textsuperscript{46}. The Supreme Court’s holding in the above case appears to be an example of this justification. Further the court by ruling that claim for alternative accommodation can only be made against the husband and not the in-laws or other relatives has proved detrimental for women residing in joint family households in which the husband himself has no legal right to reside by way of title or interest. Furthermore, it has become virtually impossible for women who had already left their households due to violence to gain orders allowing them re-entry into the household, especially in joint family scenarios. There is no guarantee as to the security in staying in such violent environment in the in-laws household.

An attempt is also made through this judgment to bring out the difference between the concept of matrimonial residence and property in the Indian and English scenario\textsuperscript{47}. Section 27 of The Hindu Marriage Act makes a

\textsuperscript{45}(2007) 3 SCC 169.
\textsuperscript{47}The major struggle for women in England had been to acquire the right to own property during the subsistence of their marriage and to fight the legal provision which merged their property with that of their husbands. The attempts to enact Matrimonial Clauses Act, 1857,
vague reference to property, but contextualizes it within a limited scope of Hindu women’s rights over the customary gifts, received jointly by the spouses, at the time of marriage. The Act did not even provide for claiming the Hindu woman’s customary right of stridhan at the time of divorce. The only recognition of right of women to residence is found under the Hindu Adoptions and Maintenance Act, 1956 where maintenance is defined as inclusive of a provision of residence. On divorce women are entitled to only a meager amount of maintenance which is insufficient to procure separate residential premises for themselves and the children under their custody. This points out to the lacunae persisting in the legislations made in India. This decision continues to dominate the legal landscape. As Batra v. Batra is the settled law on the issue till date, researcher feels that there is a need to critically examine what this means for the right to reside as envisaged under the Act.

In Hemaxi Atul Joshi v. Muktaben Karsandas Joshi 48, the Bombay High Court, the husband had filed a petition for divorce and the wife had filed a corresponding petition to protect her right to reside in the matrimonial home and sought an injunction against her dispossession. Prior to the filing of proceedings for divorce, the parties had shifted out of the joint family household into a separate apartment. The wife staked her claim of residence in the premises owned by her mother—in-law and not against her husband. The awarding limited right of divorce under stringent conditions. But women’s right to separate property after divorce was not acknowledged. Married Woman’s Property Rights Act, 1872 awarded rights over their separate property for women who were legally separated/divorced. Later the Married Women’s property Rights Act 1882 slightly improved the position of married woman. Finally in 1935, the difference between a married and unmarried woman was abolished and married women became full owners of their own individual property, even during the subsistence of marriage. Matrimonial Homes Act in 1967 specifically empowered the courts to decide the issue of property while dealing with issues of desertion and divorce. Divorce Reform Act in 1969 introduced the “Breakdown theory” of divorce. In 1973 provisions of both the above Acts were incorporated into Matrimonial Causes Act, 1973. The Family Law Act of 1996 further altered the position laying emphasis on mediation than contested litigation. These enactments stipulated that though the courts must give effect to legal rights of the parties they must also honour the wife’s right in equity to reside in the matrimonial home.

Court rejected her claim on the ground that merely because the wife stayed in the house of her mother-in-law along with her husband for some time, she did not accrue a legal right of residence in the said premises. It was not the property in which the husband had a right. Relying upon the *Batra* Case, Bombay High Court held that shared household indicates the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which husband is a member. This decision signals that if the husband had no legal right over the household the wife has no other recourse but to lean back on her natal home.

In *Vandana v. T. Srikanth*\(^4^9\), the Madras High Court provided a broad interpretation to the notions of *shared household* and *domestic relationship* under the Act. In this case the husband had contested the right of the aggrieved wife to reside in the shared household under section 17 of the Act because the parties had not lived together in the shared household for even a single day after their marriage. The husband disputed the very fact of marriage itself. But the Court, upholding the right of the aggrieved wife to reside under section 17 held that the wife has a *de jure* right to live in the shared household because of her status as a wife in the domestic relationship. The right of a legally wedded wife to be entitled to the shared household is justified in the following dictum laid down by Madras High Court It reads:

“It is not necessary for a woman to establish her physical act of living in the shared household, either at the time of institution of the proceedings or as a thing of the past. If there is a relationship which has legal sanction, a woman in that relationship gets a right to live in the shared household. Therefore, she would be entitled to protection under section 17 of the Act, even if she did not live in the shared household at the time of institution of the proceedings or had never lived in the shared household at any point of time in the past. Her right to protection under section 17 of the Act, coexists with her right to live in the

\(^{49}(2007)\) 6 M.L.J. 205 (Mad.).
shared household and it does not depend upon whether she had marked her physical presence in the shared household or not”50.

The Court pointed out that a marriage, which was valid and subsisting on the relevant date, automatically conferred a right upon the wife to live in the shared household as an equal partner in the joint venture of running a family. If she had a right to live in the shared household, on account of a valid and subsisting marriage and she was definitely in a “domestic relationship” within the meaning of section 2(f) of the Act, her bodily presence or absence from the shared household could not belittle her relationship as anything other than a domestic relationship, the court clarified.

This decision is a judicial recognition to the concept that the contract of marriage encompasses within it, a right to residence. This also brings out the developmental aspect of the provisions under the Act relating to ‘shared household’ concept in the Act.

Abha Arora v. Angela Sharma51 was another similar case wherein the wife had claimed right of residence against her mother-in-law, relying upon the notion of shared household. The mother in law initiated proceedings to restrain the entry of daughter-in-law into the premises owned by her. The daughter-in-law failed to obtain a counter injunction for her re-entry. Later the mother-in-law sold the premises and made an application to the court for permission to withdraw the proceedings filed by her. The daughter-in-law vehemently opposed this move as her rights under the Act would be defeated in case of withdrawal of suit. The High Court rejected her plea and held that since the property is owned by the mother-in-law, the daughter-in-law cannot claim the right to residence, as the same is not a shared household under the provisions of the Act. It was also taken onto consideration by the Court that the daughter-in-law was not residing in the suit property but instead was residing and

50 Id., para 20.
working in the UK and she had substantial earnings out of it. Subsequently the proceedings filed by her were dismissed for default, as she did not follow up the suit. Hence there was no reason for preventing the mother-in-law from withdrawing her suit and compelling her to proceed with it.

In *Neetu Mittal v. Kanta Mittal*\(^5\), the wife had filed proceedings against her in-laws seeking an order of permanent injunction under Order 39, Rule 1 and 2 of Civil Procedure Code, and also invoked the relevant provisions for her right to residence under the Act. The wife admitted that she had been living separately with her husband and pleaded that that accommodation was not adequate. The relationship with in-laws was not cordial and the couple were living separately due to the settlement arrived at, at the police station, between the parties. Hence, it was held that her staying with the in-laws would be detrimental to their health and interest, and their right to live with dignity. The trial court order was affirmed by the High court. Relying upon the *Batra* case, the court held that the wife’s claim of residence could only stand against her husband and not against her in-laws.

A slightly different issue came to be projected under the judgment in *M. Nirmala v. Dr. Gandla Balakotaiah*\(^3\). The wife had filed an application under Order 39 read with section.151 Civil Procedure Code seeking an injunction against her husband from dispossessing her. She also invoked section 19(f) of the Act. She contended that the property over which she claimed right to residence was purchased in 1997 out of her own and her family funds, but stood in the name of her husband. The husband denied this contention and pleaded that premises were purchased from his own funds and through a bank loan and relied upon relevant documents to prove his case. The husband was ready to pay for an alternative accommodation. The trial court dismissed the wife’s petition, but directed the husband to pay a sum of Rs.3,500/- per month towards rent. The wife challenged this order in the High court on the ground

\(^{52}\) 2008 (2) A.L.T. 241.

\(^{33}\) 2008 (2) A.L.T. 241.
that she was entitled to the possession of the matrimonial house as per section.19 of the Act. The High Court upheld the order of the Family Court on the ground that she could not prove her contribution towards the purchase of the premises. This decision tends to support the patriarchal setup wherein the wife’s role as an effective contributor to the family earnings goes unacknowledged. The fact that most women contribute to the matrimonial home either through their own earnings or through their unpaid labour was overlooked while ascertaining the right of residence and right to property in respect of matrimonial home in this case. A restricted scope of the provision of the shared household is visible from the above judgments which would drastically curtail the rights of women.

In Priya v. Shibu⁵⁴, the High Court of Kerala concluded that a divorced woman was entitled to reliefs under the Act. In the case of Bharati Naik v. Ramnath Halarnkar⁵⁵, question mooted was whether a divorced woman could have a right in the matrimonial home. In this case the woman was divorced way back in 1998. Thus, the question that arose was of the retrospective effect of the Domestic Violence Act and whether there was any present case of domestic violence where she complained about etc. The High Court of Bombay at Goa concluded that a woman who had been divorced for 12 years would be allowed to receive maintenance under the Act stating that the relationship by consanguinity, marriage, etc. would be applicable to both the existing relationship as well as the past relationship and cannot be restricted to only the existing relationship as otherwise the very intent and purpose of enacting the said Act would be lost as it then would protect only an aggrieved person who is having an existing relationship. The Court thus ruled that even a divorced woman can receive maintenance under Section 12 of the Act.

The pertinent question that arises here is the assimilation of this concept with practice in Indian society. The situation that emanates from such concepts

⁵⁵ Bharati Naik v. Ramnath Halarnkar, Cr. W.P Nos.18/09 and 64/09, Goa 17/02/10.
is that through a residence order, a respondent including family members of the respondent could be directed to leave the household, or to secure the same level of alternate accommodation for the woman. In India, most couples, after marriage, live in a joint household, shared with the husband’s parents and siblings. The question that is projected in the judicial discourse is whether such dwellings can be construed as the matrimonial home or shared household of the woman and whether she is entitled to obtain an order of injunction restraining the husband and his family members from dispossessing her. Until the Act was enacted there was no recognition of the right of residence against the husband’s family members where the couple is living within a joint family unit. This Act seeks to strengthen this right and broaden its scope.

The Madhya Pradesh High Court in *Razzak Khan v. Shahnaz Khan*\(^{56}\) stated that the aggrieved person has a right to reside in the shared household of her ex-husband. She filed for residential orders under Sections 18 to 20 of the Act. The wife contended that she lived with her husband and his two brothers in their ancestral house. The lower court granted her the protection order and maintenance for her and the minor son, the Sessions Court modified the relief and directed the Protection Officer to ensure that an alternative accommodation is given to her in the ancestral house of her husband and granted maintenance to the foster son. The husband contended that she was working as a clerk and comfortable living in her parental house and that he was a heart patient and mechanic by occupation who was not getting regular salary. And he further contended that after divorce it was not proper for her to live in the ancestral house.

The case was finally decided on the factual circumstances. The Madhya Pradesh High Court observed that:

“Thus, it is clear that every women in a domestic relationship shall have the right to reside in the shared house except in accordance

\(^{56}\)Razzak Khan v. Shahnaz Khan, 2008 (4) MPHT 413
with the procedure established by law therefore, this argument of applicant has no force that divorcee wife Shahnaz Khan has no right to reside in an ancestral house of husband or such living will amount to ‘Haram’.” “…in the alternative husband Ramzan Khan is directed to secure same level of alternate accommodation for Shahnaz Khan as enjoyed by her in the shared house with the help of Protection Officer…”57

The fact situations of the case reveal the patriarchal mindset promoted by the husband’s to deprive the aggrieved party of their entitlements as per the Act.

*Nidhi Kumar Gandhi v. The State*58, was a case filed in Delhi High Court by a woman with her minor daughter had been dispossessed. The husband resisted her claim by stating that the premises belonged to his father and that he was not residing in the said premises. The wife’s contention was that he shifted his residence only after she had initiated proceedings against him. In view of this interim orders were passed in her favour. The husband challenged the orders, relying upon the *Batra case* and pleaded that the premises were neither owned nor rented by him, and it was not the joint family property and thus could not be construed as shared household. In view of this the Session’s Court varied the residential order passed by Magistrate’s court. In appeal, the Delhi High Court restored the orders of the Magistrate’s court and observed that it was premature on the part of Sessions Judge to apply the ratio of *Batra case* without determining whether in fact, the husband’s father owned the premises and whether the husband had no right to live there. The High Court also observed that it was inconceivable how at an interlocutory stage, in view of the mandate under the Act to provide urgent relief, a final determination on that aspect could be made. Further it was held that rights of the husband’s family were not affected by the order of restoration and the wife’s occupation of the premises. This judgment effectively suggests that the

57*Id.*, para 15.
Batra holding should not be applied in cases where the issue is of urgent interim residence reliefs and there was no conclusive determination reached as to the ownership of the property.

A remarkable decision was taken by the Delhi High Court in Vijay Verma v. State N.C.T. of Delhi and Anr, in defining the scope of “shared household” under the Act in a gender-sensitive manner. The court clarified the scope of this right by stating that where a family member leaves the house to establish his own shared household separately and establishes her own household, she could not claim a right to reside under the Act on the basis of a “domestic relationship”. The case was with regard to the issue of denial of right to reside.

The court went on to discuss that in cases where such person has a coparcenary or inheritance right in the property, such right must be claimed through a civil suit and not under the Act. Therefore, the court clearly recognized and specifically excluded instances where the aggrieved woman may have either temporarily left the household or had been forced out. In such cases, the right of residence on the basis of a domestic relationship would continue. The Court sought to distinguish between acts of violence committed even when the person is living separately and stated that in such cases, the recourse lies in the IPC and other criminal laws. The reasoning of the court is to be read in conjunction with the fact that the court categorically upheld the de- jure right of a woman to reside in the shared household. Any other interpretation can have the danger of denying the right of residence under the Act to all those women who falls under domestic relationship but may not be

59Crl. M.C. No. 3878/2009. In this case, the petitioner filed an application before the trial court seeking an immediate right to reside and police protection against her brother and his wife. She contended that being a permanent resident of US, when she came to India, she was not allowed to enter the premises of her parental house by the brother and his wife. On the other hand, the brother argued that the premises were owned by his father and himself, and upon the death of the latter, the share devolved upon the grandson under a will. Further it was argued that the petitioner had already received consideration for her share in the property.
residing in the shared household, and are subjected to domestic violence within the four walls.

The judicial approach wherein the property is in the joint name of husband and the in-laws, is that the wife has a right to reside. It was so affirmed by the Delhi High Court in *Jyotsana Sharda v. Gaurav Sharda* On the issue of residence order, the husband argued that the wife does not have any right to stay in an accommodation, which is owned by the mother-in-law. The property in question was in the joint name of the husband and his mother, although the wife argued that the entire sale consideration was paid by the husband. The Court rejected the contention of the husband and held that since it was established that the property was jointly owned by the husband and mother-in-law and it was her matrimonial home before the dispute began, it is her shared household and she has a right to reside therein. Regarding the revision petition filed by the husband against the maintenance order in favour of the child, the court held that since it is only an interim arrangement to prevent destitution of the child, it could not be considered at par with an order affecting the rights of the parties. In spite of Batra’s judgment this judgment interpreted the provisions with an open mind and has considered the plight of the aggrieved woman.

In *Ashish Bhowmick & Anr. v. Tapasi Bhowmick & Anr.*, where the dispute related to the right of a widow to claim right to residence, the Calcutta High Court laid down that where the relationship between the widow and the husband’s family is acrimonious, and the parties are residing in the same house, an alternate accommodation may be the most suitable relief.

In *P. Babu Venkatesh v. Rani*, the wife had been beaten and was disposed of her matrimonial home at midnight. She sought for urgent relief of residence order against her husband and in-laws. The trial court passed ad-

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60 Criminal Revision Petition Nos. 132 and 133/2009.
61 C.R. R. No. 10 of 2009.
62 2009(2) RCR(Civil) 883
interim reliefs in her favour permitting her to re-enter the matrimonial home. She was permitted to break open the locks and enter the premises as her in-laws had locked the house. The husband contended that the house was in the name of his father and relied on the Batra case. The wife’s contention was that he had alienated the house to his father during the pendency of the case. The court took notice of the fact that if every husband started transferring his property in favour of someone else when a matrimonial dispute arises and plead that premises does not belong to him and is therefore not a shared household the women will be deprived of their right to residence. The court while upholding the order of the trial court to break open the locks observed that the wife cannot be made to wait in the street and that husbands would prevent the wives from reaping the benefits of the order by simply locking the premises and walking away.

The decision though appears to be positive from the perspective of a victim, there is an inherent limitation lying behind it. No assurance of safety to women can be guaranteed by the courts in such cases if the women are to stay in the premises in a hostile environment.

The Delhi High Court in Master Ryan through its mother Mrs. Ridhima Juneja v. P. N. Juneja and Sons, restricted the scope of an interim order for not disturbing peaceful possession passed in favour of the wife to mean constructive possession only. The facts of this case are that after marriage and the birth of their son, the parties had been residing together in the self-owned property of the in-laws. The husband was employed by the Hindu Undivided Family. As a result of alleged cruelty, the wife was forced to leave the shared household along with her son following which she filed an application under the Act seeking reliefs of residence and compensation among others. While compensation was granted, the trial court refused to grant residence order for restoring her to the shared household, based on the judgment in Batra v. Batra.

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However, an interim order directing that possession should not be disturbed was passed in her favour, which was used by her to re-enter the premises. In arriving at a conclusion against the wife, the court did not take into account the fact that the husband was employed by the Hindu Undivided Family and it was claimed that he had been disowned only after the application was filed by the wife. Further, the husband was said to be staying with a friend on a temporary basis. Hence, from the facts it may be concluded that there was an attempt to deny the wife her legitimate entitlements. The judgment clearly demonstrates the manner in which Batra decision could be abused to deny women their legitimate entitlements.

The right to reside in a “shared household” under the Act is not an unlimited right, therefore, if another legal provision exists that can be used to evict a petitioner from her house (e.g. under Rent Control Act, where the landlord seeks to evict a tenant), then a women cannot be protected by the orders issued under the Act. The ‘shared household’ provision in the Act can, in that circumstance, be used as a bargaining tool in order to secure alternate accommodation. Ultimately, however, the Act can only be used for temporary reliefs and does not provide women with property rights or long term residence rights.

In the case of Mrs. Savita Bhanot v. Lt. Col. V.D. Bhanot where the property was a government accommodation provided to the husband, the trial Court ordered certain benefits to the wife. In this case, the husband had deserted the aggrieved woman, the reliefs that could be claimed according to the court were a.) Right of residence in the house which was her matrimonial home before the parties started residing in the government accommodation, where deemed feasible; b.)Where no such matrimonial home exists, the husband can be asked to arrange for an alternate accommodation; or c.) The husband is to provide rent for alternate accommodation.

64(2010) 158 P.L.R. 1
From the analysis of all these cases as to shared household and right to residence no foundational philosophy is emerging as to the exact status of right to residence. The issue of matrimonial property rights is not interpreted favourably. The economic contribution of a woman to her family or matrimonial home is least recognized. Instead, landed properties covered by the documents of title, in her name alone, will be viewed as ‘her property’. In India the notion of ‘marital property’ is not yet recognized. There is no concept of common property and the property brought into the marriage is not subject to equitable distribution during matrimonial dissolution. Instead, even though it is most often the woman who takes on the bulk of home loans, women are invariably left empty handed after a divorce.

The model legislation on domestic violence as suggested within the United nations in 2010 clearly emphasize that such Legislation should provide for the amendment and/or removal of provisions contained in other areas of law, such as family and divorce law, property law, housing rules and regulations, social security law, and employment law that contradict the legislation adopted, so as to ensure a consistent legal framework that promotes women’s human rights and gender equality, and the elimination of violence against women.

Tracking the lacuna in the right to shared household, it is often noticed that women feel insecure and scared going back in the same household where she was abused. It gets difficult for her to segregate herself entirely from the perpetrators by living in the same household. India certainly has a long way to go since women are still not protected by way of matrimonial property laws.

In order to be fully effective, the adoption of new legislation on violence against women should be accompanied by a review and amendment, where necessary, of all other relevant laws to ensure that women’s human
rights and the elimination of violence against women are consistently incorporated\textsuperscript{65}.

7.4 Whether a Woman can be a Respondent under the Act.

The Act clearly states that only women can petition for the remedies available under this Act, the question of whether women can be named as respondents is a contentious one. The Act defines ‘respondent’ as ‘any adult male person who is, or has been, in a domestic relationship with the aggrieved person...’\textsuperscript{66}. The proviso to this Section clarifies, “provided that an 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”.

In Ajay Kant v. Alka Sharma,\textsuperscript{67} the question that came up before the High Court of Madhya Pradesh was whether women can be made respondents in applications filed under the Act. An application was filed by a wife against her husband and mother-in-law after she was dispossessed from her matrimonial home, following dowry-related harassment. The quashing of the lower court proceedings was sought on two grounds. The pertinent contention was that an application can be filed only against male members of the shared household and not against female members such as the mother-in-law. To justify the contention the definition of respondent under the Act was forwarded. The High Court upheld the first contention that female relatives cannot be made respondents under the Act and stated that,

“Thus, it is provided by this definition section 2(q) that an application can be filed by an aggrieved person...claiming relief under the Act only against the adult male person. However, as per

\textsuperscript{65} In the United States, the Personal Responsibility and Work Opportunity Reconciliation Act (1996) created a Family Violence Option, which permits survivors of domestic violence to be exempted from certain employment restrictions related to receiving public assistance payments. The United States Department of Health and Human Services issued regulations regarding the implementation of the Family Violence Option in April 1999.

\textsuperscript{66} Protection of Women from Domestic Violence Act, 2005, s.2(q)

the proviso appended to this provision, a 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. For understanding these two parts, i.e., the main part of the Section and the proviso, it is necessary to understand the scheme of the Act.”

The Court went on to distinguish between the terms “application” used in section 12 and “complaint” used in the proviso to section 2(q). The Court held that, “section 12 of the Act provides that an application (not a complaint) for seeking one or more reliefs under the Act can be filed. On perusal of sections 18 to 22 of the Act, it appears that the reliefs under these Sections as mentioned hereinabove can be passed on the application under section 12 of the Act”. The Court added “complaint” with reference to the Criminal Procedure Code, and clarified that, “this word complaint cannot be considered beyond the scope of the main provision of this Section which has been defined in first part of section 2(q)”. Based on this interpretation, the court held that a proceeding under the Act can only be initiated against an adult male person.

The second contention related to the procedural aspects. As no report from the Protection Officer was sought and the Magistrate recorded the statement of the aggrieved person without first issuing notice to the respondents, procedural requirements under the Act were not met. The Court rejected the second contention on the ground that procedural irregularities were not sufficient to quash proceedings and that, as per Section 28(2) of the Act, a Magistrate has the power to set his own procedure. In so doing, the Court acknowledged the importance of ensuring speedy and efficacious access to justice, unimpeded by procedural requirements, for a woman in need. This is in accordance with the intention of the Act.
In *Smt. Sarita v. Smt. Umrao*68 a revision petition was filed challenging the order of the appellate and trial courts, which withdrew proceedings under the Act against the mother-in-law on the basis that women cannot be made respondents under the Act. The petitioner argued that the lower courts failed to appreciate the proviso to section 2(q) which states that a complaint can be filed against relatives of the husband or male partner. It was contended that the term “relative” is not gender-specific. The High Court clarified that the term “relative” is quite broad and includes all relatives of the husband irrespective of gender or sex.

*The decisions in Nand Kishore v. State of Rajasthan*69 and *Rema Devi v. State of Kerala*70 upheld the same view that a female can be a respondent. In the first case, the Court categorically held that, “the term ‘relative’ is quite broad and it includes all relations of the husband irrespective of gender or sex”. The second case, further clarified that, “section 2(q) of the Act and its proviso if read together nowhere suggest that relative of the husband or the male partner has to be a male. In proviso to section 2(q) of the Act the word is ‘relative’ and not ‘male relative’… a female relative is not excluded from the definition of respondent…” This stance was reinforced in a number of rulings in the High Courts of Madras71, Hyderabad72 and Bombay.

In *U. Suvetha v. State by Inspector of Police and Anr*73 Supreme Court went on to examine the meaning of “relative” under Section 498 A IPC as to decide whether a girl friend can be included in the term relative. The Supreme Court held:

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“Living with another woman may be an act of cruelty on the part of the husband for the purpose of judicial separation or dissolution of marriage but the same in our opinion would not attract the wrath of section 498A of the Penal Code. An offence in terms of the said provision is committed by the persons specified therein. They have to be “husband” or “his relatives”. Either the husband of the woman or his relative must have subjected her to cruelty within the aforementioned provision. If the appellant had not been instigating the husband of the first informant to torture her has been noticed by the High Court, the husband would be committing some offence punishable under the other provisions of the Penal Code and the appellant may be held guilty for abetment of the commission of such offence but not an offence under Section 498A of the Penal Code.74 “

In the absence of any statutory definition, the term "relative" must be assigned a meaning, as it is commonly understood. Therefore, the court held that "respondent" under section 2(q) of the Act includes a female relative of the husband or the male partner. The Court further emphasized:

“Proof of legal marriage in the rigid sense or required under the civil law is unnecessary for establishing an offence under Section 498A IP. The expression ‘marriage’ or ‘relative’ can be given a diluted meaning which a common man or society may attribute to those concepts in common parlance for the purpose of s.498A IPC.75”

This is an important judgment in view of the right approach of the court towards the issue, sensitivity and understanding of the intent of the law.

75 Id., para 23.
In Jaydipsinh Prabhat Singh Jhala and Ors. v. State of Gujarat and Ors, the Gujarat High Court took note of several provisions under the Act, including the Statement of Objects and Reasons and held that female relatives can be made respondents under proviso to section 2(q) of the Act. In this case, two petitions filed against the proceedings in the lower courts was combined and heard together, in view of the fact that both related to the question of whether women can be respondents under the proviso to section 2(q) of the Act. The application under the Act, in both cases, was filed by the daughter-in-law against the husband and other in-laws, including against female relatives of the husband. In this case the court also examined the law relating to interpretation of a ‘proviso’ and concluded that it was well settled that the proviso ordinarily would provide for an exception to the main clause in a statutory provision. The Court then referred to the proviso under section 2(q) and clarified that in an ordinary case, an aggrieved woman could file an application against any adult male with whom she has a domestic relationship but where she is a wife or female in a relationship in the nature of marriage, she can also file against a female relative of her husband or male partner.

The Apex Court in Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade and Others, considered the definition of “respondent” defined under section 2(q) of the Act of 2005, and held that “although section 2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint. The Apex Court further held that legislature never intended to exclude female relatives of the husband or male partner from the ambit of complaint that can be made under the provisions of 2005 Act. It is true that expression “female” has not been used in the proviso to section 2(q).

76(2010) 51 G.L.R. 635.
77 (2011) 3 S.C.C. 650.
also, but, no restrictive meaning can be given to expression “relative” nor has said expression been defined to make it specific to males only.

Another somewhat contentious aspect of the above-mentioned section 2(q), pertaining to the definition of ‘respondent’ under the Act, is related to the rights of the aggrieved woman to claim reliefs from consanguineous domestic relationships. The definition of ‘respondent’, as any adult male person who has been in a domestic relationship with the aggrieved woman, is wide enough in its scope to implicate members of a woman’s natal family, or even her adopted family.

In Varsha Kapoor v. Union of India &Ors78, the interpretation of proviso to section 2(q) and its constitutional validity was challenged. A writ petition was filed by the mother-in-law of the aggrieved party before the High Court of Delhi contending that female relatives could not be impleaded under the Act. The facts of the case were that before the trial court, the daughter-in-law had sought reliefs under the Act, alleging various forms of abuse against the husband and other relatives of the husband. The trial court admitted the application and issued notice to the parties, upon which this petition was filed. In the writ petition, it was argued by the petitioner that the expression “a relative” in the proviso would only mean an “adult male person”, since the Preamble to the Act clearly provides that the law has been enacted to provide redressal to women against domestic violence, and as such cannot be used against women. It was also contended that the proviso cannot expand or limit the scope of the main provision for which reliance was placed on the judgment of the Supreme Court in Dwarka Prasad v. Dwarka Das Saraf79. In the alternate, it was further argued, if relative is interpreted to include female relatives, the same would not pass the test of reasonable classification under Articles 14 and 15 of the Constitution.

78 Writ Petition (Crl.) No. 638 of 2010.
To begin with, the court noted the purpose and intent of the law. Reference was also made to the judgment of the Delhi High Court in *Aruna Pramod Shah v. UOI*\(^80\) in which the court upheld the constitutionality of the Act and dismissed the contention that the gender-specific nature of the law was arbitrary. In view of the above, the court sought to segregate the definition of “respondent” under section 2(q) into two independent and mutually exclusive parts: It was held that where the aggrieved party is in a domestic relationship with the other person, such person has to be an adult male person, as per the main provision. Using this provision, any woman, irrespective of her marital status, may seek reliefs under the Act against an adult male person. The applicability of the proviso, however, is limited in nature as it applied only to cases where the aggrieved party is married or in a relationship in the nature of marriage. Only with regard to such a limited and specific class of persons, the definition of “respondent” has been widened to include a relative of husband or male partner. The court reasoned that it is common knowledge that family members of the husband may also join in treating the wife with cruelty, and such family members would invariably include women. Further, it was pointed out that leaving female relatives out of the scope of the Act would mean that the husband or male relatives would ensure that the violence is perpetrated by the female relatives thereby frustrating the object of the law. The court also referred to the provisions of the Act such as sections 19, 21 and 31, from which a clear inference in this regard can be drawn.

The Court dismissed the argument relating to the constitutional validity of the interpretation and observed that the wider scope of rights given to married women to claim reliefs under the Act against both male and female relatives must be understood in view of the fact that the Act was enacted to provide a civil remedy in addition to the criminal provision of section 498 A of Indian Penal Code.

\(^{80}\) *Supra* n. 3.
This judgment of the Delhi High Court is a landmark as to the manner in which it defined the scope of the rights of a married woman as well as for clearly upholding the constitutional validity of section 2(q). It is hoped that the legal position upheld in this judgment would aid in developing a uniform and gender sensitive understanding of the law.

The decisions in the abovementioned case suggest that the courts have begun to develop a more nuanced understanding of domestic violence, recognising that women are not only abused in their roles as wives and daughters-in-law, but can also face domestic abuse as daughters, sisters, mothers, grandmothers, etc. This is, however, an aspect of the law that has not as yet been adequately developed or implemented for the diverse manifestations of violence faced by women within the domestic sphere.

7.5 Interpretation of Procedural Requirements

Procedures prescribed under the law are meant to facilitate a woman’s access to speedy and efficacious remedies by giving effect to the substantive right recognized by this statute. The Act is supposed to provide a single window clearance system to the issue of domestic violence. With a view to providing speedy access to justice for women in such circumstances, the Act combines the remedies previously available under a number of civil and criminal laws under a single statute, making it easier for women to access reliefs in single court, through a single legal proceeding. Thus, although the Act is a civil law, it simultaneously allows women to approach criminal courts since they are often more accessible and provide the possibility of quicker justice.

The Act prescribes simple procedures by dispensing with the complex technicalities of civil law to make room for aggrieved women themselves to approach the courts, without the aid of a representative or in cases deserving assistance to be guided by Protection Officers. The Act also mandates that Magistrates should dispose of every application within 60 days from the date of
the first hearing\(^{81}\) and that courts must grant interim/urgent orders\(^{82}\) to help ensure that women facing violence at least have immediate access to shelter, food, protection, and some financial resources even when the case is pending in the court. These ‘fast-track’ procedures have often been challenged on the basis that the case has not followed the requisite legal and technical procedures.

In *Milan Kumar Singh & Anr. v. State of U.P. & Anr.*\(^{83}\), the husband challenged the application filed by his wife under the Act on the ground that such an application ought not be filed directly before a Magistrate without first approaching the Protection Officer and recording a Domestic Incident Report as per the stipulations of the Act. He also argued that the application was not in the prescribed format as provided in Form II as per the Rules.

The Court dismissed both contentions on the grounds that the provisions of the Act were not accurately interpreted by the husband. The Court held that as the Act was a social legislation, its purpose was to help the aggrieved person and not impose strict procedural requirements. The Court held:

“A plain reading of section 12(1) shows that the aggrieved person can file complaint directly to the Magistrate concerned. This is the choice of the aggrieved person that instead of directly approaching the Magistrate, he or she can approach the Protection Officer and, in case of emergency, the service provider and with their help to the Magistrate concerned. There is no illegality in directly approaching the Magistrate for taking cognizance in the matter. This is for the Magistrate concerned to take help of Protection Officer and service provider after receiving the complaint provided, if he feels it necessary for final disposal of the dispute between the parties”\(^{84}\).

\(^{81}\)Protection of Women from Domestic Violence Act, 2005, s. 12(5).

\(^{82}\)Id., s. 23.

\(^{83}\)2007 Cri. L.J. 4742, per R.N.Mishra,J.

\(^{84}\)Id., para 7.
The Court further clarified that the Domestic Incident Report therefore, is to be recorded only if the Magistrate or the parties require the assistance of the Protection Officer. An affidavit properly verified attached to the complaint is sufficient enough and the complaint cannot be dismissed solely for the reason of non-attachment of verification note. In its clarification of the proviso to section 12(1), the Court had set a precedent by reiterating that, in view of the purpose of the legislation, procedural rules must not be allowed to defeat substantive rights.

In Jyotsana Sharda v. Gaurav Sharda\textsuperscript{85}, the Delhi High Court reiterated that an approach, which defeats the substantive rights of the party, must not be adopted. Considering the question of rejection of the wife’s appeal by the Sessions Court on the ground that it was time barred, it was stated that courts must not ignore the merits of an appeal on flimsy technicalities. The only consideration that needs to be taken note of in such cases is whether the reason given for such delay is genuine.

In Amar Kumar Mahadevan v. Karthiyayini\textsuperscript{86}, a petition before the High Court of Madras was instituted to quash ongoing proceedings on an application under the Act in a lower court. The following issues were raised regarding the necessity of complying with procedures prescribed under the Act: The service of notice was not in accordance with the procedure prescribed under section 13(1) of the Act namely, that notice was not served by the protection officer and private service was permitted. Further, there was no declaration of service by the protection officer. That the Magistrate had admitted the application without calling for the report of the protection officer as required by the proviso to section 12(1). The Court dismissed both contentions at the threshold. It held that the lower court had made every effort at serving the notice to the petitioner and that directing the private service of notice was in consonance with the procedural mandate under section 28 of the Act and that,

\textsuperscript{85}Crl. Rev. P. No. 132/2009, Delhi High Court.
\textsuperscript{86}MANU./TN/9632/2007.
therefore, a declaration of service by the protection officer is not required. The Court also held that receipt of the protection officer’s report was not a condition precedent for taking cognizance of an application under Section 12 of the Act.

This judgment reiterates the fact that, in light of the objective and spirit of the Act, procedural technicalities must not be allowed to act as barriers to a woman’s access to justice. In fact, the significance of the judgment lies in the fact that before reaching its conclusion and interpreting the procedural provisions of the Act, the Court examined the intention of the legislature and observed that, as a social legislation, the Act cannot be fettered by the technicalities of procedure and path at the cost of justice, safety and security of the aggrieved woman. The Court held that the purpose of service of notice is to put the respondent on notice and to ensure compliance with the rules of natural justice, which had been fulfilled by the lower court.

Interim orders are routinely challenged on the grounds that a woman has not filed a separate application for interim reliefs. For example, in the cases of P. Chamdrasekhara Pillai v. Vasala Chandran87 and Vishal Damodar Patil v. Vishakha Vishal Patil88, filed before the High Courts of Kerala and Bombay respectively, the husbands approached Courts for quashing the ex-parte interim orders passed in favor of the aggrieved, on the grounds that the orders were illegal since the wife had filed no separate interim application. Rejecting these arguments in both cases, the Courts ruled that there was no need for a separate application for interim reliefs, reiterating that the technicalities of paperwork and applications should not impede the quick delivery of justice to women facing domestic violence.

Another common contention has been that an order passed by a Court is invalid if the Protection Officer’s report is not submitted before the order was passed. This argument rests on the basis that in the absence of the Protection Officer’s report, the court has not followed proper technical procedure and therefore the order is not legal and binding. Once again, this technical contention has been rejected by a number of High Courts across the country, including the High Courts of Madhya Pradesh and Madras. In the case of Nandkishor Vinchurkar v. Kavita Vinchurkar the Court acknowledged the fact of procedural delays happening when the trial court, who is required to pass an interim order, keeps on waiting to get the report of the Protection Officer or Service Provider, and that the idea of considering the case of a needy person at the interim stage gets actually defeated.

In all of the abovementioned cases, therefore, the Courts suggest that complaints should not be rejected on the basis of technical issues, as the purpose of the Act is to provide a simple procedure, without any formal legal drafting, for women to access justice quickly and effectively.

Despite these rulings, however, technical concerns and procedural issues continue to be the greatest impediment in allowing a woman to access the reliefs prescribed by the Act. Although the Act envisages that an aggrieved person can approach the court directly, without the aid of a representative, in reality women still find it virtually impossible to negotiate the law and its provisions without the aid of a lawyer. Furthermore, although the Act stipulates that an application must be dispensed with within 60 days from the first hearing, in reality this has rarely been possible and cases routinely take over a year to dispose. Since there is no time frame stipulated for appellate

89 Under the Act, a ‘Protection Officer’ (PO) is appointed by the state government to help an aggrieved woman register her complaint and seek protection. The first step in these proceedings is for the PO to write out a Domestic Incident Report, detailing the instances of domestic violence. The PO also assists Magistrates to implement many of the Act’s provisions and to ensure the orders passed by the Courts are properly implemented.


proceedings, cases that go into appeal are often dragged out for even longer. Finally, even though many courts have ruled that complaints do not necessarily have to subscribe to a given format and that a Protection Officer’s report is not necessary while granting interim reliefs, inconsistent practices are followed in different courts.

Although there have been a number of cases in India, where the petitioner was later abused and even killed by the respondent after a Protection Order was passed, the courts have failed to set any landmark precedents in terms of holding the various functionaries under the Act accountable for inaction or a failure to provide protection to women. For example, a number of International Courts have held the state directly responsible for a failure to provide protection to women facing domestic violence. This was reaffirmed by the landmark case of *Opuz v. Turkey*[^92], where the European Court of Human Rights held that the Turkish authorities’ failure to react to the problem of domestic violence was tantamount to a form of discrimination against women and ordered the state to pay the victim non-pecuniary damages and called for the Turkish government to modify its tolerant attitude towards domestic violence. In the light of an increasing number of women facing continued violence despite the issuance of Protection Orders, the Indian Courts need to keep in mind the state’s national and international legal obligations to protect women from violence and hold the state accountable in cases where it fails to protect women from violence.

The Act stipulates that a woman, her minor children, or her major children suffering from physical or mental abnormalities are entitled to monetary reliefs in cases of domestic violence. Although The Act specifically stipulates that the monetary relief granted to a woman should be, “adequate, fair, and consistent with the standard of living to which the aggrieved person is accustomed”[^93], women routinely find themselves having to wage prolonged

[^92]: *Opuz v. Turkey* (European Court of Human Rights, Application no. 33401/02), See Ch.3.
[^93]: Protection of Women from Domestic Violence Act, 2005, s.20 (2).
legal battles for paltry amounts of maintenance, which aren’t even adequate to cover their basic living expenses. This is evidenced in the case of Madhu Bala v. Pritam Kumar Rao\textsuperscript{94}, where the aggrieved was shuttled from the Trial Court to the Sessions Court and finally to the High Court, when her husband challenged the sum of Rs 3000 that she had been awarded for monthly rent and maintenance by the Trial Court. Although the High Court finally ruled in favor of the wife, it halved the sum awarded to her to Rs 1500 per month.

One of the objections that is sometimes raised in maintenance cases under the Act is that one or more children of the aggrieved person may be ‘illegitimate’ and it is therefore not the responsibility of the respondent to maintain them. This was one of the objections raised in the case of Suresh v. Jaibir\textsuperscript{95}. The High Court of Rajasthan stated that the Magistrate might 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 might include, but was not limited to the maintenance for the aggrieved person as well as her children.

Another point of confusion with regards to maintenance applications is whether in awarding any maintenance under section 20 of the Act, the court must also ensure it is in accordance with Section 125 Criminal Procedure Code. The High Court of Chattisgarh ruled decisively against this objection in the case of Rajesh Kurre v. Safiraba\textsuperscript{96} and clarified that the provisions of the Act are independent and are in addition to any other remedy available to the aggrieved. It was held that competent to award maintenance to the aggrieved person and child of the aggrieved person in accordance with the provisions of section 20 of the Act and the aggrieved person was not required to establish his case in terms of section 125 of the Code. Therefore, it was clarified that a

\textsuperscript{94} RLW2009(1)Raj 827.
\textsuperscript{96} MANU/CG/0119/2008, 11/11/2008, CG.
maintenance claim under the Act does not need to be established in terms of the Criminal Procedure Code.

In *Neetu Singh v. Sunil Singh*\(^7\) in an appeal before the High Court of Chhattisgarh, the aggrieved woman challenged the order of a Family Court dismissing her application filed under section 12 of the Act in a pending proceeding. The question that arose for determination was whether the family court was correct in dismissing her application, given the statutory mandate provided under section 26(1) of the Act whereby, “any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act”. The Court upheld the right of an aggrieved person to file an application under the Act in any pending proceeding, with the caveat that such an application must be filed under Section 26 of the Act, rather than under Section 12 of the Act as was done in the instant case.

This judgment provided clarification with regard to the procedure to be followed in using the law. While addressing an almost routine procedural issue, the Court reiterated the fact that filing an application under Section 26 of the Act had been provided as an option that may be exercised by the woman in order to facilitate her access to the justice system.

### 7.6 Procedure in Invoking Appeal Provisions

In *Smt. Maya Devi v. State of NCT of Delhi*\(^8\) the judgment by the High Court of Delhi held that procedure for appeal under the Act must first be used before approaching higher courts through writ or appellate jurisdictions. An application seeking a residence order was filed under the Act before a Magistrate’s Court. The Magistrate passed an interim order directing the

\(^7\)A.I.R 2008 S.C. 360, *per* L.C. Bhadoo, J.

\(^8\)MANU/DE/8716/2007
aggrieved person not to be dispossessed from the shared household pending final disposal of the application. This writ petition for quashing the interim order was filed before the Court under Article 227 of the Constitution. The Court dismissed the writ petition and held that, “an order passed by the Magistrate under this Act has an alternate relief under the Act itself which has not been availed of by the petitioner in the instant case.” The court stated that where a right or liability is created by a statute which gives a specific remedy for enforcing it, the remedy provided by that statute only must be used. A person may approach the higher court under any other provision only after the specific statutory remedy has been exhausted.

This decision comprehensively laid down the procedure with regard to appeals against any order passed under the Act. The High Court had laid down a ‘good practice’, which ought to be followed by other courts in order to avoid undue hardship to the aggrieved person. If the other party is allowed to approach higher courts without first exhausting the statutory remedies, it will lead to the negation of the rights of the aggrieved person. Thus, this judgment is an indicator as to gender-sensitive attitude of the Court in addressing the issue of domestic violence.

7.7 Retrospective Operation of the Law

In Sarvanakumar v. Thenmozhi99 High Court of Madras was confronted as to the determination on the question of maintainability of petition under the Act on the grounds that the acts alleged in the petition took place before the commencement of the Act. In this case, the wife had filed a petition under the Act alleging continuous dowry harassment and that she had been thrown out of the shared household with her child in 2006. The Court held that acts committed prior to the commencement of the Act can be the basis for filing an application under the Act. The Court categorically held that although the alleged acts took place before the Act came into force, since the wife and child

99MANU/TN/9828/2007
continue to remain dispossessed from the shared household; the act of domestic and economic abuse is still continuing and shall, therefore, attract liability under the Act. It was affirmed that being a beneficial legislation, technicalities could not stand in the way of the Court entertaining such applications. Through this notable decision the Court recognized the reality that domestic violence is an ongoing, recurrent phenomenon and that, while the cause of action may have arisen prior to the enforcement of the Act, the abuse is deemed to continue until the aggrieved person is restored to a position of safety from where she can enjoy her legal entitlements.

The court addressed this issue in Shyamlal and Ors. v. Kantabai by pointing out that section 23 of the Act does not provide for punishment to the respondent for commission of domestic violence but merely allows the court to pass an interim order in favour of the petitioner. In the instant case, the Court held that since the criminal penalty under the Act was passed only on violation of an interim order, which was only possible once the Act came into force, the question of retrospective operation of the law could not arise. Hence, it was decided that a petition under the Act is maintainable irrespective of whether the acts of domestic violence were committed before the Act came into force or the aggrieved person was not living with the respondent at the time of its coming into force.

What is particularly significant about this decision is that the Court sought to undertake a constitutional analysis of the issue of retrospective operation based on the principle of equality enshrined therein. Using the framework of reasonable classification, the Court observed that there could be no reasonable classification based upon an intelligible differentia between the women who are living with the respondent on the date of coming into force of the Act or who are subjected to domestic violence after coming into force of the Act. A similar principle was applied in case of a woman who was living

100II (2009) D.M.C. 787.
with the respondent in the same shared household on the date of its coming into force and those who have been forced to leave the shared household but were still in a domestic relationship. Demonstrating sensitivity to the vulnerabilities faced by women, it was held that not only would denial of the right to claim under the Act would be a violation of the constitutional guarantee of equality but would also allow the respondent to take advantage of his own wrong, and deny such women the benefit of the provisions of the Act.

The question of whether the Act has retrospective operation is squarely situated within the understanding of nature of domestic violence, which is not an isolated act of violence but forms part of a pattern of abuse that may, at the same time, be physical, emotional, economic and sexual. It must be noted that the debate regarding retrospectivity of the law arises because of its quasi-criminal nature. In determining this issue therefore, courts have very often relied upon the intent of the law, the definition of domestic violence therein and the general legal principles relating to retrospectivity.

Another case which raised the issue of continuing violence and retrospectivity is that of Kishor, S/o Shrirampant Kale v. Sou. Shalini, W/o Kishor Kale, Master Shantnu S/o Kishor Kale and State of Maharashtra, through P.S.O. Rajapeth Police Station. The issue before the Bombay High Court was whether an application under the Act, which was filed 15 years after the parties started living separately and where they had very little communication, could be considered to be maintainable. On examination of the contentions of both parties and provisions of the Act, the High Court held that since there had been no contact or communication between the parties for 15 years and no proximity of an act of domestic violence to the date of filing application under the Act could be shown, the case against the husband was not maintainable and would constitute an abuse of the process of law. The court relied on the fact that since the husband was already paying the amount of

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1012010 (112) Bom LR 1398.
maintenance granted under section 125 Criminal Procedure Code, the aggrieved person could make a demand for enhancement and on any deprivation, prohibition or restriction upon such demand under section 125 Criminal Procedure Code and not under this Act.

This judgment of the Bombay High Court was clearly based on the particular facts of the case and cannot be taken as laying down a principle of law or adjudicating upon a specific provision of the Act. However, in so far as the court based its conclusion on the fact that because there was no communication or contact between the parties, no proximate act of domestic violence could be alleged, it must be mentioned that the fact of desertion continued. As was rightly contended by the aggrieved person desertion itself is a form of economic abuse under the Act. Hence, irrespective of any communication or contact, the fact of continued desertion is sufficient to invoke the provisions of this Act.

In *Mrs. Savita Bhanot v. Lt. Col Bhanot*\(^\text{102}\), the Delhi High Court considered whether an application under the Act was maintainable where the allegation was with regard to domestic violence, including being forced out of the shared household, which took place before the Act came into force. In the proceedings filed by the petitioner against her husband before the trial court, it was alleged that she was forced to leave her shared household in 2005. The wife sought a residence order to allow her to live in her permanent matrimonial home since the shared household was a government accommodation. The wife appealed against the order passed by the Magistrate, which was dismissed on the ground that the cause of action arose before the Act came into force.

On the issue of retrospective operation of the law, the Court made a clear distinction between a criminal law and a law such as the Act where the issue of criminal penalty arises only on violation of the court orders. Based on this, it was concluded that the dates on which the acts of domestic violence

\(^\text{102}(2010) 158 \text{ P.L.R 1.}\)
were committed has absolutely no bearing on the matter. Similarly, it is absolutely immaterial whether the 'aggrieved person' was living with the respondent, on the date of the commission of the offence, or not. The use of the words ‘is or has been in a domestic relationship’ in the definition of aggrieved person under the Act was cited as further substantiation of the fact that the parties need not have lived together on the date of coming into force of the Act in order to seek reliefs. The Court further held that this does not amount to breach of Article 20(1) of the Constitution. While raising assumptions & presumptions, the Court further went on to say:

“There is no difference between the women who were subjected to domestic violence before 2005 and those who were later, as any differentiation would tantamount to denying the right of equality before law guaranteed to all citizens by the Constitution. Any discriminatory treatment to women in either category would be violative of their constitutional right guaranteed under Article 14 of the Constitution”.

Marking a distinct departure from other rulings of district courts in this behalf, that if the alleged acts of domestic violence have occurred before the Act was notified, they would not be entertained by the protection officers, this decision of the Delhi High Court adopts a beneficial construction/interpretation, and held that legislative intent of providing succor to women who are harassed at the hands of their husbands and their in-laws, should be taken into consideration whenever construing/interpreting the Act. But criticism was raised against the decision that this kind of interpretation runs contrary to all established norms of fairness and no justification/rationale could justify a concept as legally unsound as this.

In India without using the expression ‘ex post facto law’ the underlying principle has been adopted in the Article 20 (1) of the Indian Constitution in the following words: "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as
an offence, nor be subjected to a penalty greater than that which have been inflicted under the law in force at the time of commission of the offence.”

Hence it is the settled position that any law that has penal repercussions, is to be applied prospectively and the departure only be allowed in rarest of the rare cases, in instances morally repugnant or involving grave moral turpitude. The right to protection from retroactive criminal law is well recognised throughout the international community. The Court in the instant case has adopted a retributive approach of punishment and to punish retrospectively. It reflects how a rule as basic as this, relating to retrospectivity, can be circumvented in the garb of protection to women, and runs contrary to various international instruments and Article 20(1) of the Constitution of India.

7.8 Effectiveness of Counseling Procedure

In T. Vineed v. Manju S. Nair, the appeal that came up before the High Court of Kerala deals with the issue of counseling as stipulated under the Act. The facts in brief are that the parties, who had a child from their marriage, were estranged. The wife initiated proceedings under the Act, while the husband sought enhanced visitation hours with the child, who was in its mother’s custody. The parties had multiple litigations pending between them and the wife had also initiated divorce proceedings on the ground of cruelty. In view of the worsening relations between the parties and their dispute over child custody, the Court appointed a conciliator on the very first day of proceedings to see whether an amicable settlement could be reached. Subsequently, the parties agreed on a settlement with regard to child custody and other matters

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103 As early as 1651, Hobbes wrote: No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law. This principle was stated in 1789 in Article 1, section 9(3) of the American Constitution which prohibited ex post facto laws. Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively. Article 7 includes the important proviso that it: ... shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

104 2008 (1) K.L.J. 525.
and a mutual consent divorce were decreed as part of the judgment. Following these successful negotiations between the parties, the Court held that the attempt in matrimonial cases must be first to exhaust the option of court-mediated settlement before beginning legal proceedings.

The intentions of the Court to ensure an amicable parting of ways where the matrimonial relationship has completely broken down, to discourage multiplicity of litigation and to protect the interests of children is to be appreciated. At the same time, however, caution must be exercised in taking the view that conciliation is the first and most viable approach that the Court should take before initiating legal proceedings. On the facts of this case, a mutually agreeable settlement through conciliation was an appropriate strategy, but in another case where the issue at hand is domestic violence, an approach prioritizing conciliation could adversely affect the safety and security of the woman facing violence. As no ground playing level can be ensured and a fool proof mechanism cannot be resorted to it appears that too much reliance on conciliation can become counter-productive. It must be emphasized that the provision on counseling under the Act has been specifically drafted to ensure that if the aggrieved woman so desires, the Court can refer the parties to counseling for a mediated settlement. However, the Act specifically provides for civil reliefs in the form of protection orders to ensure that the woman’s safety is not compromised and that she approaches such negotiations from a position of equality. Hence, where there are allegations of domestic violence, there is a need to exercise some caution before recommending that settlements through conciliation ought to be the standard practice in all matrimonial disputes.

7.9 Judicial Interpretations-An Analysis

The Act recognises the right of a woman to be free from all forms of violence by providing a comprehensive definition of domestic violence, which includes physical, sexual, verbal, emotional, and economic abuse. Section 3 of
the Act defines ‘domestic violence’ as any act, omission, or commission that harms or injures or has the potential to harm or injure a woman or child. In theory, the law treats verbal, emotional, economic, sexual and physical abuse as equally serious offences. In reality, an analysis of case law on domestic violence demonstrates that the courts have rarely taken generally action in cases of verbal or emotional abuse, unless it is accompanied by some form of physical abuse.

The judiciary’s response in cases of economic abuse (deprivation of resources, alienation of assets, restricting access to facilities, etc.) has been positive to some extent. The deprivation of financial resources is a form of violence against women. However, there have been few noteworthy attempts to provide any real redress in instances of economic violence. With paltry amounts awarded as maintenance and in the absence of a clear-cut law on a woman’s matrimonial property rights, in effect the domestic violence act does little more than provide statutory recognition to economic violence as a form of domestic violence.

The following discussions on cases dealt under the Act aims to analyse judicial pronouncements regarding domestic violence and related women’s rights issues. While many judges have not hesitated to give full effect to the provisions of the Act, there have been decisions which have conservatively interpreted what are prima facie liberal provisions. There have been a significant number of judicial decisions which have challenged existing notions of patriarchy while looking at “the woman question” and have delivered judgments which granted relief to women at a time when there were no legislations which provided any remedy. Further, the judiciary has often chosen a policy of non-interference while dealing with cases relating to violence against women since they perceive such matters to be in the private domain. Given this background, the best argument along with the Act in place, is that what is needed is a radical change in the judicial mindset and recognition of the fact that ‘personal is political’.
Although the Act is still a nascent legislation, Courts are interpreting this law. The constitutional validity of the Act, which was challenged on the ground that it is gender-specific, has been upheld, and is perhaps conclusively decided, through the 2009 judgment of High Court of Chennai in Dennison Paulraj's case. An analysis of judgments indicates, however, that on the issue of whether or not the term ‘respondent’ includes female relatives of the husband / male partner, the judicial verdict is divided. The Supreme Court judgment in Batra v. Batra, which narrowly interpreted the term ‘shared household’ to deny a woman a right to residence in her in-laws’ house which was her matrimonial home, has unfortunately failed to interpret the Act in accordance with its objective of preventing the dispossession of a woman challenging domestic violence. This has impacted subsequent High Court judgments in varied ways. While some High Courts have followed the judgment to restrict the right to residence, others have distinguished on the basis of facts of the case before them, to grant residence rights in favour of the aggrieved woman. Courts have also been proactive in ensuring implementation of the Act.

A peripheral reading of the above judgments gives an impression that the Act has received much appreciation and it has effectively protected the rights of the woman victims but the contrast remains glaring. The cases analyzed leads to a conclusion that most of the rulings are within the context of matrimonial relationships and woman is seen only through the lens of being a wife alone. Case are decided based on the specific factual circumstances. Very rarely cases have come up dealing with the domestic violence perpetrated to woman within her natal family. So the Act is mainly construed and understood by the public as being a legislation intended to promote matrimonial discords. A majority of rulings remain either against the woman, or grant insufficient reliefs with no broad ideological conception of real life experiences and women’s rights as human rights. Although the preamble of the Act recognizes
that domestic violence is undoubtedly a human rights issue, the Act has not yet succeeded in building a solid foundation.