CHAPTER - 6
SETTING THE TONE BY INDIAN JUDICIARY THROUGH VARIOUS PATH BREAKING JUDICIAL PRONOUNCEMENTS

6.1 INTRODUCTORY

“Har zarre par ek qaifiyat-e-neemshabi hai,
Ai saaki-e-dauraan yeh gunahon ki ghadi hai”

- Firaq Gorakhpuri

The status of women in modern India seems to be a sort of a paradox. If on one hand she seems to be at the peak of ladder of success, on the other hand she is mutely suffering the violence afflicted on her by her own family members. As compared with past women in modern times have achieved a lot but in reality they still have to travel a long way. Their path seems to be full of roadblocks. The women have left the secured domain of their home and are now in the battlefield of life, fully armored with their talent. They had proven themselves. But in India they are yet to get their dues.

The sex ratio of India shows that the Indian society is still prejudiced against female. There are 914 females per thousand males in India according to the census of 2011\(^1\), which is much below the world average of 990 females.

Today Indian women have excelled in each and every field from social work to visiting space station. There is no arena, which remained unconquered by Indian women. Whether it is politics, sports, entertainment, literature, technology everywhere we can hear applauses for her. But increasing crime rate against women in India is a matter of grave concern and therefore immediate steps are required to curb this menace.

6.2 JUDICIAL MEASURES AND GUIDELINES

Judiciary in India has always played a laudable role in eradicating social evils, and to bring social justice to masses. The Supreme Court of India has devised various ways like epistolary jurisdiction, relaxing *locus standi* principle, allowing public interest litigation (PIL) and has played pro-active role for bringing justice to every doorstep.

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Through various cases several guidelines have been provided by the Apex Court to eradicate social evils and specially to curb crimes against women. The researcher has gone through some prominent judgments of the Indian judiciary wherein certain path breaking guidelines were passed with a view to minimize crimes against women.

6.2.1 Judiciary on Rape

The Apex Court of India has taken a stern view for crimes against women and specially rape. Times to time various guidelines have been issued by Court to protect women and penalize the perpetrators of these ghastly acts. Certain views are quoted by the researcher herewith to highlight the remarkable role of Supreme Court of India and others Courts for dealing with crime against women.

6.2.1.1 Deterrent punishment required to curb crime against women

The Supreme Court called for a "complete overhaul" of the system for curbing the spurt in crime against women, including rape and sexual harassment, saying only deterrent punishment will be effective.3

A bench of JJ. P Sathasivam and RanjanGogoi said that crime against women has increased despite stringent legislation to prevent other offences like bride burning, cruelty and suicide."In spite of stringent legislations in order to curb the deteriorating condition of women across the country, the cases related to bride burning, cruelty, suicide, sexual harassment, rape, suicide by married women etc. have increased and are taking place day by day. "A complete overhaul of the system is a must in the form of deterrent punishment for the offenders so that we can effectively deal with the problem," the bench said. The observation was made while upholding the conviction and life imprisonment awarded to two women and their mother who had burnt the victim to death.

6.2.1.2 Exemplary Punishment for Unparalleled Brutality

Four convicts in the December 16 Delhi gang-rape case were awarded death penalty by a Delhi court which said the gravity of the offence cannot be tolerated4. "Death to all," additional sessions judge Sh. Yogesh Khanna said while delivering the verdict in the Delhi gang-rape case that had evoked nationwide outrage and led the government

to bring in a stringent anti-rape law. "Court cannot turn a blind eye to such a gruesome act," the judge said, while handing down the maximum punishment to the four convicts in the Delhi gang-rape case. He said, "When crime against women is rising on day-to-day basis, so, at this point in time court cannot keep its eye shut." 

"There should be exemplary punishment in view of the unparalleled brutality with which the victim was gang raped and murdered, as the case falls under the rarest of rare category. All be given death," the court said while reading out a portion of the order.

"This is a time when serious crime against a women has come to the fore and now its judiciary's responsibility to instill confidence among the women," it said.

6.2.1.3 Violation of Human Right

In the Chairman, Railway Board and ors v. Mrs. Chandrima Das and Ors, supreme court observed that, it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved., as Smt. Hanuffa Khatoon was a victim of rape. This Court in Bodhisatway.Ms. Subdhra Chakroborty has held "rape" as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed as under:

Rape is a crime not only against the person of a women, it is a crime against the entire society. It destroys the entire psychology of a women and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity, contained in Article 21.

The Fundamental Rights are available to all the "citizens" of the country but a few of them are also available to "persons". While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non- citizen" both,

Rejecting, therefore, the contention of the learned counsel for the appellants that the

7 (1996) 1 SCC 490
petition under Public Law was not maintainable, we now proceed to his next contention relating to the *locus standi* of respondent, Mrs. Chandrima Das, in filing the petition the word ‘Life’ has also been used prominently in the Universal Declaration of Human Rights, 1948. The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in *KubicDaruszyv.Union of India and Ors.*. That being so, since ‘Life’ is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word ‘life’ cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country.

6.2.1.4 Strict Remarks on Custodial Rape

Apex court observed that in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society cry for justice becomes louder. Custodial death is perhaps one of the worst crimes.

*In Mehboob Batcha andors. v.State Rep. by Supdt. of Police* Markandeykatju, J. has

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8 (1990) 1 SCC 568 = AIR 1990 SC 605
9 Criminal Appeal no. -. 1511 of 2003, decided on 29 March, 2011
rightly pointed out the irony of situation by quoting the words of a great writer as:

\[ \text{Bane hainahal-e-hawas muddaibhi, munsif bhi,} \]
\[ \text{Kisevakeel karein kisse munsifi Chaaheh.} \]

-- Faiz Ahmed Faiz

If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge under Section 302 IPC was framed against the accused by the Courts below.

We have held in Satya Narain Tiwari @ Jolly and anr. v. State of U.P.\(^{10}\), JT 2010(12) SC 154 and Sukhdev Singh v. State of Punjab\(^{11}\), SLP (Criminal) No.8916 of 2010 decided on 12.11.2010 that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment. The horrendous manner in which Padmini was treated by policemen was shocking and atrocious, and calls for no mercy.

We are surprised that the accused were not charged under Section 302 IPC and instead the Courts below treated the death of Nandagopal as suicide. In fact they should have been charged under that provision and awarded death sentence, as murder by policemen in police custody is in our opinion in the category of rarest of rare cases deserving death sentence, but surprisingly no charge under Section 302 IPC was framed against any of the accused. We are constrained to say that both the trial Court and High Court have failed in their duty in this connection. The entire incident took place within the premises of Annamalai Nagar police station and the accused deserve no mercy. In this appeal the appellant no.1 has been given the sentence of 3 years rigorous imprisonment and a fine, while the other appellants have been given sentence of 10 years rigorous imprisonment with a fine.

In the normal course, we could have issued notice of enhancement of sentence, but as no charge under Section 302 IPC was framed, we cannot straightaway record conviction under that provision and enhance the punishment.

Before parting with this case, we once again reiterate that custodial violence in police

\(^{10}\) JT 2010(12) SC 154
\(^{11}\) SLP (Criminal) No.8917 of 2010 decided on 12.11.2010
custody is in violation of this Court's directive in \textit{D.K. Basu, State of West Bengal}^{12} and we give a warning to all policemen in the country that this will not be tolerated. The graphic description of the barbaric conduct of the accused in this case shocks our conscience. Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people.

In D.K. Basu's case this Court observed, ...Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society.

In spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanizing torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

Custodial death is perhaps one of the worst crimes in a civilized society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the

\footnote{12 1997(1) SCC 416}
inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilized nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights' jurisprudence. The answer, indeed, has to be an emphatic ‘No’.

Let a copy of this order be sent to Home Secretary and Director General of Police of all States and Union Territories, who shall circulate the same to all police officers up to the level of S.H.O. with a directive that they must follow the directions given by this Court in D.K. Basu's case (supra), and that custodial violence shall entail harsh punishment.

6.2.1.5 Guidelines regarding trial of Children in Sexual Abuse Cases

In Sakshi v. UOI and ors\textsuperscript{13} the SC gave following direction regarding trial of offences of child sexual abuse and/or rape:

Re enquiry or trial of offences under Sec. 354\textsuperscript{14} (outraging the modesty of a woman by use of assault or criminal force) or under Sec. 366\textsuperscript{15}(unnatural offences) Sec. 326\textsuperscript{16} (2) (regarding constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence) should also be applied.

The Court further provided for procedures to safeguard the interest of the child victim to such crime:

- a screen or some such arrangements may be made where the victim or witnesses do not see the body or face of the accused;
- the questions put in cross-examination on behalf of the accused, relating to the incidence of crime should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a clear language which is not embarrassing;

\textsuperscript{13} AIR 2004 SC 3566
\textsuperscript{14} Indian Penal Code, 1860 (45 of 1860)
\textsuperscript{15} Ibid
\textsuperscript{16} Ibid
• the victim of child abuse or rape be given sufficient breaks as and when required.

Some other directions given in State of Punjab v. Gurmit Singh and ors.17 approved in Sakshi v. UOI are following:

• The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

• Trial of rape cases in camera should be the rule and an open trial in such cases an exception.

• The anonymity of the victim of the crime must be maintained as far as possible throughout.

• if possible lady judges should try a case of sexual assault on female to provide the victims an ease and the system an improved quality of evidence and proper trial.

The Court in this case also hoped and observed that “… the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves18.”

Further in Hiranath Misra v. Rajendra Medical College19, the denial of opportunity to cross-examine the material witnesses was held not to vitiate the order made. It was a case where certain male students entered a girls’ hostel during the night and misbehaved with the girls. The committee appointed to enquire into the matter recorded the statements of girls in camera and used them (on the question of identity of miscreants) against the appellants without allowing them to cross-examine the girls on the ground that such a course would reveal the identity of the girls and would expose them to further indignities and also because the enquiry was held by a committee of responsible persons.

17 1996 AIR 1393
19 MANU/SC/0044/1973 : (1973)ILLJ111SC
In The Director, Tamil Nadu State Judicial Academy v. State of Tamil Nadu

The High Court of Madras gave various directions to different authorities, including those to judicial magistrates, juvenile justice boards and legal services authorities.

6.2.1.6 Directions for Magistrates/Juvenile Justice Board/Legal Services Authority

“Trials of cases of trafficking should generally be In-Camera and the Magistrate/Board should avoid disclosing the name of the prosecutrix and their orders, to save embarrassment to the victim and anonymity of the victim of the crime should be maintained throughout.”

To check if the appropriate sections of IPC, ITP Act and Juvenile Justice Act against the traffickers have been stated in the Charge Sheet and refer the matter to the concerned Court. Ensure that the evidence of the child is taken in-Camera, as per Section 326 of the Cr.P.C. and arrange for translators, if the child is from another State and does not speak the local language. Ensure that the Special Courts/Boards have a child friendly and supportive atmosphere while taking the child’s evidence. Preferably, an elder women who inspires the confidence of the child may be present.

In Sheeba Abidi v. State and Another

The petitioner in this Writ petition, under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, is the mother of a child, aged about 6 years, who is alleged to be a victim of an offence under section 366 read with Section 511 of the Indian Penal Code at the hands of his teacher-respondent No.3.

In these premises, the petitioner, who is the mother of the child victim, prays that the trial be conducted in a child friendly environment outside the Court room so that the child can give his evidence without fear, apprehension or intimidation.

The issues raised in this petition and the directions sought are squarely covered by the recent Apex court judgment in “Sakshi v. Union of India and Ors.”. This judgment was given in a Public Interest Litigation filed by a Social Organization “Sakshi”.

The directions given by the Apex Court in Sakshi v. Union of India (supra) have to be

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20 W.P.No. 36807 of 2006
21 Writ Petition (Crl) 356/2003 28.07.2004, Delhi High Court
23 2004 (2) JCC 892
applied not only to the victims of child sex abuse or rape but some witnesses also who may be equally vulnerable like a child victim. In appropriate cases, the Courts may apply these directions to the victims or witnesses of other sexual offences also if it appears that they are vulnerable to mental pressure of Court proceedings. In the case of *State of Maharashtra v. Dr. Praful B. Desai and anr.*\(^{24}\) the recording of evidence through video conferencing stands approved. It has been clearly held that evidence so recorded meets the requirements of Section 263 Cr.P.C so long as the accused and/or his pleader are present when evidence is recorded by video conferencing. The ratio of the said judgment can be applied to the victims and witnesses of sex abuse and rape cases also. However, a child victim has to be provided additional protections also as cited in *Sakshi v. Union of India and Ors.*

6.2.1.7 Power to pay interim compensation

In *Shri Bodhisattwa Gautamv. Ms. Subhra Chakraborty*\(^{25}\) the Court observed that the jurisdiction to pay compensation (interim and final) has to be treated to be a part of the overall jurisdiction of the Courts trying the offences of rape which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and Life. Interim award of Rs. 1,000 per month was awarded to the complainant herein from the date of filing of complaint till pendency of the trial of the criminal matter.

The facts were that the accused not only induced the complainant and cohabited with her, giving her a false assurance of marriage but also fraudulently got certain marriage ceremony performed knowing fully well that the marriage was void. The accused even committed the offence of miscarriage by compelling the complainant to undergo abortion twice against her free will. The way the accused exploited the complainant and abandoned her is nothing but an act of grave cruelty as the same has caused serious injury and danger to the complainant’s health both mentally and physically, as such, the accused above named has committed Criminal offences punishable under Sections 312(causing miscarriage)/420(cheating)/493(Cohabitation caused by a man deceitfully inducing a belief of lawful marriage)/497(Marriage ceremony fraudulently

\(^{24}\) JT 2003(3) C 382

gone through without lawful marriage)/498-A(26(Husband … of husband of a women subjecting her to cruelty) of Indian Penal Code.

S.C. emphasized about the crime of rape and affirmed the view of many feminists and psychiatrists that rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. It further, stated that “It destroys the entire psychology of a women … It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”The SC stressed upon the inefficiency of the rape law in India and stated that “The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects.”

Herein the SC observed that Right to Life would, therefore, include all those aspects of life which go to make a life meaningful, complete and worth-living. “Unfortunately, a women, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honor and dignity cannot be touched or violated. They also have the right to lead an honorable and peaceful life. Women, in them, have many personalities combined. They are Mother, Daughter, Sister and Wife… They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.”; it stressed.

The SC referred to the case of State of Karnataka v. Mahabaleshwar Gourya Naik,27 wherein the Court went to the extent of laying down that “even if the victim of rape is not available … on account of her having committed suicide, … the non-availability of the victim will not be fatal and the Court can record a conviction on the basis of the

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26 Indian Penal Code, 1860 (45 of 1860)
27 AIR 1992 SC 2043 = 1992 Suppl. (3) SCC 179,
available evidence brought on record by the prosecution.”

It affirmed the decision in Delhi Domestic Working Women’s Forum v. UOI\(^{28}\), and held that this decision recognizes the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender, subject to the finalisation of Scheme by the Central Government. If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme. On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women’s Forum, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life\(^{29}\).

6.2.1.8 All Persons Abetting Rape to be Convicted for Gang Rape

*Pramod Mahto and ors. v. State Of Bihar*\(^{30}\)

The facts of the case were that the four appellants and one Umesh Mahto (accused No. 5) besides 11 others who were acquitted were charged under Sections 380 and 366 read with Section 149 IPC for having entered the house of the victims and committing rape on them and thereafter removing cash and valuables from the house on the night of 16/16 of March, 1984. The prosecution case was that while accused Nos. 6 to 16 stood outside the house, accused Nos. 1 to 5 entered the house through the roof after dismantling a portion of it and thereafter accused Nos. 1 to 4 committed rape on the victims while accused No. 5 stood guard over them with a gun in his hands in order to overawe them and make them submit to the rape committed on them without protest.

In this case the SC upheld the conviction of the four accused though it did not change the punishment of life imprisonment on the primary accused and the last accused, who pointed gun towards the victims so that they could submit and did not raise alarm, was punished with only two years of rigorous imprisonment by the High Court. Sentence of other three accused were reduced from life imprisonment to ten years rigorous imprisonment.

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\(^{28}\) 1995 (1) SCC 14


\(^{30}\) AIR 1989 SC 1475, 1989 CriLJ 1479, JT 1989 (3) SC 494
Herein only this could be proved that the rape was committed on one unmarried girl and medical evidence did not show that the married women were also subjected to rape by the accused persons. The Court observed that once it was established that the appellants had acted in concert and entered the house of the victims and thereafter raped the said victim, then all of them would be guilty under Section 366 IPC in terms of Explanation I(1) to Clause (g) of Sub-section (2) of Section 366 IPC irrespective of whether she had been raped by one or more them.

The Court further observed that this Explanation had been introduced by the legislature with a view to effectively deal with the growing menace of gang rape. Further, in such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 366 IPC.

6.2.1.9 Provisions for Legal Help and Compensation to Victims of Sexual Assault

*Delhi Domestic Working Women’s Forum v. Union of India and Others* 32

In this petition under Art. 32 of the Constitution of India the Organisation had asked for a fast trial and compensation for the victims of rape, who here belonging to ST category and were raped and abused by army personnel on their way to Delhi on Muri Express. The accused were finally charged with the Sections 366B (Intercourse by public servant with women is his custody) and section 341 IPC (wrongful restraint).

The SC pointed out the defects of the criminal justice system that, complaints are handled roughly and not given warranted attention. The victims are mostly humiliated by the police, finding rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive for them, as they often say that, they considered the ordeal to be even worse than the rape itself.

In this case the SC found it necessary to indicate the broad parameters for assisting the victims of rape, which are as follows:

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with

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32 *1995 SCC (1) 14, JT 1994 (7) 183 / Supreme Court of India*
the criminal justice system. The role of the victim’s advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant’s interests in the police station should represent her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, though, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.\(^33\)

The National Commission for Women were asked by the SC to evolve such scheme as to wipe out the tears of such unfortunate victims and the scheme was required to be

prepared within six months from the date of this judgment. Thereupon, the Union of India would examine the same and should take necessary steps for the implementation of the scheme at the earliest. The schemes were also formulated by the NCW which is being implemented though very slowly.

6.2.1.10 Delay in Lodging F.I.R.: No Ground for doubting or discarding Prosecution Case

_Tulshidas Kanolkar v. The State of Goa_34

Supreme Court of India said while the murderer destroys the physical frame of his victim, a rapist degrades and defiles the soul of a helpless female. When the victim is a mentally challenged person, there is not only physically violence and degradation and defilement of the soul, but also exploitation of her helplessness. The case in hand is a classic example when the baser instincts of the appellant overtook his moral values and human sensitivity and he ravished the unsuspecting victim incapable of comprehending the vicissitudes of the dastardly act, not once but several times. So innocence was the victim that she was even not aware of the dreadful consequences.

The mental faculties of the victim were undeveloped and her Intelligence Quotient (in short ‘I.Q.’) was not even 1/3rd of what a normal person has. Tragedy struck on the victim sometimes in 1999, when parents of the victim noticed that her legs were swollen and there were signs of advanced stage of pregnancy. They were shocked beyond limits. They asked the victim as to who was responsible for her pregnancy. She in her own way pointed out accusing fingers at the appellant and said that on some pretext or the other, ravished her. When this shattering news was conveyed to the parents of the victims, they questioned the appellant.35

The Supreme Court observed that the unusual circumstances involved in this case satisfactorily explained the delay in lodging of the first information report. It further observed that, “In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity.”36

34 (2003) 8 SCC 590
Regarding non examination of some witnesses the Supreme Court stated that “Non-examination of some persons per se does not corrode vitality of prosecution version, particularly when the prosecutrix has, notwithstanding her mental deficiencies, withstood incisive cross-examination pointed to the appellant as the perpetrator of the crime.” and consent of the prosecutrix the Supreme Court said that “A mentally challenged girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent.”

Thus, the Supreme Court upheld the decision of Sessions Court regarding conviction of the accused, and imposition of rigorous imprisonment of 10 years and one year respectively for the two charged offences under Sections 376 (rape) and 507 (2) (criminal intimidation) along with a fine of Rs.10,000/- and Rs.2,000/- respectively with default stipulation.

6.2.1.11 Sensitive approach in cases of Sexual Assault of Children

In State of Rajasthan v. Om Prakash the Supreme Court herein observed that “It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39 which, inter alia, stipulates that the State shall, in particular, direct its policy towards securing that the tender age of the children is not abused and the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment.”

In the present case, the victim at the time of occurrence of rape was a child aged eight years. The accused was youth aged 18 years. The house of the accused was quite close to that of the prosecutrix. The FIR was registered in this case on the next day of the occurrence of the incident. Herein the Court reiterated the proposition while referring to the cases of State of Punjab v. Gurmit Singh and Ors, and State of }

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37 (2002) 5 SCC 745
38 (1996) 2 SCC 384
Maharashtra v. Chandraprakash Kewal Chand Jain\textsuperscript{39}, that the conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim. In the abovementioned cases the Supreme Court held that, “it must not be overlooked that a women or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person’s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.”

Observations of Mr. Justice A.S. Anand speaking for the court were referred stating that “the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook.”\textsuperscript{40}

The Court disapproved of the approach taken by the High Court and held that “The High Court has clearly committed a serious illegality in assuming that in natural course of events if rape had been committed, the young child girl and her mother would have shouted so as to collect others and they would have visited her house. The prosecutrix was unconscious. There was no question of prosecutrix shouting as assumed by the High Court. Too much was made by the High Court on account of non-examination of persons other than the family members. … The cases involving sexual molestation and assault require a different approach a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under penal laws.”

The Court negated the contention that the revenge on account of alleged dispute regarding exchange of land would be taken by the father of the prosecutrix by foisting on the accused a false case of rape involving his young daughter particularly in the setting of a village environment. The conviction could not be set aside for the non-examination of independent witness. Thus his conviction was reinstated for offence under Section 376, Indian Penal Code and rigorous imprisonment for seven years was imposed with fine of Rs.1,000/- and in default of payment of fine to further undergo six months’ rigorous imprisonment.

6.2.1.12 No Stigma on the Character of a Victim

“It demonstrates lack of sensitivity on the part of the court by casting unjustified

\textsuperscript{39} (1990) 1 SCC 550

\textsuperscript{40} http://nlrd.org/resources-womans-rights/rape-laws/latest-judgments-of-supreme-court-high-courts-rape-laws/courts-should-have-a-sensitive-approach-in-cases-of-victims-of-sexual-assault(last Visited on 6-10-2013 )
stigmas on a prosecutrix aged below 16 years in a rape case, by overlooking human psychology and behavioral probabilities. An intrinsically wrong approach while appreciating the testimonial potency of the evidence of the prosecutrix has resulted in miscarriage of justice.”

“We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial.”

In the given case when the girl came out of a school wherein she had been going for her matriculation examination and was on her way to home when she was forcibly taken into a car by the accused persons and then they took her to a lonely place and raped her one by one in the day as well as night. During the incident she was also made to drink liquor, being termed as juice by the accused person, even after resistance. She was left at the venue of her examination after the incident on the next morning. On this day she narrated the whole story to her mother and the case was reported to the police next day as her father came late from the farm on the next day of occurrence of the incident.

The SC negated the version of Trial Court and held that the prosecutrix could not elaborate about the car because, in her statement categorically asserted that, as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the Bus Adda is travesty of justice. The SC stated that the Trail Court over-looked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, the SC stressed that laxity on the part of Investigating Officer cannot become a ground to discredit the testimony of the prosecutrix and that Trial Court erred in discredit the testimony of the prosecutrix on that account. Further,

it opined that, “there was no delay in the lodging of the FIR either and if at all … in the facts and circumstances of the case was also natural.”

On corroboration the Court insisted that non-corroboration of a prosecutrix’s testimony is not fatal for the conviction of the accused and stated that, “The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.”

It also referred to the case of *State of Maharashtra v. Chandraprakash Kewalchand Jain*[^43^] on corroboration of the victim’s testimony and quoted Justice Ahmadi as stating that “A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars.”[^44^]

Finally the S.C., while seeing that more than a decade has passed after the incident and the accused persons were first time offenders, sentenced them for the offence under Section 366 IPC to undergo five years R.I. each and to pay a fine of Rs. 5000/- each and in default of payment of fine to 1 year’s R.I. each. For the offence under Section 363 IPC it sentence them to undergo three years R.I. each though impose no separate sentence for the offence under Section 366/368 IPC.

6.2.1.13 Due Weight to the Evidence of a Victim of a Sex-Offence

*Bharwada Bhogin bhai Hirji bhai v. State of Gujarat*[^45^]

Herein the appellant had, as the Supreme Court observed, behaved in a shockingly indecent manner. He misused his position as a father of a girl friend of the victims, who were visiting his house unhesitatingly because of the fact that his daughter was their friend. To have misused this position and to-have tricked them into entering the house, and to have taken undue advantage of the situation by subjecting them to sexual harassment is a crime of which a serious view must be taken. On the basis of minor discrepancies the Court did not open the evidence again, and observed as follows:

[^43^]: 1990 (1) SCC 550
[^45^]: 1983 AIR 753, 1983 SCR (3) 280
By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident.

Ordinarily the occurrence, so often having an element of surprise, “the mental faculties therefore cannot be expected to be attuned to absorb the details.”

The powers of observation differ from person to person.

By and large people cannot accurately recall conversation and reproduce the very words used by them or heard by them.

In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment.

Ordinarily a witness cannot be expected to recall accurately the sequence of events and may get confused, or mixed up when interrogated later on.

A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favor of the version narrated by the witnesses.46

As held in Dr. S.P. Kohli, Civil Surgeon, Ferozpur v. High Court of Punjab and Haryana through Registrar47 and in Moti Lal v. State of M.P.48, the Apex Court had observed that a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The

48 MANU/SC/7825/2008
Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies.

Further, on corroboration, the SC stated that “Why should the evidence of the girl or the women who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.” It also straightforwardly commented that “On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the

The Court also discussed the factors due to which a women would not want to bring to fore a false case that she has been sexually wronged and stated that “…it can be said that rarely will a girl or a women in India make false allegations of sexual assault on account of any such factor…”

6.2.1.14 Conviction founded on the Testimony of the Prosecutrix

State of Himachal Pradesh v. Asha Ram 49

The SC herein showed displeasure and dismay over the way the High Court dealt casually with such a grave offence, as in the given case, overlooking the alarming and shocking increase of sexual assault on the minor girls. In this case the accused was father of the prosecutrix. The Court averred herein that “There can never be a more graver and heinous crime than the father being charged of raping his own daughter. He not only defies the law but it is a betrayal of trust. The father is the fortress and refuge of his daughter in whom the daughter trusts. Charged of raping his own daughter under his refuge and fortress is worse than the gamekeeper becoming a poacher and treasury guard becoming a robber.”

The facts of this case “shocked the judicial conscience.” The respondent-accused Asha Ram was married and out of the wedlock they had three daughters and two sons. The accused was having strained relations with his wife and was living separately. His wife was living in some servant quarters with one of the daughters and two sons. Accused was living in the accommodation allotted to him in the servant quarters attached to Raj Bhawan with the other two daughters namely Kumari Uma and

49 AIR 2006 SC 381
Kumari Seema (prosecutrix). On the fateful night the accused returned home at about 12.30 AM and went to the room where his daughters Uma and Seema were sleeping. He asked Kumari Seema to serve him the dinner. On being asked, the prosecutrix went to the kitchen and brought the food to the room of the accused. The accused is alleged to have bolted the door of his room from inside and after switching off the light asked Kumari Seema to sleep in the same room. He then forcibly committed rape on her and even the pleadings of the prosecutrix went unheard by him, and when she tried to raise alarm her mouth was gagged. She pleaded with the accused that she is his daughter but he turned a deaf ear and forcibly committed sexual intercourse with her. It is further alleged that when she tried to raise cries, her mouth was gagged by the accused with a piece of cloth. She narrated the entire occurrence to her sister Uma. On the following morning they went to their mother to inform her about the occurrence after which a complaint was registered under Section 366 IPC and accordingly a charge was framed.

The trial court found the accused guilty under S. 366 IPC sentenced him to suffer rigorous imprisonment for 5 years and a fine of Rs.1000/- and in default rigorous imprisonment for 3 months. Though seeing the gravity of the crime of rape by father on her daughter the SC increased the punishment from 5 years RI to imprisonment for life.

The SC upheld the conviction and held that, “it is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. … Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.”

Court herein reiterated the point made out by itself that in the case of Bharwada
Bhogin bhai Hirji bhai v. State of Gujarat\(^50\), that “in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the women who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?” It also referred to judgments in the cases of Rajś v. State of U.P\(^51\), Madan Gopal Kakkad v. Naval Dubey\(^52\), on corroboration of testimony of a prosecutrix. It also referred to the case of Ranjit Hazarika v. State of Assam\(^53\), wherein this Court held that “non-rupture of hymen or absence of injury on victim’s private parts does not belie her testimony.” Also while referring the case of State of Punjab v. Gurmit Singh\(^54\), this Court pointed out that “Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. … The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.” The SC reiterated its observation made in the Gurmit Singh’s case in State of Rajasthan v. N.K.\(^55\) and stated that “…no guilty should escape unpunished once the guilt has been proved to hilt.”\(^56\)

In Virender v. The State of Nct of Delhi\(^57\), The High Court of Delhi held as under—

It would be useful to refer to certain observations of the Apex Court in the pronouncement reported at Radhuv v. State of Madhya Pradesh\(^58\) which succinctly laid down the applicable principles thus:

It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct

\(^{50}\) AIR 1983 SC 753 at pp.756-757
\(^{51}\) (1980) 4 SCC 262
\(^{52}\) (1992) 3 SCC 204
\(^{53}\) (1998) 8 SCC 635.
\(^{54}\) (1996) 2 SCC 384.
\(^{55}\) (2000) 5 SCC 30
\(^{58}\) 2007 Crl.L.J. 4704
corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions.

6.2.1.15 Rape is a crime and not a medical condition

In allegations of rape, a sexual offence, the ingredients of the offence must be considered. In this behalf, reference deserves to be made to Medical Jurisprudence and Toxicology (Twenty First Edition) by Modi at page 369 which reads thus:

Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. 59

The necessary ingredients which are to be satisfied to bring home the charge under section 366 of the IPC have been stated in the pronouncement of the Apex Court in Santosh Kumar v. State of U.P. 60 The court placed reliance in para 6 on the texts on medical jurisprudence by Modi (considered above). Parikh and the Encyclopedia of Crime and Justice which were cited in paras 38 to 39 of Madan Gopal Kakkad v. Naval Dubey 61.

The essentials of the offence have been described in State of Punjab v. Rakesh Kumar 62 thus:

‘Rape’ or ‘Raptus’ is what a man hath carnal knowledge of a women by force and against her will (Co. Litt.123-b); or as expressed more fully, ‘rape is the carnal knowledge of any women, above the age of particular years, against her will; or of a women child, under that age, with or against her will’ (Hale PC 628).

The statement of prosecutrix in such cases deserves to be recorded with utmost

59 Dr. Jaisingh P. Modi, Medical Jurisprudence and Toxicology 369, (21edn., 2005)
60 MANU/SC/844/2006
61 MANU/SC/0509/1992 : [1992]2SCR921 38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:
Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains 39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1336, it is stated:...even slight penetration is sufficient and emission is unnecessary. Therefore, absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed.”
62 2009 CriLJ 396
sensitivity and care. Regard must be had to the trauma which the victim is undergoing as well as the unwarranted feeling of shame the victims of such offence feel. It is, therefore, necessary and incumbent on the court to sensitively examine a prosecutrix in a trial relating to commission of an offence under section 366 of the IPC to ensure that the prosecutrix understands and brings out in her deposition as to what has transpired. This requires a matured and sensitive handling by the court.

It was observed by Fazal Ali, J in Pratap Misra v. State of Orissa\textsuperscript{63} that medical jurisprudence is not an exact science and it is difficult for any doctor to say with precision and exactitude as to when a particular injury was caused as to the exact time when the appellants may have had sexual intercourse with the prosecutrix\textsuperscript{64}.

In \textit{R v. Ahmed Ali}\textsuperscript{65} Nariman J had made observations on medical evidence. It was stated by the learned Judge that the evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion. Even opinion with regard to rupture of a hymen has been held to be inclusive so far as commission of an offence of rape is concerned.\textsuperscript{66}

It is trite that medical evidence would at best be a matter of mere opinion. In the instant case certainly from the medical evidence brought on record, no conclusive finding with regard to the charge against the appellant can be returned.

\textbf{6.2.1.16 Increasing Exploitation of Domestic Workers: A Concern}

Increasing incidents of gross misuse and abuse of the laws relating to rape and sexual abuse and exploitation of uneducated, ignorant and uninformed domestic workers by unscrupulous persons/ placement agencies etc. for their personal gains. Large scale instances of trafficking of women and children by the placement agencies has come to light where these workers are separated from their family and subject to all kind of ill-treatment and exploitation in the hands of either by the placement agencies or by their employers\textsuperscript{67}.

\begin{itemize}
\item \textsuperscript{63} MANU/SC/0120/1977 : 1977 CriLJ 817
\item \textsuperscript{64} Dr. K.S. Narayan Reddy, “Medical Jurisprudence and Toxicology (Law Practice & Procedure)” 3\textsuperscript{rd}edn.(2010) p. 439
\item \textsuperscript{65} R v. Ahmed Ali 11 WR Cr. 25
\item \textsuperscript{66} http://nlrd.org/resources-womans-rights/rape-laws/latest-judgments-of-supreme-court-high-courts-rape-laws/crime-of-rape-legal-principles (Visited on nov. 12,2012)
\item \textsuperscript{67} Dr.Kamini Lau /ASJ Rohini (delhi) in her judgment in Session Case No 148/11
\end{itemize}
Recently, there has also been a spurt of cases relating to rape and sexual abuse being registered on the allegations made by the migrant domestic workers regarding rape and sexual abuse either by the persons of the placement agency or by the employers as in the present case. In many cases these young girls from backward areas are being rampantly exploited by those running the placement agencies who use them (the girls) as pawns to settle their personal scores with their professional rivals and customers who seek employment of such domestic workers from their agencies. Currently there is no regulation controlling or regulating these placement agencies and hence the necessity of putting in place some control and regulatory mechanism for these placement agencies by way of a legislation so that the migrant domestic workers are not exposed to any kind of exploitation as are being observed by the Court. However, till such time it is actually done, the task of both the investigating agency and the Courts becomes onerous so as to ensure on the one hand that the existing penal provisions are not being abused to implicate an innocent and on the other hand that no guilty is left scot free.

6.2.1.17 Digital Rape: A Concern

The trial court while convicting the accused in St. v. Pahlad, stated that, “Here, I may observe that the prosecutrix is a victim of Digital Rape that is manual manipulation of clitoris, vulva, vagina, or anus for purpose of sexual arousal and stimulation by use of fingers, sticks, bottles, objects etc.” The Courts cannot extend the definition of rape so as to include all forms of penetration such as penile/ vaginal penetration, penile/ oral penetration, penile/ anal penetration, finger/ vaginal and finger/ anal penetration and object/ vaginal penetration as observed by the Hon’ble Supreme Court in the case of Shakshi v. Union of India, wherein the Hon’ble Supreme Court had observed that “…the definition of rape in Section 365 cannot be enlarged so as to include all forms of penetration such as penile/ vaginal penetration, penile/ oral penetration, penile/ anal penetration, finger/ vaginal and finger/ anal penetration and object/ vaginal penetration, as it may violate the guarantee enshrined in Article 20 (1) of the Constitution of India which

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69 FIR No. 155/11, PS Keshav Puram (Delhi)
70 2004 Cri.L.J. 2991 (2892) (SC)
says that no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charges as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence…”

There is growing demand world over for inclusion of Digital Rape/ Male Rape/ Oral Rape/ Anal and Rectal Rape within the definition of Rape and the fact that it is the cases like the present one which sometimes reflects the Institutional helplessness in appropriately dealing with the crime on account of the lag in law. Section 366 Indian Penal Code to a large extent does cover case of carnal intercourse committed by a person against the order of nature but technically its applicability is limited and by operation it becomes difficult to include certain category of cases where the offence has been committed by the offender on another with an object. It is only to cover all kinds of penetrations without a person’s consent in any manner, that the need for a re-look at the existing laws has been necessitated. The present case is an eye opener and it is time that the Legislature take a serious note of the extent of depravation which exists in the Indian Urban Society, victims of which are usually small children and senior citizens being easy targets; the cause of which could be the X-rated material easily available in the market and internet. This case sounds a wake up call for the Indian Legislators to step in and think about having a re-look at the definition of Rape so as to specifically include the instances of Digital Rape/ Male Rape/ Anal Rape and make the offence Gender Neutral or to formulate a separate exhaustive legislation covering all categories cases of sexual assault similar to the Legislations which exist in Scotland, Ireland, Australia, Victoria (Sexual Assault Act) and United States [Violence Against Women Act, 1994 (VAWA)]. The definition of Rape in the Criminal Code of Queensland has been now enlarged to include the instances of Digital Rape. Rape as provided under Section 349(2) of the Criminal Code of Queensland (amended) covers instances when the person has carnal knowledge with or of the other person without the other persons consent; or the said person penetrates the vulva, vagina, or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or the said person penetrates the mouth of the other person to any extent with the person’s penis

71 Act (45 of 1860)
without the person’s consent and the maximum penalty provided for the offences of Rape/ Digital Rape/ Oral Rape is Life.

Coming now to the aspect of compensation to the victim of aggravated sexual assault/ Digital Rape, I may observe that at the time of the incident the victim aged about 80 years was a destitute who had been abandoned by her family and was living in a public park where she sustained herself on the mercy of the residents. This Court vide order dated 19.10.2011 had directed the information regarding the condition of the victim to be placed before the competent authority under the Welfare of Parents and Senior Citizen Act, 2006 pursuant to which the victim has now been lodged at an Old Age Home at Dwarka. As per the information received by the Court till date the old age pension is not being released to her, despite the directions of the Deputy Commissioner (competent authority under the Welfare of Parents and Senior citizen Act, 2006). It is unfortunate that the Government Red-Tapism spares none, not even a senior citizen destitute. The case of a destitute who is a victim of an aggravated sexual assault is required to be treated at priority at all levels\(^{72}\) in the government and the insensitivity of the System qua the plight of these victims is appalling.

The Hon’ble Apex Court has time and again observed that the subordinate Courts trying the offences of sexual assault have the jurisdiction to award the compensation to the victims being an offence against the basic human right and violative of Article 21 of the Constitution of India. It has been so observed by Hon’ble Mr. Justice S. Saghir Ahmed and Justice Kuldip Singh (Ref. Bodhisattwa Gautam v. Subhra Chakraborty)\(^ {73}\) that the jurisdiction to pay compensation (interim and final) has to be treated to be a part of the over all jurisdiction of the Courts trying the offences of rape which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and Life. In the present case keeping in view the fact that the process of grant of Old Age Pension to the victim has already been initiated, therefore in order to provide Restorative and Compensatory Justice to the victim who requires constant medical assistance in view of her age requires State attention and rehabilitation. I hereby direct the GNCT of Delhi through Principal Secretary (Home) to grant an compensation to the tune of Rs.50,000/- (Rs. Fifty Thousand) to the prosecutrix ‘S’ wife of Babulal presently lodged at Old Age Home Bindapur, Pocket-


\(^{73}\) AIR 1996 SC 922
4, Dwarka, Delhi which amount shall be used for her welfare under due guidance/advice of the Welfare Officer. [Ref.: HariKishan and State of Haryana v. Sukhbir Singh and Ors. 74 and Bodhisattwa Gautam v. Subhra Chakraborty75]. I hereby direct that a copy of this order be sent to the Principal Secretary (Home), GNCT of Delhi for information and necessary action under intimation to this Court. At this stage, on request of Ms. Sadhna Singh Advocate for the Delhi Commission for Women one copy be also given to her to be placed before the Chairman, Delhi Commission for Women for necessary action.

6.2.1.17.1 10-Year Jail for Digital Rape

In a case of digital rape, where a 19-year-old used a wooden stick to criminally assault an 80-year-old destitute women, a Sessions court here on Tuesday awarded 10 years rigorous imprisonment to the convict, while exhorting the legislature to expand the definition of rape to include digital rape, male rape, oral rape, anal and rectal rape.76

At present, Section 365 of the Indian Penal Code does not define rape to include these kinds of aggravated sexual assaults, while Section 366 of the Indian Penal Code, which has been partially repealed when homosexuality was decriminalised, deals with the vaguely worded “carnal intercourse against the order of nature with any man, women or animal”.

Sentencing the convict, to 10 years’ rigorous imprisonment on three counts of kidnapping, attempt to murder, and rape against the order of nature (Section 366 IPC), Additional Sessions Judge Kamini Lau observed: “There is growing demand the world over for inclusion of digital rape/ male rape/ oral rape/ anal and rectal rape within the definition of rape. Cases like the present one sometimes reflects the institutional helplessness in appropriately dealing with the crime on account of the lag in law. Section 366 IPC to a large extent does cover cases of carnal intercourse committed by a person against the order of nature, but technically its applicability is limited and by operation it becomes difficult to include cases where the offence has been committed by the offender on another, with an object.”

The victim, who had been abandoned by her family, used to live at a park in north-west Delhi where she survived on the mercy of local residents who gave her food. At
2 a.m. on May 20, 2011, the accused forcefully took her into the nearby bushes and inserted the wooden stick into the private parts and thrust his hand into her mouth to muffle her cries. She was discovered, bloodied and unconscious, by morning walkers at the park who alerted the police and admitted her to a hospital nearby, where she underwent extensive surgery. The victim identified the accused from among six suspects paraded before her while she was in hospital.

Dr. Lau also pointed law-makers to exhaustive legislation covering all categories of sexual assault enacted by Scotland, Ireland, Australia, US, Victoria and Queensland (both in Australia). “The definition of rape in the Criminal Code of Queensland has been now enlarged to include the instances of digital rape…and the maximum penalty provided for the offences of rape/ digital rape/ oral rape is life.”

Counsel for the Delhi Commission for Women also argued in court that there was no reason why a victim of digital rape should not be treated at par with a victim of rape.

While directing that the victim be lodged at an Old Age Home at Dwarka in October 2011, it had also directed that she be paid old-age pension which, however, has not been released yet owing to red tape. “It is unfortunate that the Government red-tapism spares none, not even a senior citizen destitute. The case of a destitute who is a victim of an aggravated sexual assault is required to be treated at priority at all levels in the government and the insensitivity of the system is appalling,” the court noted. Dr. Lau also directed Delhi to provide Rs.50,000 as compensation to the victim for her medical needs and rehabilitation.

6.2.1.18 Non-disclosure of name of Victim

The Supreme Court directed the Madhya Pradesh (MP) government to pay Rs. 10 lakh each as compensation to two girls who were gang raped in Betma village in Indore district. In doing so, the Court modified the decision of the MP High Court which had ordered Rs. 2 lakh to be paid to the victims. The Court also came down upon the MP government for disclosing the names of the victims in an affidavit filed by the government.

The order was a passed by a Division Bench of Justices RM Lodha and Madan B Lokur in a Special Leave Petition titled Satya Pal Anand v. State of MP.

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78 [SLP (Crl) 5019/2012]
Petitioner Satya Pal Anand, appearing in person, submitted that the compensation amount of Rs. 2 lakh was simply too low and inadequate. He prayed that a larger sum be awarded as compensation considering the fact that the victims were from poor families.

The Court after hearing the petitioner and the counsel for the MP government fixed an amount of Rs. 10 lakh and ordered for payment of the balance amount of Rs. 8 lakhs to each of the victims. The Court also observed that,

“The post traumatic stress to such a victim cannot be compensated by any amount. No amount of money can restore the dignity and confidence of a rape victim. However, certain measure like adequate compensation, insurance, employment and social security scheme may help in rehabilitating the rape victim to some extent.”

Taking a stern view of the fact that the names of the rape victims were disclosed in an affidavit submitted on July 30, 2013 by the Additional Superintendent of Police, Indore, the Court issued a notice to the police officer to “...show cause why an offence under Section 228A [of the IPC] be not registered against him for disclosing the identity of the rape victims.”

The Court, however, declined to consider the larger issue of framing of a uniform social security scheme for rape victims on the ground that the issue was already pending before another Bench of the Supreme Court. The matter will now be listed after 6 weeks.

The issue of identity disclosure of rape victims has been a matter of grave concern and the ambiguity in the law envisaged in Section 228A of the IPC coupled with the obvious negligence of the higher courts, including the Supreme Court, has on numerous occasions defeated the object of the provision.

Section 228A prohibits the disclosure of identity of victims of certain offences including rape. Certain exemptions have been culled out to the said prohibition in order to facilitate investigation into the offence. The provision also exempts printing or publication of a judgment of any High Court or the Supreme Court. However, the important issue of whether Judges can make such disclosure in their orders or judgment has been left unaddressed by Section 228A with the result that judges, including those in the Apex Court, often end up disclosing the names of the victims in

79 Indian Penal Code, 1860 (45 of 1860)
their judgments. Cases like *Karthi @ Karthick v. State represented by Inspector of police, Tamil Nadu*\(^{80}\), and *State of Rajasthan v. Munshi*\(^{81}\) bear testimony to this fact.

Since printing or publication of a judgment of any High Court or the Supreme Court is expressly allowed by the provision, the prohibition under the provision does not serve its purpose in such cases where the victim’s name is disclosed in the judgment. As pointed out by Mariamma A.K.,

“When Judges of Supreme Court disclose the name of the rape victim in judgments, repeat the same time and again, it points out the need to amend the section so as conceal the exposure of the victim’s identity. As far as the victims are concerned, whether the disclosure was at the hands of the media or by the Judge, the result is same.”

In cases where the statute is ambiguous, the courts are expected to ensure that the purpose of the law is fulfilled through its meaningful interpretation. Failure to do so raises a question mark over the judicial wisdom to obliterate the grey areas of law.

**6.2.1.19 Rape victims and Bail orders**

The Bombay High Court has ordered that the names of rape victims will no longer be disclosed in bail orders passed by it and the Sessions Court. Mr. Justice R.C. Chavan on Tuesday directed the registries of both courts to drop victims' names from all bail orders after a rape victim's lawyer pointed out the discrepancy to the court.

The court was hearing a bail application made by Ramesh Dhiraj Singh, a film producer who has been accused of raping a 33-year-old Pune woman after promising her a lead role in his upcoming film. Speaking to Mid Day, the victim's lawyer Flavia Agnes said, "There are already Supreme Court judgments which prohibit the publication of the victim's name by media.

But all court judgments are already present in the public domain as they are uploaded on the Internet by the courts themselves. The Supreme Court had taken note of this and ordered that victims' names should be left out of judgments. But the practice continued during the hearing of bail applications."\(^{82}\)

Justice Chavan took note of the situation and ordered, "Bail applications in such cases


\(^{81}\) Criminal Appeal No. 928 OF 2001

sometimes Refer to victims by their names, which expose the victim. Therefore in bail applications reference of the victims' names should be avoided. The registry of this court as well as the Registrar of the Sessions Courts shall ensure that whenever such applications are filed, the names of the victims in the application are dropped out.

6.2.2 Dowry Cases and Judiciary

‘Dowry Death’ and ‘Dowry’

In Bachni Devi and Anr. v. State of Haryana,\textsuperscript{83} Supreme Court stated as follows:

The definition of the term ‘dowry’ under Section 2 of the Act shows that any property or valuable security given or “agreed to be given”\textsuperscript{84} either directly or indirectly by one party to the marriage to the other party to the marriage “at or before or after the marriage” as a “consideration for the marriage of the said parties” would become ‘dowry’ punishable under the Act. Property or valuable security so as to constitute ‘dowry’ within the meaning of the Act must therefore be given or demanded “as consideration for the marriage”.

Supreme Court pointed out that since Kanta died within 3 months of her marriage. On August 11, 1990, she was found dead by hanging from a ceiling in the appellants’ house. Kanta hailed from a poor family. circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

6.2.2.1 Apex Court direct all trial courts to add Ordinarily Sec. 302 to Charges of Sec.-304B

In Rajbir @ Raju v. State of Haryana\textsuperscript{85} Supreme Court held that the injuries, prima facie, indicate that the deceased Sunita's head was repeatedly struck and she was also throttled.

We have recently held in the case of Satya Narayan Tiwari @ Jolly and another v. State of U.P.\textsuperscript{86}, that, this Court is going to take a serious view in the matters of crimes

\textsuperscript{83} Criminal Appeal No. 831 of 2006
\textsuperscript{84} (1996) 4 SCC 596
\textsuperscript{85} 2010 (Crl.MP No. 23051/2010), http://indiankanooon.org/doc/1160243/(Visited on May 12, 2013)
\textsuperscript{86} Criminal Appeal No.1168 of 2005 decided on (Oct. 28, 2010)
against women and give harsh punishment. This view was reiterated by us in another special leave petition in the case of *Sukhdev Singh and another v. State of Punjab* and we issued notice to the petitioner as to why his life sentence be not enhanced to death sentence. Issue notice to petitioner No.1 why his sentence be not enhanced to life sentence as awarded by the trial Court.

We further direct all trial Courts in India to ordinarily add Section 302 to the charge of section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women.

6.2.2.2 Conviction on the Basis of Testimony of Witness

In *Kesari Madhav Reddy v. State of A.P* the Apex court held that conviction can be held on the basis of evidence corroborated by testimony of witness. In the present case the father of the deceased at the time of her marriage with accused husband had agreed to pay Rs. 80,000/- towards dowry and also supply articles worth Rs. 6000/- but at the time of the pooja held at the house of the accused, he paid Rs. 40,000/- and promised to pay the balance amount after the accused and the deceased had lived happily and peacefully for about one month. The accused were, however, not happy with this arrangement and they told the deceased to bring the balance amount and for that purpose would beat and abuse her. Even though father of the deceased spent money on accused husband’s operation for appendicitis and after his discharge from the hospital he took his wife with him to the matrimonial home, but the demands for the balance amount of dowry etc. were renewed by the accused sometime in the year 1999. It appeared however that the demands for dowry still continued and the deceased and the couple had an on-off relationship with each other over a period of time.

On the 19th April, 2000, when the parents of the deceased met her she stated that she had been administered a beating by the accused and that she was not being provided any food by them, on persuasion the husband even promised that they would not harass the deceased any further. Though the same day, the accused husband asked for Rs. 2,000/- to purchase a table fan upon which the father promised to give it to him later. Though, on the 20th of April, 2000 at about 8:00 am the deceased came running out of her matrimonial home with burn injuries raising a hue and cry and fell down

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87 Petition(s) for Special Leave to Appeal (Crl)... 2010 CRLMP.NO(s). 23051, dated 22/11/2010
88 (2011) 2 SCC 790
finally succumbed to injuries in a hospital\textsuperscript{89}.

In this dying declaration, the deceased clearly stated that her husband was always abusing her and that she had been set afire by him. The dying declaration was made as per given procedure had been recorded after the doctor had given a certificate of fitness. It is true that there is no reference whatsoever to the fact that kerosene oil had been poured on her but we have absolutely no reason to doubt the statement made by the deceased and recorded by a Magistrate. We also see that insofar as in-laws were concerned she clearly did not say anything about their involvement with the burning incident on the 20\textsuperscript{th} of April, 2000. The SC finally held the accused husband convicted under S. 302 IPC and awarded him a life sentence under that provision. Though, the acquittal of in-laws was maintained.

6.2.2.3 Admissibility of Dying Declaration – Exact Statement of Victim to be used

\textit{Kanti Lal v. State of Rajasthan}\textsuperscript{90}

In this case the accused asked for Rs. 50,000/- as loan for starting a business which they wanted to be treated as dowry by the parents of the deceased. The in-laws did not allow the deceased to go with her father to her paternal home just ten days before the death of the deceased unless the loan of Rs. 50,000/- had been adjusted and treated as dowry money. On refusal by her father, the husband of the deceased started ill-treating her. Finally, the girl’s parents came to know that she is in hospital, wherein she was brought with severe burn injuries, causing her death.

The Court in this case relied upon the decision made by SC in \textit{Hira Lal and ors. v. State Govt. of NCT}\textsuperscript{91}, this Court reiterated that the essential ingredients to attract application under Section 304B are that:

[i] the death of a women should be caused by burns or bodily injury or otherwise than under a normal circumstance

[ii] such a death should have occurred within seven years of her marriage,

[iii] she must have been subjected to cruelty or harassment by her husband or any relative of her husband,


\textsuperscript{90} AIR 2009 SC 2703

\textsuperscript{91} AIR 2003 SC 2865,
such cruelty or harassment should be for or in connection with demand of dowry, and

such cruelty or harassment is shown to have been meted out to the women soon before her death.

Further it is said that the presumption under Section 113B of Evidence Act, 187292 is a presumption of law. On proof of the essential mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The essentials required to be proved for raising the said presumption are that:

the question before the court must be whether the accused has committed the dowry death of the women,

the women was subjected to cruelty or harassment by her husband or his relatives,

such cruelty or harassment was for or in connection with any demand for dowry, and

such cruelty or harassment was soon before her death.

Further, the Court herein discussed the proper way to prepare dying declaration also. It emphasized that unless the dying declaration is in question and answer form it is very difficult to know to what extent the answers have been suggested by questions put. Further, that what is necessary is the exact statement made by the deceased should be available to the Court. It was also stated that if the doctor happened to be present at the time of recording of the dying declaration and he had heard the statement made by the deceased, he would ordinarily endorse that the statement had been made to his hearing and had been recorded in his presence. The endorsement as made is indicative of the position that a statement had been recorded and the same was being attested by the doctor93.

In the present case, these basic principles are ignored by D.W. 2 at the time of recording of the alleged dying declaration of the deceased. As noticed above, the

92 Act No. 1 of 1872 w.e.f. (15th March, 1872)
doctor has not made any endorsement on the dying declaration to state that it was
recorded in his presence and attested by him. The mother of the deceased refused to
put her thumb-impression on the said document.

Finally, the Supreme Court upheld the conviction of husband and jeth (brother-in-law)
of the deceased for 10 years u/S. 304B and 3 years u/S. 498A.

6.2.2.4 Demand of Dowry: Meaning and Scope

*Baldev Singh v. State of Punjab* 94

The Trial Court in this case relied upon the evidence of deceased’s brother and
another person and found that their evidence was clear and cogent to the effect that
the deceased was being harassed for not bringing adequate dowry and though some of
the demands were satisfied by the relatives, the demands persisted. On account of
such persistent demands, the deceased felt harassed and consumed poison and had
ultimately died as a result thereof. The high court also upheld the conviction of the
appellant accused persons.

Upholding the conviction the Supreme Court in this case held that, “The offence
alleged against the accused is under Section 304B IPC which makes “demand of
dowry” itself punishable. Demand neither conceives nor would conceive of any
agreement. If for convicting any offender, agreement for dowry is to be proved,
hardly any offenders would come under the clutches of law.” Further, the Supreme
Court observed that “when Section 304B refers to “demand of dowry”, it refers to the
demand of property or valuable security as referred to in the definition of “dowry”
under the Act. The argument that there is no demand of dowry, in the present case,
has no force.”

Further commenting on the importance of circumstantial evidence the Court stated
that, “In cases of dowry deaths and suicides, circumstantial evidence plays an
important role and inferences can be drawn on the basis of such evidence. That could
be either direct or indirect.”

It further pointed out the significance of amendment to Section 4 of the Dowry
Prohibition Act, 1961 as amended by means of Act 63 of 1984, under which “it is an
offence to demand dowry directly or indirectly from the parents or other relatives or
guardian of a bride.” It also stated that the word “agreement” referred to in Section 2

94 AIR 2009 SC 913
has to be inferred on the basis of the facts and circumstances of each case.  

Lastly it observed on definition of “dowry” that “demanding of her share in the ancestral property will not amount to a dowry demand, but the evidence … shows that the demands were in addition to the demand for her share in the ancestral property.” Though, the Court reduced the imprisonment from ten years to seven years finding the first one on “higher side”.

6.2.2.5 Meaning of ‘Demand for Dowry’

The Supreme Court observed about that there was no dispute of fact that death of the deceased occurred within seven years of her marriage and she was subjected to harassment and ill-treatment by the appellant accused husband and mother-in-law after the father of the deceased refused to accede to their demand for purchase of motorcycle due to financial inability, as established by the evidence. At which, the accused appellant got angry and warned that deceased would not be allowed to stay in her matrimonial home. The Supreme Court further upheld the decision of the Trial Court and stated that unlawful demand of motorcycle was made appellants from deceased and her father and she was being harassed on account of the failure of her father to provide the motorcycle and that led her to commit suicide by hanging. Pertinently, the demand of motorcycle by the accused mother-in-law from deceased’s father was for her son and when her father showed his inability to meet that demand, the accused husband started harassing and ill-treating deceased. In this view of the matter, the Supreme Court held that it cannot be said that there was no demand by accused husband.

The Supreme Court in this case held that the case of “Appa saheb cannot be read to be laying down an absolute proposition that a demand for money or some property or valuable security on account of some business or financial requirement could not be termed as ‘demand for dowry’. It was in the facts of the case that it was held so. If a demand for property or valuable security, directly or indirectly, has a nexus with marriage, in our opinion, such demand would constitute ‘demand for dowry’; the cause or reason for such demand being immaterial.”

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96 Bacchnidevi v. state of Haryana , (2011) 4 SCC 427

97 http://nlrd.org/resources-womans-rights/dowry-death/dowry-death-latest-judgments-of-supreme-court-high-courts/if-a-demand-for-property-or-valuable-security-directly-or-indirectly-has-a-nexus-with-marriage-in-our-opinion-such-demand-would-constitute-demand-for-dowry-the-cause-or-reason-for-such-demand (last Visited on 22-10-2013)
Finally, the Supreme Court held that there was no merit in the contention of the counsel for the appellants that “the demand of motorcycle does not qualify as a ‘demand for dowry’.” It asserted that all the essential ingredients to bring home the guilt under Section 304B IPC were established against the appellants by the prosecution evidence. As a matter of law, the presumption under Section 113B of the Evidence Act, 1862 was fully attracted in the facts and circumstances of the present case and the appellants had failed to rebut the presumption under Section 113B. Thus, the accused persons were sentenced to suffer rigorous imprisonment of seven years under S. 304B IPC.

6.2.2.6 Conviction in Dowry offences solely on Circumstantial Evidence

In Vijay Kumar Arora v. State Govt. of NCT of Delhi\(^98\) Apex Court held that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. As per father of the deceased, the deceased was subjected to physical and mental cruelty for bringing insufficient dowry. According to the said witness, he had given dowry worth Rs. 65,000/ to the appellant and his family members at the time of marriage of the deceased. On one occasion, the deceased was asked to bring gold set for her mother in law though the father could only arrange for a gold chain. The husband had demanded scooter from the deceased and he was not able to meet the said demand of the appellant because of his weak financial conditions\(^99\).

The appeal was dismissed by the SC and appellant’s conviction and sentence for life imprisonment and fine of Rs. 2000/- under Section 302 IPC was confirmed. Further, applying the principle laid down in *Surinder Kumar v. State (Delhi Administration)*\(^100\) to the facts of the present case, the SC stated that it became clear that if the stove had burst as suggested by the defence, the deceased would not have sustained burns on the face, neck, trunk, upper limbs etc. and her clothes would not have been found containing kerosene oil.

\(^{98}\) (2010)2SCC353


\(^{100}\) AIR 1987 SC 692
6.2.2.7 Meaning of the expression ‘soon before her death

In Uday Chakraborty and ors. v. State of West Bengal\(^{101}\)

The Trial Court convicted all the five accused persons i.e. the husband and other in-laws for an offence punishable under Sections 498A/304B of the Indian Penal Code (hereinafter referred to as ‘IPC’) and sentenced them for 6 years rigorous imprisonment. No separate sentence was awarded under Section 498A of IPC on the ground that the accused persons were awarded sentence for the substantive offence of murder under Section 304B of IPC. Finally the Court dismissed the appeal and held that offence under Sections 304B read with 498A of IPC was made out and had been proved by prosecution beyond any reasonable doubt. The Court stated that execution of the “Chuktiparta” itself demonstrate that there was a clear intention on the part of the appellants to take dowry in and as consideration for marriage. Gifts were given at the time of marriage and some items were also agreed to be given subsequent to the marriage. This itself would be an appropriate fact to be taken into consideration and is, in any case, completely in line with the case of the prosecution\(^{102}\). The Court observed that the expression ‘soon before her death’ has to be given its due meaning as the legislature has not specified any time which would be the period prior to death, that would attract the provisions of Section 304B of IPC. The concept of reasonable time would be applicable, which would primarily depend upon the facts of a given case, the conduct of the parties and the impact of cruelty and harassment inflicted upon the deceased in relation to demand of dowry to the cause of unnatural death of the deceased. In our considered view, the marriage itself has not survived even for a period of two years, the entire period would be a relevant factor in determining such an issue.

\textit{Ashok Kumar v. State Of Haryana}

The deceased and accused Ashok Kumar were married on 9th October, 1986 wherein the father of the deceased had given sufficient dowry at the time of her marriage according to his means, desire and capacity. But, the appellant and his family members were not satisfied with the dowry. They allegedly used to harass and

\(^{101}\) AIR 2010 SC 3506

maltreat the deceased and used to give her beatings. They had demanded a refrigerator, a television etc. One week prior to the date of occurrence, the deceased came to the house of her father at Kaithal and narrated the story. She specifically mentioned that her husband wanted to set up a new business for which he required a sum of Rs. 5,000/-; which could not be managed by her parents due to which the accused and his family members alleged to have burnt the deceased by sprinkling kerosene oil on her as a result of which the deceased died. Also, as per post-mortem, cause of death was shock and dehydration which resulted from extensive burn injuries, which were ante-mortem.

The SC partially accepted the appeal and accused was awarded sentence of 6 years rigorous imprisonment\textsuperscript{103}. It stated that, at time of occurrence, the accused was present at home and failed to protect or save deceased from burning which caused her death. Marriage itself had survived for short period nearly one and half year. Cruelty and harassment to deceased was stated to be caused by mother in law of deceased and brother in law of deceased, they had been acquitted by High Court for total lack of evidence. The Court further observed that neither State nor complainant had preferred Appeal against judgment of acquittal.

Re definition of dowry the SC referred to the cases of \textit{Ram Singh v. State of Haryana}\textsuperscript{104} (customary gifts); \textit{Satvir Singh v. State of Punjab}\textsuperscript{105} (in connection with marriage); \textit{State of Andhra Pradesh v. Raj Gopal Asawa}\textsuperscript{106} (not restricted to agreement or demand for payment of dowry before and at the time of marriage but even include subsequent demands). Further it referred to the case of \textit{Kaliyaperumal v. State of Tamil Nadu}\textsuperscript{107} (ingredients for raising presumption S. 304B)

The Court sided with the decisions of other courts wherein the husband had demanded a specific sum from his father-in-law and upon not being given, harassed and tortured the wife and after some days she died, such cases would clearly fall within the definition of ‘dowry’ under the Act.

Further, it is observed that the expressions ‘soon before her death’ cannot be given a restricted or a narrower meaning. Regarding the meaning of the phrase “soon before

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\textsuperscript{103} AIR 2010 SC 2839
\textsuperscript{104} (2008) 4 SCC 70
\textsuperscript{105} AIR 2001 SC 2828
\textsuperscript{106} (2004) 4 SCC 470
\textsuperscript{107} AIR 2003 SC 3828
death” the Court stated that, the interpretation given should be one which would avoid absurd results on the one hand and would further the object and cause of the law so enacted on the other; and stated that this expression would normally imply that there has to be reasonable time gap between the cruelty inflicted and the death in question.

The SC relied on case of Tarsem Singh v. State of Punjab,108 held that the legislative object in providing such a radius of time by employing the words ‘soon before her death’ is to emphasize the idea that her death should, in all probabilities, has been the aftermath of such cruelty or harassment. Yashoda v. State of Madhya Pradesh109 has also been referred, wherein this Court stated that determination of the period would depend on the facts and circumstances of a given case.

The Court opined that cruelty and harassment by the husband or any relative could be directly relatable to or in connection with, any demand for dowry. The expression ‘demand for dowry’ will have to be construed *ejusdem generis* to the word immediately preceding this expression. Similarly, ‘in connection with the marriage’ is an expression which has to be given a wider connotation. It is of some significance that these expressions should be given appropriate meaning to avoid undue harassment or advantage to either of the parties. These are penal provisions but ultimately these are the social legislations, intended to control offences relating to the society as a whole. Dowry is something which existed in our country for a considerable time and the legislature in its wisdom considered it appropriate to enact the law relating to dowry prohibition so as to ensure that any party to the marriage is not harassed or treated with cruelty for satisfaction of demands in consideration and for subsistence of the marriage.

6.2.2.8 Proximate Connection between Death and Demand of Dowry

In Bansi Lal v. State of Haryana110 the supreme court held that in each case, the court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death.

The SC in this case approved the conviction and sentence of the accused husband for offences under Sections 498A, 304B and 306 of IPC and award of sentence to

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108 AIR 2009 SC 1454,
110 AIR 2011 SC 691
undergo rigorous imprisonment for two years and to pay a fine of Rs. 500/. However, for the offence under Section 304B IPC sentence to undergo for 10 years had been reduced to 6 years RI and pay a fine of Rs. 2,000/.

The Appellant was married to the deceased on 4th April, 1988. On 25th June, 1991 the Appellant, his mother, brother and sister-in-law had consistently harassed deceased by making dowry demand i.e. a scooter. She had been maltreated by them. After one year of marriage, deceased came and stayed with her family for about 14 months. It was only after convening a panchayat of close relatives, she had returned to her matrimonial home. Again they maltreated and insisted for the demand of a scooter, thus, she had been subjected to cruelty, harassment by demand of dowry to the extent that she committed suicide on 25th June, 1991, at her matrimonial home.

The demand of scooter had been consistent and persistent as witnesses had specifically deposed that the demand was only in respect of scooter and nothing else.

In the instant case, the conduct of the accused forced the deceased to leave her matrimonial home just after one year of marriage and stay with her parents for 14 months continuously. It was only at the assurance given by the panchayat that the accused or his family members would not humiliate or subject the deceased with cruelty, that she re-joined her matrimonial home. Court stated that presumption should be made in this case under S. 113B Indian Evidence Act.

The Supreme Court observed that in Section 113B of the Indian Evidence Act, 1862 the legislature in its wisdom has used the word “shall” thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. It is unlike the provisions of Section 113A of the Evidence Act where a discretion has been conferred upon the court wherein it had been provided that court may presume to abatement of suicide by a married women. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113B relatable to Section 304 IPC, the onus to prove shifts exclusively and heavily on the accused.

Further, the SC stated that, in each case, the court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. Reference made to *T. Aruntporunjothi v. State through S.H.O., Pondicherry*[^112]; *Devi Lal v. State of Rajasthan*[^113]; etc.

### 6.2.2.9 Presumption under Section 113A and 113B of Indian Evidence Act

In *Devi Lal v. State of Rajasthan*[^114]

Court held if charge are under – section 113A of the Act relates to offences under Sections 498-A and 306 of the Code, whereas Section 113B relates to Section 304-B thereof. Whereas in terms of Section 113A of the Act, the prosecution is required to prove that the deceased was subjected to cruelty, in terms of Section 113B, the prosecution must prove that the deceased was subject by such person to cruelty or harassment for, or in connection with, any demand for dowry – the question, as to what are the ingredients of the provisions of Section 304B of the Indian Penal Code is no longer res integra. They are: (1) That the death of the women was caused by any burns or bodily injury or in some circumstances which were not normal; (2) such death occurs within 6 years from the date of her marriage; (3) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband; (4) such cruelty or harassment should be for or in connection with the demand of dowry; and (5) it is established that such cruelty and harassment was made soon before her death – evidence brought on record by the prosecution clearly suggest that Pushpa had all along been subjected to harassment or cruelty only on the ground that her father had not given enough dowry at the time of marriage. For proving the said fact, it was not necessary that demand of any particular item should have been made – no case has been made out for interference with the impugned judgment.

### 6.2.2.10 Conviction on basis of Dying Declaration of Deceased

*Muthu Kutty and another v. State by Inspector of Police, Tamil Nadu*[^115]

Held: The situation in which a person is on death bed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept

[^112]: AIR 2006 SC 2475
[^113]: AIR 2008 SC 332
[^114]: Criminal Appeal No. 1088 of 2001), decided on 10/12/2007
[^115]: 2005 AIR 1473, 2004(6 )Suppl.SCR222 , 2005(9 )SCC113 , 2004(9 )SCALE520 , 2004(10 )JT538
the veracity of his statement. It is for this reason the requirements of oath and cross-
examination are dispensed with. Besides, the dying declaration, if excluded, will
result in miscarriage of justice because the victim being generally and only eye-
witness in the serious crime, the exclusion of the statement would leave the Court
without a scrap of evidence.

Conviction under – the acceptability of alleged dying declaration in the instant case
has to be considered. The dying declaration is only a piece of untested evidence and
must like any other evidence, satisfy the Court that what is stated therein is the
unalloyed truth and that it is absolutely safe to act upon it – there is no material to
show that dying declaration was result of product of imagination, tutoring or
prompting. On the contrary, the same appears to have been made by the deceased
voluntarily. It is trustworthy and has credibility – the Courts below have rightly relied
upon the dying declaration – something unusual in the conclusion of the trial Court.
After having accepted that the accused persons were responsible for setting the
deceased ablaze, applied Section 304 Part B IPC and not Section 302 IPC. The Trial
Court observed that the accused without knowing what they were doing at the
relevant time poured kerosene and set fire on the deceased and in view of this
situation Section 302 IPC was not applied and Section 304 B IPC was applied. The
reasoning is clearly wrong – no prejudice is caused to the accused appellants as they
were originally charged for offence punishable under Section 302 IPC along with
Section 304-B IPC – the conviction as recorded and affirmed and the sentences
imposed do not warrant any interference.

6.2.2.11 Conviction of accused under Section-306 IPC without Charge

In Dalbir Singh v. State of U.P., the Apex court held Sections 302, 304-B
and 498a – trial under – in view of conflict of opinion in two decisions of this Court
State of A.P. these appeals have been directed to be placed for hearing before a
three-Judge Bench – whether in a given case is it possible to convict the accused
under Section 306 IPC if a charge for the said offence has not been framed against

116 http://www.indiacourts.in/MUTHU-KUTTY-AND-ANR.-Vs.-STATE-BY-INSPECTOR-OF-
POLICE,-TAMIL-NADU_403b86a5-d851-4c74-8dae-6df7147596be (Visited on Oct.23, 2013)
118 1994 Supp. (1) SCC 173
119 1997(5) SCC 348
him – in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion – he is convicted under Section 306 IPC and is sentenced to the period already undergone.

*The State of Andhra Pradesh v. Raj Gopal Asawa and Another*\(^{120}\)

Indian Penal Code, 1860 – Sections 304B and 498a – conviction by trial court – legality of the judgment of DB of Andhra Pradesh High Court holding respondents not guilty questioned by State of Andhra Pradesh – in view of the fact that the death occurred within the very few months of the marriage, and the evidence of PWs 2, 3, 4 and 6 that shortly before the deceased committed suicide, demand of dowry was made, the plea in untenable. The accusations clearly stand established so far as A-1, respondent no.1 is concerned. So far as accused A-3 is concerned, there is no evidence that he ever made any demand of dowry – custodial sentence of 6 years would meet the end of justice for respondent no.1- A-1.

6.2.2.12 Conviction under Sec.-306 without Charge

In *State of Andhra Pradesh Appellant v. Yadla Srinivasa Rao and others*\(^{121}\) appeal preferred by parents of deceased seeking conviction of accused u/s. 304B, IPC – omission to frame charge u/s. 306 – although a charge specifically under Section 306 IPC was not framed but all facts and ingredients constituting that offence were mentioned in the Statement of Charges framed under section 494A and Section 304B of IPC – held same facts and evidence on which accused No.1 was charged under Section 498a and Section 304B, the accused can be convicted and sentenced under Section 306 IPC.

6.2.3 Honor Killings and Judiciary

The Supreme Court said that honor killings fell in the category of rarest of rare crimes and those committing them deserved capital punishment.\(^{122}\) Justices Markandey Katju and Gyan Sudha Misra in their ruling said, “Honor killings are nothing but barbaric and brutal murders by bigoted persons with feudal minds.” The judges said “In our opinion, honor killings, for whatever reason, come within the category of rarest of

\(^{120}\) Criminal Appeal No. 384 of 1998), decided on 3/17/2004


\(^{122}\) Bhagwan Dass v. State (NCT) of Delhi .. (2006) 5 SCC 47
rare cases deserving death punishment.

“It is time to stamp out these barbaric, feudal practices which are a slur on our nation.”

The court said this while upholding the death sentence awarded to Bhagwan Dass, who was convicted for killing his daughter after she deserted her husband Raju and began an incestuous relationship with her uncle. The judgment said “In our opinion both the trial court and high court have given very cogent reasons for convicting the appellant and we see no reason to disagree with their verdicts.” “There is overwhelming circumstantial evidence to show that the accused committed the crime as he felt that he was dishonored by his daughter.” Speaking for the bench, Justice Katju said: “This is necessary as a deterrent for such outrageous, uncivilized behavior. All persons who are planning to perpetrate ‘honor’ killings should know that the gallows await them.” The judgment said “There is nothing honorable in honor killings.”

The court pointed out “Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts.”

Starting his judgment with a couplet from renowned poet Mirza Ghalib:

\[\text{Hai mauja zanekkulzum-e-khoon kaash yahi ho,}\]
\[\text{Aataa hai abhi dekhiye kya kya mere aage}\]

Justice Katju said: “This is yet another case of gruesome honor killing, this time by the accused-appellant of his own daughter.”

The court said ‘honor’ killings had become commonplace in many parts of the country, particularly in Haryana, western Uttar Pradesh and Rajasthan.

“If someone is not happy with the behavior of his daughter or other person, who is his relation or of his caste, the maximum he can do is to cut off social relations with her/him.

“But he cannot take the law into his own hands by committing violence or giving threats of violence.”

6.2.3.1 Strict punishment for honor killing

At least 10 members of a family were sentenced to death by a local court for killing an 18-year-old girl, her lover and the lover’s brother in 2008.124 A local court here Wednesday awarded death penalty to a man for killing his teenaged daughter in 2009 over her love affair, police said.125 “Additional District Judge KaminiPathak gave the death sentence to ShaukatSaifi, who beheaded his 15-year-old daughter in June 2009 over her love affair with a youth in Kirmicha village,”

6.2.3.2 Khap Panchayats decision: A Concern

Taking a stern view on honor killings and Khap Panchayats, justice Markendye Katju rightly picture the situation in words of a famous writer as:

“Harzarre par ekqaifyat-e-neemshabihai,
Ai saaki-e-dauraan yeh gunahon ki ghadi hai”

- Firaq Gorakhpuri

Supreme court held that we have in recent years heard of ‘Khap Panchayats’ (known as katta panchayats in Tamil Nadu) which often decree or encourage honor killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people.126 We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh’s case, there is nothing honorable in honor killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.

Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such

124 Ramesh Pal etc. v. State of U.P., Decided on June 1,2011 ,The Hindu (Delhi), June 8, 2011
126 Arumugam Sevai v. State of Tamil Nadu, 2011 (6) SCC 405
atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and chargesheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.\(^{127}\)

The appellants in the present case have behaved like uncivilized savages, and hence deserve no mercy. With these observations the appeals are dismissed.

Copy of this judgment shall be sent to all Chief Secretaries, Home Secretaries and Director Generals of Police in all States and Union Territories of India with the direction that it should be circulated to all officers up to the level of District Magistrates and S.S.P./S.P. for strict compliance. Copy will also be sent to the Registrar Generals/Registrars of all High Courts who will circulate it to all Hon’ble Judges of the Court.

6.2.3.2.1 Khap Violence and Supreme Court

The Supreme Court said it intended to lay down guidelines to curb khap panchayat-dictated violence against couples marrying inter-caste or in same gotra till the government enacted a suitable legislation to deal with the menace.

Dealing with a PIL detailing the violence in various states, mainly in northern India, directed at the behest of khap panchayats, a bench of Justices Aftab Alam and Ranjana P Desai said till the government enacted a legislation, a draft of which has been submitted by the Law Commission, a guidelines on the footsteps of Vishaka judgment would fill the legal void.

“On the lines of Vishaka judgment, till such time legislation is enacted, we will issue whatever direction which is legal and proper,” the bench said and suggested that the guidelines could be implemented as a pilot project in few of the worst affected districts where khap dictated violence against matrimonial alliances had been recurring.

For this purpose, petitioner Shakti Vahini’s counsel Ravi Kant suggested Haryana districts of Jind and Rohtak and Baghpat in western Uttar Pradesh. The bench summoned the Additional Director General of Police (law and order), Haryana and Inspector General of Police, Meerut Zone, along with the Superintendents of Police of the three districts to the court on January 14 to discuss framing of guidelines and their implementation.\textsuperscript{128}

Additional solicitor general Indira Jaising supported laying down of guidelines by the court till a legislation was enacted but stressed that NGOs and social activists, who were instrumental in successful implementation of Vishaka guidelines, needed to be involved in monitoring the police action to prevent crimes against couples marrying against the wish of their parents or against the dictates of khaps.

Jai sing said the government had received representation from various khap panchayats demanding amendments to the Hindu Marriage Act to ban ‘sagotra’ marriages, but the Centre had rejected their demand.

When amicus curiae Raju Ramachandran suggested a moderate approach, the bench said, “We do not want to delay the matter any longer.” However, it said in a judicial proceeding it was imperative that the views of the khap panchayats were heard.

“We are getting the views on khap panchayats from those who are adverse to them. We may share the views but we must hear from them about their views on this issue. We may at the end of the day reject their views as unconstitutional. But it will be more satisfying in a judicial proceedings if the khaps were heard more so because all the parties before the court are hostile to them,” the bench said.

6.2.3.2.2 No Specific Legal Framework to Stop Khap-Dictated Honor Killing

Despite hundreds of couples marrying against social barriers being hounded out or killed at the behest of Khap Panchayats in northern India, Uttar Pradesh, Rajasthan and Haryana have prepared no legal framework to counter the menace; the Supreme Court was informed on Monday. UP government in its affidavit admitted that “There was no specific legal framework to address the problem of honor killings but the Director General of Police and additional DGP have issued directions to ensure compliance with the provisions of Protection of Women from Domestic Violence Act, 2005\textsuperscript{129}.”

Rajasthan was relying on two circulars – one issued in 2001 and another in 2006 – to

\textsuperscript{128} Available at : dhananjay.mahapatra@timesgroup.com (Visited on May 1, 2013)
\textsuperscript{129} Protection of Woman from Domestic Violence Act, 2005 (Act no. 43 of 2005)
check activities of caste panchayats. Haryana, on the other hand, said it had put in place an action plan to combat honor killings. This information was collated by amicus curiae Raju Ramachandran from the affidavits filed by the states in response to a PIL by NGO “Shakti Vahini” seeking the apex court’s intervention to protect couples, who were forced to annul their inter-caste marriages or killed for defiance. The Centre said it was actively planning to amend the Indian Penal Code (IPC) to make honor killing a specific offence.\textsuperscript{130}

Ramachandran’s report said there was a legislative vacuum in countering Khap Panchayats and honor killings dictated by them. “Therefore, it would be appropriate for the Supreme Court to give appropriate directions to prevent atrocities in the name of honor and tradition,” he said.

He suggested that the states must be directed to immediately identify areas, where Khaps are active and the police officers in charge of these areas must take every step possible to protect any inter-caste marriages, including protection to the threatened couple. The amicus said the police must act in advance and prevent Khap Panchayat meetings aimed at taking decisions against couples in the name of honor and if required arrest key members to foil the gatherings.

Haryana, which has seen several honor killings in the past, said its action plan mandated the police not to take action for alleged kidnapping of girl by a boy till the girl’s statement was recorded by a Magistrate. The action plan directs police to provide adequate security to couples and take strict action against those who harass, intimidate or harm couples in the name of honor, it said.

The Law Commission has already circulated a proposed legislation – Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliance) Bill, 2011 – and sought public response. It proposes upto one-year imprisonment and Rs 10,000 fine for those who participate in Khap meetings convened to condemn any inter-caste marriage.

The Bill also proposed punishment of upto two years of imprisonment and Rs 20,000 fine if one was found taking steps to prevent such marriages; a three-year jail term...

and Rs 30,000 penalty for anyone resorting to criminal intimidation of such couples.

6.2.3.3 Compensation on Illegal Confinement, torture and harassment in case of Inter Caste Marriage

In Arvinder Singh Bagga v. State of U.P\(^{131}\)

SC said we have carefully perused the report. We are appreciative of the good work done by the learned District Judge. He had held a thorough inquiry by examining several witnesses to arrive at the truth. In our considered opinion the report is a fair one and deserves to be accepted. It is accordingly accepted.

The report in no uncertain terms indicts the police. It inter alia states:

“On a careful consideration of all the evidence on record in the light of the surrounding circumstances I accept the claim of Nidhi that she was tortured by the police officers on 24/25/26-6-1993. On 24-6-1993 she was pressurised by J.C. Upadhyay SHO, Sukhpal Singh SSI and Narendra pal Singh SI and threatened and commanded to implicate her husband and his family in a case of abduction and forcible marriage thereafter. She was threatened with physical violence to her husband and to herself in case of her default and when she refused, her family members were brought in to pressurise her into implicating them. On 25-6-1993 she was jolted out of sleep by Sukhpal Singh SSI and made to remain standing for a long time. She was abused and jostled and threatened by J.C. Upadhyay, Sukhpal Singh and Narendra pal Singh with injury to her body if she did not write down the dictated note. Sukhpal Singh SSI even assaulted her on her leg with danda and poked it in her stomach. She did not yield to the pressure. Then, on 26-6-1993 566 she was given filthy abuses and threatened by J.C. Upadhyay and Sukhpal Singh for writing a dictated note. She was pushed and jostled by them both. Sukhpal Singh SSI hit her with a danda on her leg and made threatening gestures aiming his danda on her head. Ultimately they both succeeded in making her write a note dictated by them whose contents were those which were incorporated by the investigating officer in his case diary as her statement under Section 161 Cr.P.C.\(^{132}\) Thereafter on 26th July she was purported to be taken by K.C. Tyagi to the Court for the recording of her statement under Section 164 Cr.P.C but was taken by J.C. Upadhyay SHO to Chauki Chauraha Police Outpost and kept

\(^{131}\) AIR 1995 SC 117

there and brought to the police station and kept there. She was dispatched from there to Nari Niketan only at 5 p.m. When ACJM 11 had passed orders for Nidhi being kept at Nari Niketan, Bareilly, K.C. Tyagi 10 was under obligation to take her from court to Nari Niketan straightway without any delay whatsoever but she was brought back to the police station and lodged there and only afterwards she was despatched from there for Nari Niketan. Then on 29-6-1993 while being taken to the court for the recording of her statement under Section 164 CrPC, Nidhi was brought from Nari Niketan to the police station and there J.C. Upadhyay SHO commanded her to speak that which he had asked her to speak and if she did not make her statement accordingly and went with Charanjit Singh then she would not be spared by him and he would ensure that she underwent miserable lifetime. He further told her that if she cultivated enmity with the police its consequences were only too obvious. So the torture extended up till 29-6-1993. Torture is not merely physical, there may be mental torture and psychological torture calculated to create fright and submission to the demands or commands. When the threats proceed from a person in Authority and that too by a police officer the mental torture caused by it is even more grave.” This clearly brings out not only high-handedness of the police but also uncivilized behavior on their part. It is difficult to understand why Sukhpal Singh SSI assaulted Nidhi on her leg with danda and poked it in her stomach.

Where was the need to threaten her? As rightly pointed out in the report that torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to make her submit to the demands of the police? A further reading of the report shows:

(i) fabrication;
(ii) illegal arrest;
(iii) without personal knowledge or credible information that the arrested persons were involved in a cognizable offence; and
(iv) illegality of verbal order of arrest not contemplated under Section 55 Cr.P.C.

This again is a blatant abuse of law.

The report clearly holds Narendrapal Singh SI of indulging in illegal arrest and

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detention in arresting Charanjit Singh Bagga and Rajinder Singh Bagga. Further, both of them were tortured as they were given danda blows at police station on 23-6-1993. The report blames J.C. Upadhyay SHO and K.C. Tyagi 10 for the wrongful detention of Nidhi.  

“The detention of a married women in custody who is not an accused on the pretext of her being a victim of abduction and rape which never was to her knowledge and to the knowledge of the police officers concerned aforesaid is itself a great mental torture for her which cannot be compensated later but here we have found that she was tortured otherwise also by threats of violence to her and to her husband and his family and was given physical violence calculated to instill fear in her mind and compel her to yield and to abandon her marriage with Charanjit Singh Bagga which had been duly performed in Arya Samaj Bhoor and which had been duly registered in the office of Registrar of Hindu Marriages under the U.P. Hindu Marriage Registration Rules, 1963 framed by the Governor in exercise of the powers conferred by Section 8 of the Hindu Marriage Act, 1955 (Act No. XXV of 1955). She was made to write a statement as commanded by J.C. Upadhyay SHO and Sukhpal Singh SSI on 26-6-1993 which was reproduced by the 10 in the case diary as her statement under Section 161 CrPC. The physical and mental torture was given to Nidhi on 24-6-1993 and 25-6-1993 by J.C. Upadhyay SHO, Sukhpal Singh and SSI and Narendrapal Singh S.I. but on 26-6-1993 it was done by only J.C. Upadhyay SHO and Sukhpal Singh SSI and there was no participation of K.C. Tyagi in the torture and harassment dated 24-6-1993, 25-6-1993 and 26-6-1993.”

On a perusal of all the above, we are really pained to note that such things should happen in a country which is still governed by the rule of law. We cannot but express our strong displeasure and disapproval of the conduct of the police officers concerned. Therefore, we issue the following directions:

1. The State of Uttar Pradesh will take immediate steps to launch prosecution against all the police officers involved in this sordid affair.

2. The State shall pay a compensation of Rs 10,000 to Nidhi, Rs 10,000 to

Charanjit Singh Bagga and Rs 5000 to each of the other persons who were illegally detained and humiliated for no fault of theirs. Time for making payment will be three months from the date of this judgment. Upon such payment it will be open to the State to recover personally the amount of compensation from the police officers concerned.

6.2.4 Judiciary on Trafficking of Women and Girl Children

On dated 6th of December 2012, the Supreme Court after hearing the statements made by all the relevant state parties, NGOs and the panel members of the committee constituted by the Hon’ble Court itself observed that some of the State governments have initiated action to formulate schemes for rehabilitation of women in general, and the reliefs available can be extended to the target group of the proceedings i.e., Victims of Commercial Sexual Exploitation. The court perhaps for the first time also took note of the fact that one of the reasons for poor implementation of the scheme is the lack of knowledge of the availability of facilities among the people who are supposed to benefit from it. Going a step further the court also mentioned that there is lack of awareness not only among beneficiaries but also among those responsible for implementation of the schemes. Therefore, the court directed that the all the State Governments should take immediate steps to publicise the Schemes that are available through its own agencies, as well as through the State Legal Services Authorities and the District Legal Services Authorities.135

The court in order to fill the void created by the absence of appropriate facilities for the Victims of Commercial Sexual Exploitation observed that “Till such time a composite scheme as intended to be framed, is made ready, the concerned authorities should take steps in accordance with the Schemes, which are already available in the different States. We may lay some stress on the relief’s available under Section 356A of the Code of Criminal Procedure, the implementation whereof is, of course, with the State and District Legal Services Authorities. The said Authorities should also publicize the reliefs which are available under the aforesaid provision, so that victims of any kind of crime or discrimination, may apply to the Legal Services Authority directly for immediate relief.”

Further as a positive step towards providing better care and educational facilities for the children of Victims of Commercial Sexual Exploitation, it was brought to the notice of the court that the Delhi Government was contemplating to provide for additional space at MCD primary school for children in a day care centre and night drop in centre. This centre situated in the midst of a red light area- G.B road is sought to cater to the needs of the children of Victims of Commercial Sexual Exploitation in the area. The court in this matter directed that the Additional Commissioner In-charge, Community Services Department, North Delhi Municipal Corporation, Civic Centre, Minto Road, New Delhi, should take immediate steps on the basis of the letters, which have been written by the Director of the Department of Women and Child Development, in this regard, within a fortnight from the date of communication of this order.

It remains to be seen how effectively the state authorities will be able to fulfill the task of publicising the schemes as per the dictum of the Supreme Court and in compliance with their duty.

6.2.4.1 Rehabilitation of Women in Prostitution – A time for Action

The Supreme Court has issued notice to all States and Union of India on the issue of Rehabilitation. This is the right time we thought seriously about rehabilitation of victims of human trafficking. We don’t need to think about ifs and buts- it is time for action.

Recently the Supreme Court had issued notice to all states while noting down the concern on the pathetic conditions of Sex Workers:

Although we have dismissed this Appeal, we strongly feel that the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed. As already observed by us, a woman is compelled to indulge in prostitution not for pleasure but because of abject poverty. If such a woman is granted opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body. Hence, we direct the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually
abused women in all cities in India.\textsuperscript{136} We propose to have the response of the Centre and the States in this regard and hence issue notice to the Central Government and all the State Governments which will also file responses by the date fixed for hearing.

The court was expressing anguish and concern about failure of the Union of India and the States to effectively implement the National Plan of Action 1998 to combat trafficking and Rehabilitation has caused irreparable damage to lakhs of victims who have been caught in this illegal trade. The applicants states that this Honorable Court in \textit{Gaurav Jain v. Union of India} keeping in view of the legislative inertia and the consequent failure of the government directed that a high level committee be constituted to make an in depth study of these problems and to evolve such guidelines to protect the rights and interest of victims of sexual exploitation. It also laid down certain guidelines and further directed that a high level committee be constituted to make an indepth study of these problems and to evolve such suitable schemes as are appropriate and consistent with the guidelines.

The Honorable Court in \textit{Vishal Jeet v. Union of India} \textsuperscript{137} explained the pathetic situation of the victims:

\begin{quote}
No denying the fact that prostitution n always remains as a running sore in the body of civilisation and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large.
\end{quote}

The Honorable Supreme Court in Vishaljeet v. Union of India\textsuperscript{138} laid down certain guidelines for eradication of the malady:

\begin{quote}
This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Courts in such cases have to always take a serious view of this matter and inflict consign punishment on proof of such offences. Apart from legal
\end{quote}

\textsuperscript{136} \textit{Available at:} shaktivahini.wordpress.com (Visited on Feb.3, 2014)
\textsuperscript{137} 1990 AIR 1412 1990 SCR (2) 861 , 1990 SCC (3) 318 JT 1990 (2) 354
\textsuperscript{138} \textit{Ibid}
action, both the Central and the State Government who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction. Bhagwati, J. (as he then was) in Lakshmi Kant Pandey v. Union of India, 139 while emphasizing the importance of children has expressed his view thus: “It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a ‘supremely important national asset’ and the future well-being of the nation depends on how its children grow and develop. We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, Devadasi system and Jogin tradition and will also at the same time protect and safeguard the interests of the children by preventing of the sexual abuse and exploitation.

The Honorable Supreme Court in Gaurav Jain v. Union of India 140 had keeping in view the legislative inertia and the consequent failure of the Government to protect the rights and interest of the victims, laid down certain guidelines and further directed high level committee be constituted to make an indepth study of these problems and to evolve such suitable schemes as are appropriate and consistent with the guidelines. The Supreme Court realizing the enormity of the problem and the need to urgently mend the systematic and symbolic failures proceeded to give further directions.

When Shakti Vahini 141 had petitioned to the Supreme Court that such committees were not functional and pursuant to the Supreme Court notice many governments had formed the committees just to file affidavits in the Supreme Court. After that again these committees became nonfunctional. The National Plan of Action 1998 formed pursuant to the Honorable Supreme Court order has remained a dead document as nothing much has been done for the emancipation of women victims.

The National Human Rights Commission in 2006 has also framed a Plan of Action to combat Trafficking but the same has also remained as a dead document. The Government of India has initiated several initiatives in collaboration with NGOs to combat trafficking and has also formed a special cell in the Ministry of home Affairs, Government of India as the Nodal Agency for the Anti Human trafficking Units. The

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139 (1984) 2 SCC 244
141 (Writ Petition No.190 of 2002)
law enforcement agencies are also being sensitized on the issue of Trafficking and several modules for police trainings have been formulated by United Nations office on Drugs and Crimes (UNODC), Bureau of Police Research and Development (BPRD) and Ministry of Home Affairs. The Union of India in collaboration with NGOs has launched Ujjwala and Swadhar Schemes which are more focused towards trafficked children and as short stay homes.

The Government of India unfortunately has till date not devised any proper scheme for rehabilitation for women in prostitution so that they can become part of the mainstream.

The Supreme Court asked different state governments to spell out its plan for proper rehabilitation of the rescued sex workers in coordination with the experts committee formed to suggest measures in this regard.

“What are the mode and the manner in identifying those sex workers who were willing to leave the trade? After their rescue, where would they go,” a Bench of Justices Altamas Kabir and Gyan Sudha Misra asked. The court suggested that the statement under Section 164 of the Criminal Procedure Code should immediately be recorded after rescuing sex workers and there should be plans ready for providing vocational training to them. The panel headed by senior advocates Pradeep Ghosh and Jayant Bhushan told the court that the committee was going to hold a workshop on Saturday where all stake holders including sex workers and NGOs would discuss with the state government representatives on the rehabilitation plan.


This writ application has been filed by an NGO taking up the cause of the commercial sex workers residing in Mallisahi at Bhubaneswar. According to the petitioner, the members of the weaker sex being victims of circumstances like extreme poverty or having been forced by abductors to take up such activities, have become as such and no other avenue is available to them, they are compelled to work as such for their survival.

This Court specifically directed that in the counter affidavit, the State Government will furnish the details of the actions so far taken and proposed to be taken, regarding

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143 2007 (1) OLR 150
rehabilitation of the victims of commercial sexual exploitation as per the direction of the Supreme Court made in the case of *Gaurav Jain v. Union of India and Ors.* In spite of such specific direction, though this matter is pending before this Court from the year, 1998, no counter affidavit whatsoever has been filed on behalf of the State. Such inaction of non-filing of the counter affidavit, ex facie discloses the callous attitude of the State Government towards the victims as well as the scant regard to the orders passed by this Court wherein it was directed to file counter affidavit, as stated earlier.

The High Court reiterated the decision of the SC in Gaurav Jain’s case wherein the Court held that it is the duty of the State and all voluntary non-government organizations and public spirited persons to come in to their aid to retrieve them from prostitution, rehabilitate them with a helping hand to lead a life with dignity of person, self-employment through provisions of education, financial support, developed marketing facilities as some of major avenues in this behalf. Marriage is another object to give them real status in society. Acceptance by the family is also another important input to rekindle the faith of self-respect and self-confidence. Housing, legal aid, free counseling assistance and all other similar aids and services are meaningful measures to ensure that unfortunate fallen women do not again fall into the trap of red light area contaminated with foul atmosphere.

The Court also reiterated from the said decision, that “The society should make reparation to prevent trafficking in women, rescue them from red light areas and other areas in which the women are driven or trapped in prostitution.” Further, that their rehabilitation by socio-economic empowerment and justice is the constitutional duty of the State and that their economic empowerment and social justice with dignity of persons are the fundamental rights and the Court and the Government should positively endeavor to ensure them.

The Court reiterated the observations of the Supreme Court in Gaurav Jain’s case, that in the given case the Legislature has already done its duty. And the Executive and the Judiciary were required to act in union to ensure enforcement of fundamental and human rights of the fallen women.

Finally the High Court directed the State of Orissa to take immediate measures in

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accordance with the decision of the apex Court in the case of Gaurav Jain (supra) so as to rehabilitate the fallen women (commercial sex workers) residing at Mallisahi in Bhubaneswar by providing minimum amenities like water supply, electricity etc. by undertaking awareness camps to make such victims aware of their rights under the Constitution, providing minimum education to the children of such victims, providing health care so as to prevent spreading of AIDS and providing alternate accommodation to them. In the event it is decided to evict the said inhabitants of Mallisahi who are in such category, without complying with the aforesaid direction, such victims/commercial sex workers residing over Government land, admittedly for the last forty years, shall’ not be evicted from their place of residence which are under their occupation.

6.2.4.1.1 Rehabilitation of Victims and Correction of Women offenders

In this case Emphasis laid on Differentiation between victim and offender – Rehabilitation of victims and correction of women offenders. According to the petitioner, lives of women in the area had become traumatic and filled with pain and insecurity. Between 5.1.2003 and 15.4.2003, in all, 584 arrests were made, of which 546 were women and 36 were men. The arrests were made of the women in Chakla Bazaar (red light area) area without following the procedure established by law. The respondents Nos.4 and 5 and their subordinates took from the women Rs.1,000/- to Rs.1,500/- threatening them that if they did not pay up the amount, they would be imprisoned. The women arrested were not informed under what provisions of law they were arrested and were not produced before Magistrate. Only in a few instances the women were produced before the Magistrate.\footnote{Sahyog Mahila Mandal and anr. v. State Of Gujarat and ors. (2004) 2 GLR 1764}

The petitioner further submitted that if a rehabilitation plan had to be worked out, first a conducive environment needed to be built to make the women agreeable to such plan and the police authorities should be directed to stop arresting the women. It stated that due to police raids and harassment, all such policy measures were on the verge of failure and the intervention programmes would have no impact. It was also contended that the women in prostitution/sex work were entitled to right to privacy, and equal protection of law and that prostitution or sex work, which is one of the oldest professions, served an essential social function.
As per our submission, this profession is illegal as per our legal system and the service furthers violates the basic human right of these women who are not in this profession with their own free will.

The Gujarat High Court herein upheld the validity of Section 6 1(b), 14, 15 and notification dated 23.2.2000 issued by the Commissioner of Police, Surat under Section 6(1)(b) of the ITPA stating that “There is a rational connection between the impugned provisions of Section 6 and the prevention of the social nuisance associated with prostitution in such notified areas or public places… Public places provide an environment for pimps and procurers to attract women and girls or to pick up children by befriending them or offering them short-term affection and economic assistance. The purpose of these provisions is to proscribe prostitution in public places and they are neither discriminatory nor arbitrary and, therefore, do not violate the right to equality by criminalising prostitution in public places.”

It further stressed on the proper enforcement of the provisions and held that, “The primary responsibility to ensure safety and immediate well-being of trafficked persons, including victim prostitutes who are controlled and exploited by others in the trade lies heavily with the enforcement authorities and officials. It should be ensured that rescue operations do not further harm the rights and dignity of the victims of prostitution.”

Further, while stressing that the Act deals with offenders and victims not in similar ways, it observed that, “The scheme of the provisions of Sections 15(5), 16(2) read with Section 16 (2) and (4) of the Act clearly envisages a humane treatment to the victim prostitutes who are in need of care and protection and who may be detained in a protective home for a period being not less than one year and not more than three years. In the process of discharge of his functions under sub-sections (2) and (4) of Section 16, a Magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women to assist him as contemplated by sub-section (5) of Section 16. Section 21 provides for establishment of protection homes and corrective institutions under the Act. Therefore, the women and girls in respect of whom offences punishable under the Act are committed in any premises in which they are living and those who were living or made to carry on prostitution in a brothel and are rescued under Section 16, are all required to be dealt with under Section 16(4) of the Act, where the Magistrate is satisfied about the correctness of information and
the need of care and protection, by making an order of detaining them in a protective home. Even a women or a girl who carried on or is made to carry on prostitution can apply under Section 19 to the Magistrate for being kept in a protective home or to be provided with care and protection in the manner indicated in sub-section (3) of Section 19 for rehabilitation of such person.\footnote{http://nlrd.org/resources-womens-rights/anti-trafficking/anti-trafficking-latest-judgments-of-supreme-court-high-courts/differentiation-between-victim-and-offender-rehabilitation-of-victims-and-correction-of-woman-offenders-gujarat-high-court (Visited on August 8, 2013)}

In this regard further emphasis were made by the Court re these categories that “The scheme of the Act and the Rules thus clearly indicates that the victim-prostitutes,… or other persons working as prostitutes under the control of pimps and procurers and those rescued from the premises … as also those persons who are to be kept in protective or corrective detention, are all required to be dealt with by the police officials and other authorities with utmost care and concern in order to ensure that they are properly rescued, kept in safe custody and rehabilitated in accordance with the provisions of the Act and the Rules.

It further held that even though order of detention needs to be made by the Court in such cases, sub-section (3) of Section 10-A empowers the State Government at any time after the expiration of six months from the date of an order of such detention, on satisfaction of reasonable probability that the offender will lead a useful and industrious life, discharge her from such institution with or without conditions. Also, matching provisions are there in the Suppression of Immoral Traffic in Women and Girls Rules, 1985.

It also stressed that “The States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.”

The Gujrat High Court herein upheld the validity of Section 6 1(b), 14, 15 and notification dated 23.2.2000 issued by the Commissioner of Police, Surat under Section 6(1)(b) and gave following directions and orders:

1. Even a women or girl living in a brothel or who is carrying on or being made to carry on prostitution in a brothel and removed there from on direction of Magistrate under Section 16(1) is required to be produced under Section 16(2)
of the Act before the Magistrate issuing the order and is required to be dealt with in accordance with Section 16 (2), (3), (4) and (5) for the purposes of safe custody and rehabilitation;¹⁴⁷

2. On the basis of reasonable grounds for believing that an offence punishable under the ITP Act is committed in respect of a women or girl or other person, and after her removal from the premises under Section 15(4) of the Act, she should be forthwith produced before the appropriate Magistrate and examined by a registered medical practitioner for the purpose of determining her age or for detection of any injuries, as a result of sexual abuse or for the presence of any sexually transmitted diseases under sub-section (5-A) of Section 15.

3. The female offender, found guilty of an offence under Section 6 or Section 8, may be ordered by the Court to be detained in a corrective institution in lieu of sentence of imprisonment in accordance with the provisions of Section 10A of the Act.

4. The Act has provisions for identification of victims and their rescue and rehabilitation in protective homes and corrective institutions and therefore authorised police officers and the appropriate magistrates were required to exercise their functions and duties under the Act in a manner that would achieve the object of the Act of rehabilitation of the women and girls rescued or removed from brothels and other premises;

5. Having regard to the statutory provisions authorizing the appropriate magistrate to order detention of prostitutes in protective homes or corrective institutions as contemplated by Sections 10-A, 16(4) and 19(3) of the Act read with Rule 5 of the Rules framed thereunder, it is obligatory for the State Government to provide under Section 21 of the Act such number of protective homes and corrective institutions under the Act as are, in its discretion, sufficient and adequate;

6. For effective supervision and control of the rehabilitation of prostitutes, there shall be constituted by the State a high power State Level Rehabilitation Committee comprising officers such as additional chief secretary as chairman, and secretary or officer of departments like Home, Health, Finance; member

¹⁴⁷ *Ibid*
of State Commission for Women, District Health and Welfare Officer, Civil Surgeon/medical officer as members of the Committee.

7. There will also be constituted by the State Government a Local Cell for the District of Surat comprising given members.

8. The State Level Committee for Rehabilitation will get acquainted with the “Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others” and other relevant International Conventions, Declarations, Agreements or Protocols etc. to which India is a Party, and which have a bearing on the suppression of immoral trafficking and rehabilitation of women and girls.

9. The State Level Rehabilitation Committee will prepare and circulate a note expeditiously for guidance for all the authorities and officials concerned with such rescue and rehabilitation under the Act.

10. “The State Level Rehabilitation Committee may be entrusted by the State Government, subject to its ultimate control, power to take and implement its decisions in the matters of rescue and rehabilitation of the women, girls and children who are required to be dealt with for detention in protective homes and corrective institutions under the provisions of the Act.”

11. The State Level Rehabilitation Committee will take up the issue of rehabilitation of the prostitutes operating in Chakla Bazaar area of Surat on priority basis, and collect data for identifying cases which are required to be put up before the magisterial courts through authorized police officers for being dealt with under Sections 16(2)(4), 16 or 19(3) of the Act and issue directions to subordinate authorities for expeditiously dealing with such cases for the speedy rehabilitation of the women or girls and children affected by the trade of prostitution;”

12. “The State Level Rehabilitation Committee shall periodically convene, as per its convenience, at least once in two months, to review the progress in the matter of rescue and rehabilitation of the trafficked persons, especially women and children who are required to be rescued and rehabilitated as per the provisions of the said Act and the Rules made thereunder and the international

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Ibid
norms reflected in the Conventions, Protocols and Agreements to which India is a party.”

13. “The State Level Rehabilitation Committee shall consider the recommendations and suggestions of the Local Cell which will study the nature and extent of the offences committed under the Act in the City of Surat and identify the trafficked persons and females and children who are required to be rescued and rehabilitated under the provisions of the said Act and the Rules made thereunder and in consonance with the International Conventions and Protocols etc. to which India is a party and make suggestions or recommendations to the State Level Rehabilitation Committee towards rescue and rehabilitation of such persons;”

14. The Local Cell shall periodically check-up the conditions in the protective homes or corrective institutions and, if any violation of the Rules relating to maintenance of such homes/institutions were noticed, report them immediately to the State Level Rehabilitation Committee with its suggestions and recommendations in the matter;

15. The Local Cell shall inform, by suitable publications, posters or handbills in the localities involved, the women and girls working as prostitutes, about their right to make application under Section 19 for being kept in a protective home/ corrective institution and also about the facilities available in such homes and institutions under the various provisions of the Suppression of Immoral Traffic in Women and Girls (Gujarat) Rules, 1985, particularly drawing their attention to the provisions showing the facilities that are required to be made available in such homes/institutions, such as medical examination of inmates, daily routine of inmates, diet to inmates, supply of clothes etc., living space for inmates, religious and moral instructions to inmates, libraries for protective homes/institutions, and similar ameliorative provisions.

16. The Local Cell will examine genuine grievances made against police officers and other authorities in writing with sufficient particulars by NGOs or the aggrieved women or girls or other persons involved in prostitution and try to

149 Ibid
locally sort them out in accordance with law and, if legal aid is called for in any case, refer the same to the appropriate authority under the Legal Service Authorities Act, 1986;

17. The Local Cell may make such suggestions and recommendations as deemed proper for attending to the grievances of affected victims of prostitution at the hands of other persons, to the State Level Rehabilitation Committee for its consideration and decision;

18. The Local Cell shall be convened periodically, at least once in a month, to consider the aspects of rescue and rehabilitation of the women and girls working as prostitutes and the children affected by the trade, their grievances, and make monthly reports to the State Level Rehabilitation Committee about the action taken by the Local Cell for redressal of genuine grievances and facilitating rescue and rehabilitation of women or girls involved in prostitution and the children affected by the trade of prostitution under the provisions of the Act and the Rules made thereunder;

19. Finally, the State Level Rehabilitation Committee shall submit its yearly report and recommendations to the Cabinet for its consideration.

6.2.5 Judiciary on Obscenity

In Pratibha Naithani v. Union of India\textsuperscript{150} Pratibha Naithani, a political science teacher in St Xavier’s College, Mumbai, filed a compliant on the telecast of “adult and obscene films by the electronic media” and “obscene photographs” in the print media. The Court held that a number of television channels were violative of the programme code under the Cable TV Network Act and the Cable TV Network Rules. The main issue(s) of the case were whether cable operators/cable service providers are free to telecast CBFC certified adult films despite the restriction in Clause (o) of Rule 6(1) of the Cinematograph Act Rules that no programme shall be carried on the cable service which is “unsuitable for unrestricted public exhibition.”

The court held that the adult viewer's right to view films with adult content is not taken away by Clause (o) of Rule 6(1). “Such a viewer can always view Adult certified films in cinema halls. He can also view such films on his private TV set by

\textsuperscript{150} AIR 2006 (Bom.H.C.) 259
means of DVD, VCD or such other mode for which no restriction exists in law.” The Court held that the restriction upon cable operators and cable service providers that no programme should be transmitted that is not suitable for unrestricted public exhibition did not violate their right to carry on trade and business. The Court further held that only films sanctioned by the CBFC, under the Cinematograph Act and Rules, as suitable for “unrestricted public exhibition” could be telecast or transmitted on Cable TV.

The decision shows that it is freedom of every adult to watch any kind of video, film, etc. as a person above the age of 18 doesn’t fall under such a section of society “whose minds are open to such immoral influences and who is watching the content of this sort.” But this freedom is only restricted to adults and such content is not free for “unrestricted public exhibition”, so it is needed to get the film sectioned by Central Bureau of Film Certificate, the authorized organization, under the Cinematograph Act and Rules, so that only suitable content will go on air for suitable public viewing on cable TV.

In Director General, Directorate General of Doordarshan and others v. Anand Patwardhan and another\textsuperscript{151} A case was filed by independent filmmaker Anand Patwardhan challenging Doordarshan’s refusal to telecast his documentary titled, “Father, Son and Holy War.” The documentary portrayed issues such as patriarchy, violence, fundamentalism, suppression of women, etc. Part-I of the film was given a 'U' Certificate and Part-II was given an 'A' Certificate by the Censor Board. The main issues of the concern were whether the High Court was justified in directing the screening of the film certified U/A and whether the policy of Doordarshan of not telecasting adult movies can be said to be violation of Article 19(1)(a) of the Constitution of India.

The supreme court of India held that there are scenes of violence and social injustices but the film by no stretch of the imagination can be said to subscribe to any of that. The depiction is meant to convey that such social evils are evil. There cannot be any apprehension that it is likely to affect public order or incite commission of an offence.

\textsuperscript{151} 1996(8)SCC433
The Court observed that the documentary was given two awards at the 42nd National Film Festival in 1995, conducted by the Ministry of Information and Broadcasting, Government of India, after being adjudged best investigative film and best film on social issues. It was therefore highly irrational and incorrect to say that it has no specific message to convey. The Court also held that a documentary couldn’t be denied exhibition on Doordarshan simply on account of its "A" or "UA" certification.

Further Bobby Art International and others v. Om Pal Singh Hoon and others:\(^{152}\)

A writ petition was filed by the first respondent to quash the certificate of exhibition awarded to the film *Bandit Queen*. The film was based on a book which had been in the market since 1991 without objection. The first respondent was the president of the Gujjar Gaurav Sansthan and was involved in the welfare of the Gujjar community. The certificate was quashed by a single judge in the Delhi High Court and on appeal to a Division Bench, the verdict was upheld.

The court reversed the decision of the Delhi High Court. It held that since the Tribunal (Censor Board) had viewed the film in “true perspective” and granted the film an ‘A’ certificate, and since the tribunal was an expert body capable of judging public reactions to the film, its decision should be followed. The court dismissed the first respondent’s writ petition.

The court observed that a film that illustrates the consequences of a social evil necessarily must show that social evil. “We find that the (high court) judgment does not take due notice of the theme of the film and the fact that it condemns rape and degradation of violence upon women by showing their effect upon a village child, transforming her to a cruel dacoit obsessed with wreaking vengeance upon a society that has caused her so much psychological and physical hurt, and that the scenes of nudity and rape and use of expletives, so far as the Tribunal had permitted them, were in aid of the theme and intended not to arouse prurient or lascivious thoughts but revulsions against the perpetrators and pity for the victim.”

6.2.5.1 Depiction of Women in an Undignified Manner by the Media

In *Suo Moto v. State of Rajasthan*:\(^{153}\) The Rajasthan High Court taking up the matter (of “the depiction of women in an undignified manner by the media”) *suo moto*,

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\(^{152}\) 1996 AIR (SC) 1846  
\(^{153}\) AIR 2005 Raj 300
directed the Ministry of Information and Broadcasting, the Director General of
Doordarshan and the Registrar of Newspapers, to submit affidavits of the concerned
authorities indicating how the menace was being controlled and eradicated.

On August 29, 2004, the court further directed the Government of India and the state
of Rajasthan to offer concrete suggestions on how to curb the menace of depicting
women in an indecent manner in newspapers, magazines, advertisements, television
programmes, posters and music videos. The Monitoring Committee was also directed
to submit a report on obscenity in hoardings and other advertisements and on
television.

The Committee was asked to scrutinise television programmes telecast by various
channels as well as newspapers in order to identify advertisements or photographs or
material that were “compromising the dignity of women and at the same time
corrupting and degrading those whose minds are open to immoral influence”.

In its report the Committee submitted that there was no effective scrutiny of
newspapers. The Rajasthan High Court listed the findings of a meeting that the
Committee had with various women’s organisations:

Issue(s): The main issue involved in this petition was the depiction of women in an
“undignified manner” by the media, including television channels, and the nature of
the government’s responsibility in regulating this.

Decision: The court held that before telecasting/ broadcasting the programmes under
the Cable Television Networks (Regulation) Act 1995, it is expected that the
government verifies whether the programmes that are going to telecast conform to the
regulations or not.

The court said that in cases where a programme is telecast and broadcast in violation
of Rule 6(1)(k) of the Cable Television Networks Rules, 1994, and where the
programme is found indecent or derogatory to women, or is likely to deprive, corrupt
or injure public morality or morals, strict action had to be initiated against those
responsible for such telecasting. Similar action must also be taken against persons
responsible for hoardings, advertisements and posters. The court said that the District
Magistrate or Sub Divisional Magistrate or a Commissioner of Police has to take steps
under Section 19 of the Act to prohibit in the public interest transmission of certain
programmes found violative of the prescribed Programme and Advertising Codes.
The court observed that the government had enacted the Indecent Representation of Women (Prohibition) Act, 1986, but that there was lack of implementation and enforcement of such laws and regulations.

The court directed the government to ensure that advertisements not following rules and regulations be discontinued. “Using scantily clad female models for products like car batteries, tobacco, electric inverters, shaving appliances and other advertisements should be stopped forthwith.”

According to the court, the Censor Board should ensure that 'A' certificates are given to adult films and posters for such films are displayed in a “more healthy and less revealing manner” at public places and near cinema halls.

The state government was directed to constitute a District Level Committee to implement the Indecent Representation of Women (Prohibition) Act, 1986, under the chairmanship of the District Collector, with members drawn from among official and non-official organisations working for women's empowerment, jurists, cinema hall owners, etc.

The court directed the Central Government to authorise a responsible person to oversee and ensure strict compliance with the Cable Television Networks (Regulation) Act, 1995 and Rules and the provisions of the Indecent Representation of Women (Prohibition) Act, 1986.

It asked the Central Government to help promote cooperation between state agencies in order to ensure strict compliance with the relevant acts and rules. According to the court, compliance should be made in true in letter and spirit. It should not be a mere formality to give the statistics and details of action taken by the Union of India and the state government. Concrete steps should be taken to prevent the depiction of women in an undignified manner through broadcasting, telecasting and advertisements, etc, and prompt steps need to be taken against the responsible persons. Balancing between protection of children

In Ajay Goswami v. Union of India and others

The petitioner's grievance was that the freedom of speech and expression enjoyed by the newspaper industry is not balanced with the protection of children from harmful

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154 AIR2007SC493
and disturbing materials. The petitioner requested the court to direct the authorities to
strike a reasonable balance between the fundamental right of freedom of speech and
expression enjoyed by the press and the duty of the government to protect vulnerable
minors from abuse, exploitation and the harmful effects of such expression. The
petitioner requested the court to direct the concerned authorities to provide for
classification or introduction of a regulatory system for facilitating a climate of
reciprocal tolerance, which could include:

(a) an acceptance of other people's rights to express and receive certain ideas and
actions; and

(b) accepting that people have the right not to be exposed against their will to
another person's expression of ideas and actions.

The court held that in view of the availability of sufficient safeguards in terms of
various laws, rules, regulations and norms to protect society in general and children in
particular from obscene and prurient contents, the petitioner's writ was not
maintainable.

It stated that any steps to ban publication of certain news pieces or pictures would
fetter the independence of the free press, which is one of the hallmarks of our
democratic setup.

The court examined the test of obscenity very carefully through existing Indian case
law and case law from other jurisdictions. It held that an imposition of a blanket ban
on the publication of certain photographs and news items, etc, would lead to a
situation where the newspaper will be publishing material catering only to children
and adolescents, thereby depriving adults of their share of entertainment of a kind
permissible under accepted norms of decency in any society.

The court also held that a culture of “responsible reading” should be inculcated
among the readers of any news article: “No news item should be viewed or read in
isolation. It is necessary that publication must be judged as a whole and news items,
advertisements or passages should not be read without the accompanying message
that is purported to be conveyed to the public. Also, members of the public and
readers should not look for meanings in a picture or written article which are not
conceived to be conveyed through the picture or the news item.”

The court dismissed the petition, but observed that the Central Government should
seriously look into, and make appropriate amendments to, the provisions of Section 14(1) of the Press Council Act, 1968 in accordance with the request made by the Press Council of India to arm it with the authority to recommend official de-recognition of newspapers for government advertisements or for an appropriate period or withdrawal of the accreditation granted to a journalist to facilitate functioning and also to claim concessions in railways, etc.

In *R. Basu v. National Capital Territory of Delhi and another*155

Mr. Arun Aggarwal, a practising advocate, filed a complaint before the learned Chief Metropolitan Magistrate (CMM) against Star TV, Star Movies and Channel V, naming persons responsible for the day-to-day affairs of these channels or the various cable operators transmitting these channels. According to the complainant, the obscene and vulgar TV films shown and transmitted through various cable operators amounted to obscenity and, therefore, the accused persons had committed offences under Sections 292/293/294 IPC and under Section 6 read with Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986.

Decision: The high court held that for the two films without censor certificates the petitioners could not claim immunity from Section 292 IPC. For the other two films, also, the court said that, since the petitioners had not produced CBFC certificates, they could not claim immunity from prosecution.

The court observed that the legislature had enacted the Cable Television Network (Regulation) Act to tackle the “problem” of obscenity, and a Programme Code had also been introduced. “Various statutory safeguards for regulating transmission on cable television networks in India have been provided therein. The petitioners have to abide by these guidelines and laws relating to the electronic media, keeping in mind the sentiments and social value of the Indian society, while relaying its programmes.”

The court observed that, in view of this development, a joint application was moved by the petitioners and the complainant, in which the complainant agreed not to press his complaint in view of the aforesaid statutory provisions and other provisions now in place.

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155 2007 Cri.LJ 4245
Facts: MF Husain painted an art work of a nude lady in grief without giving it any title. The untitled painting was sold to a private collector in 2004. In 2006 it was included as part of an online charity auction for victims of the Kashmir earthquake under the name ‘Bharat Mata.’ Husain had no role or involvement in this auction. There were large-scale protests against the painting, which appeared in an advertisement for the auction. Husain had to tender an apology to the public for the same.

This was the context in which several complaints were filed in different parts of the country alleging various offences against M F Husain on the account of the said painting. Arrest warrants and summons to appear in court were issued against him in these places. Husain approached the Supreme Court for the consolidation of all the complaints. The apex court consented and the matter was consolidated and transferred to the court of Ld. ACMM, Delhi, by way of transfer petitions. This court issued summons against the petitioner, M F Husain, for crimes under Sections 292, 294 and 298. A revision petition against this was filed in the Delhi High Court.

Issues: Whether Husain’s portrayal of ‘Bharat Mata’ should be considered obscene and whether he should be held criminally liable under Section 292 of the IPC.

Decision: The court held that, on the face of it, the painting was neither lascivious nor likely to appeal to the prurient interest – i.e., the painting would not arouse sexual interest in a perverted person and would not morally corrupt or debase a person viewing it.

The court ruled that nudity alone cannot be said to be obscene. According to the judgment, “…the aesthetic touch to the painting dwarfs the so-called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked.” The nude woman was not shown in any peculiar kind of posture, nor were her surroundings painted so as to arouse sexual feelings or lust. The placement of the Ashoka Chakra was also not on any particular part of the body of the women that could be deemed to show disrespect to the national emblem.

The court observed that magistrates should scrutinise each case in order to prevent vexatious and frivolous cases from being filed. Only in appropriate cases should a private complaint case proceed further without a prior investigation by the police – a
magistrate should postpone the issue of process against the accused in cases where the accused resides at a place beyond the area in which he exercises jurisdiction. He must examine the nature of the allegations made in the complaint and the evidence – both oral and documentary – in support thereof and even question the complainant and witnesses himself to find out whether or not there is a prima facie case.

According to the judges, “There are very few people with a gift to think out of the box and seize opportunities, and therefore such people’s thoughts should not be curtailed by the age-old moral sanctions of a particular section of society having oblique or collateral motives who express their dissent at every drop of a hat.”

The court recommended that the government think of appropriate legislation to make sure that artists and other creative persons are not made to run from pillar to post to defend themselves against criminal proceedings initiated by oversensitive or motivated persons for publicity.

The Supreme Court for the first time adopted and expanded the scope of the test for obscenity during the trial of 1965 case of Ranjit Udeshi and used Hicklin test of England, which defined obscenity as matter which had the tendency “to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall”. The Hicklin test allows a publication to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on “most susceptible” readers such as children or weak-minded adults.

It is very unfortunate that the definition of obscenity provided in the Indian constitution is very vague i.e. it doesn’t give a proper definition to obscenity. The history of obscenity trials indicate that anything which is sexually explicit has been considered obscene. But now the scenario is changing, recent trails shows that the decisions taken by the judges on different cases are more liberalized towards distinction of sex and sex related matters. Form the study of two different cases, Pratibha Naitthani v. Union of India and Directorate General of Doordarshan and Others v. Anand Patwardhan and Another, it has been found that:

158 AIR 2006 Bom 259
159 1996(8)SCC433
It is freedom of every adult to watch any kind of video, film, etc. as a person above the age of 18 doesn’t fall under such a section of society “whose minds are open to such immoral influences and who is watching the content of this sort.” But this freedom is only restricted to adults and such content is not free for “unrestricted public exhibition”, so it is needed to get the film sectioned by Central Bureau of Film Certificate, the authorized organization, under the Cinematograph Act and Rules, so that only suitable content will go on air for suitable public viewing on cable TV. It is also found that how definition of obscenity is determined by the way the maker has treated the subject. One cannot simply certify anything as obscene even if it is carrying certain remarks about sex and sexuality; it has to be judged from an average, healthy and common sense point of view, because it is the treatment given by the maker which determines what is obscene and what is not.

6.2.6 Cases of Outraging Modesty of Women and Judiciary

Section 354 mentions ‘to outrage modesty of women’ but the section does not define what modesty is? ‘Outrage the modesty of women’ is a vague term. What can be termed as modesty for one women, need not necessarily be the same for some other women.

Further, the meaning of molestation makes an assault on a women, culpable only if it is done with the intention of outraging her modesty. In absence of an extensive definition of ‘modesty’ and ‘intention of outraging’, courts have displayed a patriarchal mindset in dealing with the victim. Also, the offence of rape defined in section 366 of IPC is constituted only when ‘penetration’ is present. Hence, the grey area lies between section 354 and section 366? Courts often rely upon technicality of the absence of ‘penetration’ and impose a relatively minor punishment of imprisonment up to two years for molestation.

The court tried to define the term ‘outraging the modesty of women’ in the case of Aman Kumar v. State of Haryana 160, saying the act of pulling a women, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a women, and knowledge that modesty is likely to be outraged, is sufficient to constitute the offence.

Also in the case Rupan Deol Bajaj v. K.P.S. Gill161 the court said that since the word ‘modesty’ has not been defined in the Indian Penal Code, dictionary meaning was looked

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upon. According to Shorter Oxford English Dictionary (3rd Edn.) modesty is the quality of being modest and in relation to women means “womenly propriety of behavior, scrupulous chastity of thought, speech and conduct”\textsuperscript{162}. In relation to women, the term ‘modest’ in the same dictionary is defined as “decorous in manner and conduct; not forward or lewd; shame fast”.

Also in the case \textit{Ram Das v. State of West Bengal}\textsuperscript{163} a railway officer who was forcibly trying to secure a berth, occupied by a lady and her baby was accused for committing offence under Section 354 and was sentenced with two years of imprisonment. The matter was brought to Supreme Court and it said that the most serious allegation against the appellant was that he forcibly held the two ladies to his chest thereby trying to outrage the modesty of two women in the presence of two gentlemen which is so unnatural, that there must be clear and unimpeachable evidence before it can be accepted.

The Supreme Court held that appellant being a railway employee; it was his duty to behave courteously to passengers. His conduct in forcibly trying to occupy the seat occupied by a lady and her baby and assaulting her when she resisted, called for censure. Appellant was held guilty of assault\textsuperscript{164} but not with an intent to outrage modesty. A sentence of three months rigorous imprisonment was awarded by SC, the maximum sentence permissible under Section 352 and acquitted the charge under Section 354.

The state of Andra Pradesh however took an initiative in 1991 by following substitution for Section 354, “Assault or criminal force to a women with intent to outrage her modesty.-Whoever assaults or uses criminal force to a women, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and is liable for fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term which may be less than five years, but which shall not be less than two years.”\textsuperscript{165}

The term ‘women’ is very unclear and controversial. Does it include women of all ages, right from a newly born baby to an elderly octogenarian women? Are mentally disordered,

\textsuperscript{162} Available at : Collins Cobuild Advanced Learners English Dictionary 922(4 ed.,2003); See Generally Collins English Dictionary 1047(7th ed.,2005)
\textsuperscript{163} A.I.R. 1954 S.C. 711: 1954 Cr L.J. 1793
\textsuperscript{164} See Sec. 352, \textit{Indian Penal Code, 1860}
\textsuperscript{165} See Sec. 2, \textit{Andra Pradesh Act no.6 of 1991}. 
physically challenged, women under anaesthesia etc included?

In landmark case *State of Punjab v. Major Singh* 166 a three judge SC bench decided, injury to vagina of a female child of seven and half months can hold accused guilty of outraging modesty under Section 354.

The judge Sarkar, C.J interpreted that an act done with the intention or knowledge that it was likely to outrage the women's modesty be considered along with female’s reaction. Females of all age do not possess modesty, which can be outraged and dismissed the appeal.

The second judge Mudholkar, quoted ‘modesty’ as not referring to a particular women but to the accepted notions of womanly behavior and society. Whether female has capacity to understand or not is immaterial, allowed the appeal and held conviction under Section 354. As per the third judge Bacbawat, J. the expression "women" denotes a female human being of any age. The culpable intention to outrage the modesty being the bottom line of the matter and agreed with the order of Mudholkar.

In yet another landmark case *Rupan Deol Bajaj v. K.P.S. Gill* 167 a DGP who slapped on the posterior of lady IAS was accused of outraging modesty. A compliant was filed. Later revision complaint under Section 482 of the Cr.P.C 168 was filed which was quashed by High Court. The prosecutrix challenged it, SC directed Chief Judicial Magistrate to take cognizance.

Trial found accused guilty under Section 354, 509 IPC and sentenced imprisonment with fine. In an appeal, Sessions Judge confirmed conviction, altered the sentence releasing accused on probation with fine enhanced to Rs. 50,000/-. On challenging this, the HC did not interfere with the conviction but enhanced fine to Rs. 2, 00,000/-. This too was challenged.

The SC did not set aside the findings of the various courts and observations of HC as it had set an example and enhanced the faith of a common man in judiciary. As accused had completed the period of probation without any complaint or violation, so no other punishment was warranted and appeal dismissed.

6.2.7 Acid Attacks on Women and Judiciary

The Supreme Court of India has provided various guidelines to stop acid attacks, in this series in *Laxmi v. Union of India*¹⁶⁹, On 6.2.2013, gave a direction to the Home Secretary, Ministry of Home Affairs associating the Secretary, Ministry of Chemical & Fertilizers to convene a meeting of the Chief Secretaries/concerned Secretaries of the State Governments and the Administrators of the Union Territories, inter alia, to discuss the following aspects:

(i) Enactment of appropriate provision for effective regulation of sale of acid in the States/Union Territories.

(ii) Measures for the proper treatment, after care and rehabilitation of the victims of acid attack and needs of acid attack victims.

(iii) Compensation payable to acid victims by the State/or creation of some separate fund for payment of compensation to the acid attack victims.

Also following the order of 6.2.2013, three subsequent orders on 16.4.2013, 9.6.2013 and 16.6.2013 were passed by this Court.

Supreme Court accordingly, direct that the acid attack victims shall be paid compensation of at least Rs. 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs. 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter¹⁷⁰. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance of the above direction.

In its latest judgment dated July 26, 2014 Hon’ble Supreme Court has asked the government to increase the amount of compensation to victims of acid attacks from Rs. 3 lakhs to 10 lakhs, since the medicine and surgeries are very costly.

An Apex Court bench headed by CJI Lodha reportedly expressed alarm over the instances of acid attack by jilted lovers, questioning the government for its “laxity” in

¹⁶⁹  The Criminal Writ Petition 129 of 2006
dealing with the situation which has turned “pathetic\(^\text{171}\)”. The Bench has issued notices to the Centre as well as the State Governments on a plea for framing rehabilitation policy for acid attack victims.

The Court was hearing a PIL filed by a Bihar based NGO, Parivartan Kendra, which is a registered NGO (Registration No. 206/2006 under the Registered Society Act, dated 28.05.06 at Patna, Bihar).

The Supreme Court had earlier set March 31 as a deadline for State Governments to frame rules for regulating sale of acid and other corrosive substances to prevent their misuse. It had further directed the crime to be made a non-bailable offence and had increased the compensation amount to Rs. 3-lakhs for the victims. The Court had directed that a photo identity card containing residential address issued by authorities concerned would be required for purchasing such substances which in any case cannot be sold to a person who is below 18 years. While *Laxmi v. Union of India & Ors* prayed for new laws regulating the sale of acid, this PIL only addresses the rehabilitation of the acid attack survivors.

The petition claimed that over a 1000 attacks have occurred in India in the past year targeting mostly young women, with attackers have ranging from disapproving boyfriends’ families, to jilted stalkers, to street stalkers to even family members. The petition challenged the compensation amount of 3 lakh as fixed by the court, stating that it is grossly inadequate, unreasonable unduly, and arbitrary. This amount does not take into consideration the acid attack survivor’s struggles at all. Acid attacks need lifelong surgeries with each surgery costing around Rs. 3 lakhs. The petition also points out blatant violations of the apex court order and states that, “acid is still readily available to most of the population in India, acid attackers continue to live with impunity, and victims cannot afford basic care or services\(^\text{172}\).”

It points out the grounds where the Indian law lacks, as it does not address the issue of speedy investigation, does not address any methods to expedite the trials for acid survivors and that the law has not included inputs from survivors or advocacy groups.


6.2.8 Judiciary on Sexual Harassment at Workplace

Vishaka and Others v. State of Rajasthan and Others\(^\text{173}\) was the case, which brought sexual harassment at workplace into public glare. The petitioners wanted assistance in suitable methods for realization of the true concept of “gender equality”; and to prevent sexual harassment of working women in all workplaces through judicial process and to fill the vacuum in existing legislation. The Supreme Court held that, “each incidence of sexual harassment of women at workplace results in violation of the fundamental rights,” “gender equality” and the ”right to life and liberty.” It was a clear violation of the articles 1, 15 and 21 of the constitution. Gender equality includes protection from sexual harassment and right to work with dignity, which is universally, recognized Human Right. From the viewpoint of the Supreme Court it took this case quite seriously as it understood the gravity of the situation. The Supreme Court took assistance from the then solicitor general of India to formulate certain guidelines and norms to help working women against sexual harassment.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time, It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.

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

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

a) Physical contact and advances;
b) A demand or request for sexual favors;
c) Sexually coloured remarks;
d) Showing pornography;

\(^{173}\) (JT 1997 (7) SC 384)
e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Where any of these acts is committed in circumstances where-under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto. Preventive Steps need to be taken: All employers or persons in charge of work place whether in public or private sector should take appropriate steps to prevent sexual harassment.

Following the judgment in Vishaka case, Supreme Court in Smt. Vijay Jalali v. H.M.T. LTD. and Others held that no disciplinary action can be taken against the harassed employee for any action like beating etc. taken by her in self defence.\(^{174}\)

*In Apparel Export Promotion Council v. A.K. Chopra* supreme court broadened the definition of sexual harassment and observe some new patterns regarding the issues.

Few questions raised in this case are

- Does an action of the superior against a female employee which is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment?
- Is physical contact with the female employee an essential ingredient of such a charge?
- Does the allegation that the superior tried to molest a female employee at the place of work, not constitute an act unbecoming of good conduct and behavior expected from the superior?

\(^{174}\) M.P.H.C. 2010 LLR ,1060, “Dismissal of female employee for slapping a security guard is liable to be quashed when she was sexually harassed by him”, *Legal News And Views*,25(3),March 2011,
The Supreme Court in this case declared that sexual harassment is gender discrimination against women and also said that any act or attempt of molestation by a superior will constitute sexual harassment\textsuperscript{175}.

Supreme Court said that the nature of approach expected from the law courts to cases involving sexual harassment which come to the forefront and require our consideration. In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression molestation. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favor of the superior officer is wholly misplaced and mercy has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee, Miss X, was wholly against moral sanctions, decency and was offensive to her modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. Also Supreme Court added some more points to the already provided guidelines\textsuperscript{176}.

Another landmark judgment on this issue came in the form of Medha Kotwal Lele and Others v. Union of India and Others\textsuperscript{177} wherein supreme court has laid down some fresh guidelines regarding Sexual Harassment at Work Place. Supreme Court asserted that this Court has passed certain orders from time to time. Notices were issued to all the State Governments. The States have filed their responses. On 26.4.2004, after hearing the learned Attorney General and learned counsel for the States, this Court directed as follows: “Complaints Committee as envisaged by the Supreme Court in its judgment in Vishaka’s case will be deemed to be an inquiry authority for the purposes of Central Civil Services (Conduct) Rules, 1964 (hereinafter called CCS Rules) and the report of the complaints Committee shall be deemed to be an inquiry

\textsuperscript{175} AIR 1999 SC 625: 1999 AIR SCW 274: 1999 Lab IC 918
\textsuperscript{176} http://www.legalserviceindia.com/lawyer (Visited on Jan.12, 2014)
report under the CCS Rules. Thereafter the disciplinary authority will act on the report in accordance with the rules.” This Court further directed in the order dated 26.4.2004 that similar amendment shall be carried out in the Industrial Employment (Standing Orders) Rules. As regards educational institutions and other establishments, the Court observed that further directions would be issued subsequently.

On 16.1.2006, this Court in couple of these matters passed the following order: “These matters relate to the complaints of sexual harassment in working places. In *Vishaka v. State of Rajasthan*\(^{178}\), this Court issued certain directions as to how to deal with the problem. All the States were parties to those proceedings. Now, it appears that the directions issued in *Vishaka* case were not properly implemented by the various States/Departments/Institutions. In a rejoinder affidavit filed on behalf of the petitioners, the details have been furnished. The counsel appearing for the States submit that they would do the needful at the earliest. It is not known whether the Committees as suggested in *Vishaka* case have been constituted in all the Departments/Institutions having members of the staff 50 and above and in most of the District level offices in all the States members of the staff working in some offices would be more than 50.

It is not known whether the Committees as envisaged in the *Vishaka case* have been constituted in all these offices. The number of complaints received and the steps taken in these complaints are also not available. We find it necessary to give some more directions in this regard. We find that in order to co-ordinate the steps taken in this regard, there should be a State level officer, i.e., either the Secretary of the Woman and Child Welfare Department or any other suitable officer who is in charge and concerned with the welfare of women and children in each State. The Chief Secretaries of each State shall see that an officer is appointed as a nodal agent to collect the details and to give suitable directions whenever necessary\(^{179}\).

As regards factories, shops and commercial establishments are concerned, the directions are not fully complied with. The Labor Commissioner of each State shall take steps in that direction. They shall work as nodal agency as regards shops, factories, shops and commercial establishments are concerned. They shall also collect the details regarding the complaints and also see that the required Committee is

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\(^{178}\) (1997) 6 SCC 241

\(^{179}\) Ibid
established in such institutions. Counsel appearing for each State shall furnish the
details as to what steps have been taken in pursuance of this direction within a period
of eight weeks.

On the basis of these guidelines and various other strictures passed from time to time
by Supreme Court finally Sexual Harassment of Women at Workplace (Prevention ,
Prohibition and Redressal)Act, 2013<sup>180</sup> has been passed by the Parliament which has
been elaborated in detail in the previous chapter.

6.2.9 Female feticide and Judiciary

Indian society's discrimination towards female child still exists due to various reasons
which has its roots in the social behavior and prejudices against the female child and,
due to the evils of the dowry system, still prevailing in the society, in spite of its
prohibition under the Dowry Prohibition Act. The decline in the female child ratio all
over the country leads to an irresistible conclusion that the practice of eliminating
female fetus by the use of pre-natal diagnostic techniques is widely prevalent in this
country. Female feticide has its roots in the social thinking which is fundamentally
based on certain erroneous notions, ego-centric traditions, pervert perception of
societal norms, and obsession with ideas which are totally individualistic sans the
collective good. All involved in female feticide deliberately forget to realize that
when the fetus of a girl child is destroyed, a woman of future is crucified.<sup>181</sup> The
supreme court has also stated that Indian women have suffered and are suffering
discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude
and yet they have been subjected to all inequities, indignities, inequality and
discrimination<sup>182</sup>.

6.2.9.1 Steps at various levels

To stop the increasing number of sex selective abortions and balancing the skewed
sex ratio, the Parliament enacted the Pre- Conception and Pre-Natal Diagnostic
Techniques (Prohibition on Sex- Selection) Act, 1994<sup>183</sup>, which has its roots in Article
15(2) of the Constitution of India. The Act is a welfare legislation. The Parliament
was fully conscious of the fact that the increasing imbalance between men and women

<sup>180</sup> Act no.14 of 2013, w.e.f. April 22, 2013
<sup>181</sup> http://www.advocatekhoj.com/library/judgments/announcement.php?WID=3222(Visited on March
2, 2014)
<sup>182</sup> Madhu Kishwar v. State of Bihar (AIR 1996 5 SCC 125)
<sup>183</sup> ACT NO. 57 OF 1994 enacted on September 20, 1994
leads to increased crime against women, trafficking, sexual assault, polygamy etc. Unfortunately, facts reveal that perpetrators of the crime also belong to the educated middle class and often they do not perceive the gravity of the crime.

Supreme Court from time to time has issued guidelines to curb this menace, in 2001 in Centre for Enquiry into Health and Allied Themes v. Union of India\textsuperscript{184} had noticed the misuse of the Act and gave various directions for its proper implementation. Non-compliance of various directions was noticed by this Court again in Centre for Enquiry into Health and Allied Themes v. Union of India\textsuperscript{185} the two-Judge Bench commenced the judgment stating that the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents. The Court also commented on the immoral and unethical part of it as well as on the involvement of the qualified and unqualified doctors or compounders to abort the fetus of a girl child. It is apposite to state here that certain directions were given in the said decision.

In light of the alarming decline in sex ratios in the country to the disadvantage of women, on the petition was filed by CEHAT an organization working for the welfare of women and children seeking directions from the Supreme Court for the implementation of the Pre-Natal Diagnostic Techniques Act which regulates the provision of pre-natal diagnostic technology. In this case the Court took on the unique role of actually monitoring the implementation of the law and issuing several beneficial directives over the course of 3 years during which the case was proceeding in court. This petition put the issue of sex selection and sex selective abortion on the national agenda and as a consequence there have been heightened activities on this issue by government and non-governmental agencies alike.

Having noticed that those directions as well as the provisions of the Act are not being properly implemented by the various States and Union Territories, the supreme court passed an order on 8.1.2013 directing personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they have taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by this Court\textsuperscript{186}.

\textsuperscript{184} (2001) 5 SCC 577
\textsuperscript{185} (2003) 8 SCC 398, WP (C) No. 339 of 2002
\textsuperscript{186} Voluntary Health Association of Punjab v. Union of India & Others [Writ Petition (Civil) No. 349 of 2006], decision 3rd march, 2013
It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilized. In the first part of the last century Swami Vivekanan had said: "Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."

6.2.9.2 Strict Action against Culprit Doctors

The health ministry seems to be flexing its muscles against the practice of sex determination and female feticide by seeking action against 100 doctors across the country for violation of Pre-conception & Pre-natal Diagnostic Techniques Act, 1994 (PC & PNDT Act).

The ministry has sent a list of 100 names detailing the punishment awarded to the doctors by various courts to the Medical Council of India (MCI). The ministry has sought action by MCI in the matter of suspension/cancellation of medical license of these doctors convicted under the PC & PNDT Act. Punishment ranged from six months to five years' imprisonment to outright cancellation of medical license and fines $^{187}$.

6.2.9.3 Human Trafficking Rising Due to Female Feticide: Court

A trial court here has urged exercising of zero tolerance in female feticide cases, observing that the illegal sex determination tests are giving rise to human trafficking.

Citing the figures of sex ratio in India and statistics that said that nearly 10 million female fetuses have been aborted in the country over the past two decades, Additional Sessions Judge Kamini Lau said that “courts have to exercise a zero tolerance for those prima facie involved in the crime of female feticide”.

“Of the 12 million girls born in India, one million do not see their first birthdays. As a result of this human trafficking has become common in various states of India where teenage girls are being sold for cheap money by poor families, being treated as sex objects with more than half of such cases going unreported,” she said in an order Wednesday but only made available Thursday.

The judge cited the United Nations’ World Population Fund reports which indicate that India has one of the highest sex imbalances in the world and the demographers warn that there will be a shortage of brides in the next 20 years because of the adverse juvenile sex ratio.

The court observed that advent of technology like ultrasound techniques resulted in the fetal sex determination and sex selective abortion by medical professionals. “Is it not that when a female child is aborted after sex determination, it is the doctor whose aim is to save the lives of people, who connives in this illegal act only for earning a few extra bucks?” it asked.

It noted that there are thousands of such clinics where such illegal activities of sex determination and abortions are carried out on a daily basis and in some cases, in connivance with politicians, police and other local authorities. The judge urged that as a part of a national policy, this court is required to come down heavily on those involved into illegal acts relating to female feticide.

6.2.10 Judiciary and Instances Domestic Violence

The Hon’ble Apex Court in Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade And Others, reported in, 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. Hon’ble 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) also, but, no restrictive meaning can be given to expression “relative” nor has said (6) expression been defined to make it specific to males only.

6.2.10.1 Definition of domestic violence is broadened to include emotional and verbal abuse

The Domestic Violence Act is a beneficial piece of legislation, which is an outcome of the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995). It is also a result of efforts of United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW). Undoubtedly

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189 (2011) 3 SCC 650
domestic violence is being committed in India on an epidemic scale. Although the criminal law deals with domestic violence in the form of Section 498-A IPC, it was felt that there is no remedy under the civil law. Therefore, in order to get rid of the mischief of domestic violence, the Parliament, in its wisdom, enacted the Act, which came into force on 26 October, 2006. Undoubtedly the Act is meant to protect the women from domestic violence committed against them by the husband and his family members. The Act has recognised the fact that domestic violence is limited not only to physical and mental cruelty, but can also extend to verbal and emotional abuse, and even to economic abuse. The Act has recognised the fact that mental cruelty can take the form of verbal and emotional abuse, such an abuse would include threat to causing physical abuse to any person in whom the aggrieved person is 14 interested. Moreover, the Act has recognised that aggrieved person has a right to economic resources of the husband and his family members, has a right to “stridhan”, and has a right to be maintained. In case her economic rights are violated by the husband or his family members, then according to Section 3 of the Act, domestic violence is committed. Since the Act is a social beneficial piece of legislation, Section 3 of the Act must be given a liberal interpretation. Moreover, she has been denied her stridhan, she has been denied maintenance, she had been denied access to shared household even after October 26, 2006. Hence, civil wrongs are continuing even after the date when the Act has come into force. Gajendra Singh v. Minakshi Yadav.

6.2.10.2 Protect Women from Domestic Violence

Women have been subjected to violence, domestic or otherwise, throughout the pages of history—whether they be Helen of Troy, or Sita of Ramayana, whether they be Casandra of Troy, or Dropadi of Mahabharata. Women have been easy pray to the male ego, and dominance. Much as the Indian Civilization pays obedience to the feminine divine, but the harsh reality remains that throughout the length and breath of this country, women are assaulted, tortured, and burnt in their daily lives. The phenomenal growth of crime against women, has attracted the attention of the international community. The International organisations took a serious look at the

epidemic called “domestic violence”. The Vienna Accord of 1994, and the Beijing Declaration and the Platform for Action (1995) felt the necessity for a proper law on this burning issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) asked the member nations to enact a proper law for dealing with the mischief of domestic violence192.

In India, although the criminal law deals with domestic violence in the form of Section 498-A IPC, but there was no provision in the Civil Law to deal with the said problem. In order to get rid of the mischief of domestic violence, the Parliament, in its wisdom, enacted the Act, which came into force on 26 October, 2006. The Act is a social beneficial piece of legislation, which should be given as wide and as liberal an interpretation as possible.

Thus, Section 20 of the Act is meant to ameliorate the financial condition of the aggrieved person, who may suddenly find herself to be without a hearth and home. Financially, the aggrieved person may exist in a suspended animation, if she is neither supported by the husband, nor by her parents. In order to protect women from such a perogutory, Section 20 bestows a right to seek monetary relief in the form of compensation and maintenance. Section 20, thus, is a powerful tool for ensuring gender equality in economic terms. Section 20, does not contain any exception in favor of the husband. In fact, it recognises the moral and legal duty of the husband to maintain the wife. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilized. In the first part of the last century Swami Vivekanand had said: - "Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind"193.

In an era of human rights, of gender equality, the dignity of women is unquestionable. Articles 14 and 15 of the Constitution of India recognise the dignity of women. The Constitution empowers the Parliament to enact laws in favor of women. Flowing from the constitutional ranges, Section 125 Code of Criminal Procedure, Section 24 Hindu Marriage Act, Section 20 Domestic Violence Act, ensure that women are paid maintenance by the husband. Section 26 of the Act further lays down that the

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193 Voluntary Health Association of Punjab v. Union of India & Others [Writ Petition (Civil) No. 349 of 2006], decision 3rd march, 2013
maintenance paid under the Act, would be in addition to maintenance paid under any other law being in force for the time being. Therefore, the provisions of the Act are supplementary to provisions of other law in force, which guarantee the right of maintenance to the women. Hence, the observations made by Their Lordship of Delhi High Court, in the case of Sanjay Bhardwaj, that “No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not”. Such an observation is clearly contrary to the provisions of law. Hence, this Court respectfully disagrees with the opinion of Their Lordship of the Delhi High Court.\(^{194}\)

The Law has always stood to favor of the women. For the Law recognises their vulnerability for survival in the cruel world. Women, being a keeper of hearth in home, need to be protected as they are the foundation of any society. If women are exposed to physical abuses, to sexual exploitation, the very foundation of the society would begin to weaken. It is only after recognising their importance, sociologically, that the ancient Indian Seers had opined that “Gods dwell only in those houses, where women are respected”. Thus, both the law and society recognise a moral and legal duty of the husband to maintain the wife.

6.2.10.3 Incidents prior to act can also be entertained afterwards

In the case of Savita Bhanot v. Lt. Col. V.D. Bhanot\(^{195}\) dealt with a case filed under the Domestic Violence Act and the Court came to the conclusion that the petition under the Domestic Violence was maintainable even if the Act of Domestic Violence have been committed prior to the coming into force of the Act. The said judgment has no application\(^{196}\)

6.3 SPEEDY TRIAL IN WOMEN HARASSMENT CASES

The Supreme Court has taken a serious note on delay in trial and directed all Sessions courts in the country to conduct rape trials daily and complete the process in two months from the date of commencement of examination of witnesses.

“In particular, when examination of witnesses has begun, it shall be continued from day to day until all witnesses in attendance have been examined, unless the court finds adjournment beyond the following day necessary for reasons to be recorded,” said a


\(^{195}\) Special Leave Petition (Crh.) No. 3916 OF 2010

\(^{196}\) http://indiankanoon.org/docfragment/175370787/?formInput=domestic%20violence%20act%20cases (Visited on May 11, 2013)
Bench of Justices Swatanter Kumar (who has since assumed charge as Chairperson of the National Green Tribunal) and Ibrahim Kalifulla.

The Bench, referring to regular adjournments being sought, said: “We are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds.”

Adjournments were granted for the asking, quite often to suit the convenience of the advocate, the Bench said. “We make it clear that the legislature has frowned upon granting adjournments on that ground. At any rate, inconvenience of an advocate is not a ‘special reason’ for bypassing the mandate of Section 309 of the Cr.PC\textsuperscript{197} [power to court to adjourn proceedings].”

The Bench directed all High Courts to issue circulars to subordinate courts to strictly adhere to the prescribed procedure to ensure speedy trial and also rule out any maneuvering taking place by granting an undue, long adjournment for the mere asking. “When witnesses of a party are present, the court should make every possible endeavor to record their evidence and they should not be called back again. Work fixation of the court should be so arranged as not to direct the presence of witnesses whose evidence cannot be recorded. Similarly, cross-examination should be complete immediately after the examination-in-chief and, if need be, within a short time thereafter. No long adjournment should be allowed.”

The Bench said: “We hope and trust that the High Courts would take serious note of the directions issued in the decisions reported in the \textit{Rajdeo Sharma case}, which has been extensively quoted and reiterated in the subsequent decision of this court reported in the \textit{Shambhu Nath case}, and comply with the directions at least in the future years. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judicial Academy to achieve the desired result.

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling

\textsuperscript{197} \textit{Code of Criminal Procedure, 1973} (Act no. 2 of 1974)
the accused person to show cause against the sentence proposed to be imposed on him\textsuperscript{198}.

Don’t blame tools:

The Bench said: “It is no justification to glide on any alibi by blaming the infrastructure for skirting the legislative mandates embalmed in Section 309\textsuperscript{199} of the Code. A judicious judicial officer who is committed to his work could manage with the existing infrastructure for complying with the legislative mandates. The precept in the old homily that a lazy workman always blames his tools is the only answer to those indolent judicial officers who find fault with the defects in the system and the imperfections of the existing infrastructure for their tardiness in coping with such directions.”

We have referred to the above legal position relating to the extent of reliance that can be placed upon a hostile witness who was not declared hostile and in the same breath, the dire need for the Courts dealing with cases involving such a serious offence to proceed with the trial commenced on day to day basis in de die in diem until the trial is concluded.

6.4 REHABILITATION / COMPENSATION APPROACH OF HON’BLE SUPREME COURT

The Supreme Court in Bandhua Mukti Morcha\textsuperscript{200} has elucidated the rehabilitation of Bonded Labor and directed the Government to award compensation to Bonded labor under the provisions of Bonded Labor System (Abolition) Act 1966 after taking note of serious violation of Fundamental and Human Rights

“The other question arising out of the implementation of the Bonded Labor System (Abolition) Act 1966\textsuperscript{201} is that of rehabilitation of the released bonded laborers and that is also a question of the greatest importance, because if the bonded laborers who are identified and freed, are not rehabilitated, their condition would be much worse than what it was before during the period of their serfdom and they would become more exposed to exploitation and slide


\textsuperscript{199} Ibid

\textsuperscript{200} 1984 (3) SCC 161

\textsuperscript{201} (Act No. 19 of 1976) w.e.f. [9th February, 1976.]
back once again into serfdom even in the absence of any coercion.

It may be pointed out that the concept of rehabilitation has the following four main features as admirably set out in the letter dated 2nd September 1982 addressed by the Secretary, Ministry of Labor, Government of India to the various States Governments:

(i) Psychological rehabilitation must go side by side with physical and economic rehabilitation;

(ii) The physical and economic rehabilitation has 15 major components namely allotment of house-sites and agricultural land, land development, provision of low cost dwelling units, agriculture, provision of credit, horticulture, animal husbandry, training for acquiring 134 new skills and developing existing skills, promoting traditional arts and crafts, provision of wage employment and enforcement of minimum wages, collection and processing of minor forest produce, health medical care and sanitation supply of essential commodities, education of children of bonded laborers and protection civil rights;

(iii) There is scope for bringing about an integration among the various central and centrally sponsored schemes and the on-going schemes of the State Governments for a more qualitative rehabilitation. The essence of such integration is to avoid duplication i.e. pooling resources from different sources for the same purpose. It should be ensured that while funds are not drawn from different sources for the same purpose drawn from different sectors for different components of the rehabilitation scheme are integrated skillfully; and

(iv) While drawing up any scheme/programme of rehabilitation of freed bonded labor, the latter must necessarily be given the choice between the various alternatives for their rehabilitation and such programme should be finally selected for execution as would need the total requirements of the families of freed bonded laborers to enable them to cross the poverty line on the one hand and to prevent them from sliding back to debt bondage on the other.

We would therefore direct the Government of Haryana to draw up a scheme
on program for “a better and more meaningful rehabilitation of the freed bonded laborers” in the light of the above guidelines set out by the Secretary to the Government of India, Ministry of Labor in his letter dated 2nd September 1982. The other State Governments are not parties before us and hence we cannot give any direction to them, but we hope and trust that they will also take suitable steps for the purpose of securing identification, release and rehabilitation of bonded laborers on the lines indicated by us in this Judgment.”

The compensation since 1968 has undergone a change and presently the compensation is Rs 20,000 and access to Government schemes of poverty alleviation and also housing under Indira Awas Yojana.

Supreme Court in M.C. Mehta v. State of Tamil Nadu and Others – seeing the severe violation of fundamental rights in cases of child labor laid down guidelines for compensation and rehabilitation:

“It may be that the problem would be taken care of to some extent by insisting on compulsory education. Indeed, Neera thinks that if there is at all a blueprint for tackling the problem of child labor, it is education. Even if it were to be so, the child of a poor parent would not receive education, if per force it has to earn to make the family meet both the ends. Therefore, unless the family is assured of income allude, problem of child labor would hardly get solved; and it is this vital question which has remained almost unattended. We are, however, of the view that till an alternative income is assured to the family, the question of abolition of child labor would really remain a will-o’-the wisp. Now, if employment of child below that age of 14 is a constitutional indication insofar as work in any factory or mine or engagement in other hazardous work, and if it has to be seen that all children are given education till the age of 14 years in view of this being a fundamental right now, and if the wish embodied in Article 39(e) that the tender age of children is not abused and citizens are not forced by economic necessity to enter avocation unsuited to their age, and if children are to be given opportunities and facilities to develop in a healthy manner and childhood is to be protected

\[202\text{ Writ Petition (Civil) No.465/1986} \]
against exploitation as visualised by Article 39(f), it seems to us that the least
we ought to do is see to the fulfillment of legislative intendment behind
enactment of the Child Labor (Prohibition and Regulation) Act, 1986. The aforesaid would either see an adult (whose name would be suggested by
the parent/guardian of the concerned child) getting a job in lieu of the child,
or deposit of a sum of Rs.25,000/- in the Child Labor Rehabilitation-cum-
Welfare Fund. In case of getting employment for an adult, the parent/guardian
shall have to see that his child is spared from the requirement to do the job, as
an alternative source of income would have become available to him.”

The Supreme Court in Delhi Domestic Working Women’s Forum v. Union India and
others in recognition of severe violation of Fundamental rights of Rape Victims
had directed the National Commission Women to evolve a “scheme so as to wipe out
the tears of unfortunate victims of rape”. The Supreme Court observed that having
regard to the Directive Principles contained in Article of the Constitution, it was
necessary to set up a Criminal Injuries Compensation Board, as rape victims besides
the mental anguish, frequently incur substantial financial and in some cases are too
traumatized to continue in employment.

The National Commission for Women pursuant to the orders of the Honorable
Supreme Court has drafted a scheme for Compensation. Some states have already
started the implementation of the scheme. The scheme has proposed a
compensation of Rs2 to Rs3 Lakhs for Rape victims.

The Government of India has recently amended the The Code of Criminal Procedure
1963 as amended by The Code of Criminal Procedure (Amendment) Act 2008 (5 of
2009) has now an added provision in the form of the section 356, 356-A and 356-B
on victim compensation.

Article 23of the Constitution of India prohibits ,”Traffic in Human Beings” this
Honorable Court has held that the expression “Traffic in Person” in Article 23(1) of
the Constitution of India is evidently a very wide expression which includes the
prohibition of traffic in women for immoral and other purposes . In the case of women
in prostitution the failure to implement the National Plan of Action drafted pursuant to

203 (Act No. 61 of 1986) [23rd December, 1986.]
204 writ petition (CRL) No.362/93
the Judgment in *Gaurav Jain v. Union of India* has resulted in serious deprivation of fundamental rights.

The trafficked victims and women in prostitution go through serious fundamental rights violation which includes bondage and sexual slavery and repeated rape and gang rape. The crimes are very serious in nature which results in deprivation of Fundamental Rights and therefore the state is liable. As mentioned above this Honorable Court has already ordered compensation in Bonded Labor and for victims of Rape, the victims of Human Trafficking and women in Prostitution also are eligible for compensation from the State.206

The failure of the Union of India and the State Governments to draft a suitable rehabilitation scheme for women in prostitution is a serious violation of orders of this Honorable Court and also violation and deprivation of Article 21 and Article 23(1) of the Constitution of India. Article 23 read with Article 39, 41 and 42 together constitute inalienable rights and the failure to grant such right would constitute deprivation of basic fundamental rights. The problem of trafficking and prostitution is also serious violation of Articles 14 & Article 19 of the Constitution of India.