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WOMEN LIVING IN LIVE-IN RELATIONS: LEGAL STATUS AND HUMAN RIGHTS – CONTEMPORARY ISSUES

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Statement of the problem

Various pronouncements of the Supreme Court and High Courts differ in their views with regard to entitlement to maintenance etc. of a woman when the marriage is not strictly proved or when the relationship is not as that of "marriage" but is only "in the nature of marriage" as that of "live-in relations". Some other related issues are also raised in courts as to what would be the status of a relationship in the nature of marriage when the woman already had a husband living from whom she has not taken divorce, or likewise, when the man is having his wife living but starts living with another woman, and as to whether that position would change if they beget children from such relationship, and so on. By virtue of the present paper the researcher shall try to weave a string of theory that may be made applicable to all such cases so that the social and beneficial purpose is achieved, without however, violating the explicit mandate of the provisions of law, be they civil or criminal, or they be general or personal.

Introduction

In this contemporary India the legislature in its first bid has come out with a new theory with the enactment of the Protection of Women from Domestic Violence Act, 2005 when the expression "in the nature of marriage" has been alternatively used with the word "marriage" for which reference may be made to section 2(f)[1] that define "domestic relationship" and section 2(q)[2] that define "respondent" putting all the controversy, with respect to whether it would be necessary to prove factum of marriage in a claim under section 125 of the Code of Criminal Procedure, 1973, to quietus.

Similarly, section 497 of Indian Penal Code, 1860 making adultery as an offence has been held unconstitutional by the Supreme Court in *Joseph Shine* v *Union of India,*[3] being violative of Articles 14, 15 and 21 of the Constitution. It was held that criminalising consensual sexual activity is manifestly arbitrary as it perpetuates the subordinate status ascribed to women in marriage and society. It was further observed that the principle of the sexual exclusivity of a married woman for the benefit of her husband as the owner of her sexuality is absurd.

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1 Section 2(f) of The Protection of Women from Domestic Violence Act, 2005 reads as under:

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

2 Section 2(q) of The Protection of Women from Domestic Violence Act, 2005 reads as under:

(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.

3 Writ Petition (Criminal) No. 194of 2017, dated 27-09-2018, Division Bench decision comprising of five judges of the Supreme Court.

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Significantly, the criminal provision exempts from sanction if the sexual act was with the consent and connivance of the husband. The patriarchal underpinnings, that is, male dominated society as a foundation of Section 497 render the provision manifestly arbitrary. The basis of the said provision lied in a system where one man fought against another man for a woman, without, however, woman having a say in the matter which is unreasonable and unconstitutional. However, adultery has been held to continue to attract civil action as that of a ground for taking divorce, which otherwise is gender neutral.

Again when the right to privacy implicit wherein is right to live with dignity both have been explicitly recognized by the nine judges' bench of the Supreme Court in *re. Puttaswamy*[4] to be indefeasible fundamental right being an inseparable part of Art. 21 of the Constitution, no room of doubt is left over the intention of the law makers and of those whose duty it is to interpret the same as to what is likely to be the future line of judicial thinking.

Besides above, there is a plethora of judicial pronouncements in this regard determining in each individual case in its peculiar facts and circumstances as to whether a hapless woman who is unable to maintain herself would be entitled to some kind of protection under the law. Some judgments lean to the favour of woman and some exhibit patriarchal mind still dominate the decision making process. In this view of the matter, the present researcher shall try to find out as to whether there is any theorem crystalised by judiciary in this regard or that stray judgments alone are being pronounced without there being any fine fabric woven with single thread of clean and clear ideology!

Marriage, meaning and proof of

Introduction

For the purpose of understanding the meaning of the expressions "live-in relations" and "in the nature of marriage" it would be unavoidable to discuss and analyse the meaning, import and interpretation of the expression "marriage". The reason is obvious, that if a case falls within the meaning of the expression "marriage", be it under uniform marriage law or personal marriage law, the matter would fall outside the compass of debate; whereas if a case falls outside the definition of marriage, but yet close to it, a beneficial interpretation can be pressed in service with the help of law or precedent or both. However, if a relationship comes within draconian sweep of criminality or falls outside the scope of morality or it becomes opposed to public policy or it may assume a character so distant from that of the "marriage" such that in no way it can be said to be "in the nature of marriage", it may require further debate.

Different situations

The issue of marriage may arise for decision in various situations, some of which can be named as, in a criminal trial for the offence under section 494 dealing with bigamy and also under section 17 of the Hindu Marriage Act, 1955. However, in the case of marriage, the law is no more *res-integra* that to make out a case of bigamy, both marriages should necessarily be strictly proved.[5] Another would be a situation where conflicting interests

[4] Per nine judges bench decision of the Supreme Court in *K.S. Puttaswamy (Retd.) vs Union of India,* on 26 September, 2018.

[5] Except till the enactment of Hindu Marriage Act, 1955 it can be said that there was nothing in the Hindu law that made a second marriage of a male Hindu void. Section 5 of the Hindu Marriage Act casts a condition for marriage, amongst others conditions, that neither party should have a spouse living at the time of the marriage. Section 17 makes such marriage even void if it is solemnized after the coming into force of the Hindu Marriage Act. On the Criminal side, sections 494 and 495 IPC shall apply accordingly which makes bigamy a punishable offence, *Bhaurao Shankar Lokhande* v *State of Maharashtra*, AIR 1965 SC 1564: 1965 (2) SCR 837. For the purpose of provisions of Section 494 of IPC performance of necessary ceremonies as per customs and usages of the community to the parties belong assumes significance such that even admission by the opposite party with respect to marriage may not be sufficient. The word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form' it cannot be said to be 'solemnized' for the purpose of determination of the offence of bigamy. *Kunsum Dadarao*

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of two women are involved such that depending on the answer to the question, their share in the income of the male partner shall depend.[6] Yet another would be a situation where both are major and possess all requisite qualifications for marrying but are not technically married, where it may not be much difficult to take a beneficial interpretation to the favour of woman in distress if they lived similar to that of husband and wife. Similarly, in yet another situation, the female partner may have a husband living who also has not been divorced. It can also be a case of adultery. However, in *Joseph Shine* v *Union of India*[7] the provision from where the offence of adultery emanated has now been declared as unconstitutional by the Supreme Court, though the same shall continue to be a ground of divorce.

Essentials of a valid marriage, its solemnization etc.

Based on section 7[8] of the Hindu Marriage Act, 1955, Mulla's Hindu Law[9] and various judicial pronouncements[10] describes essential ceremonies for a valid Hindu marriage in the Brahma form or the Asura form as "invocation of fire, followed by *saptapadi*[11] before such sacred fire, unless it is allowed to be performed otherwise by virtue of custom[12] as per the caste to which the parties may belong.[13]

Khandagale v *Dadarao Bajorao Khandagale*, 2003 (2) ALD Crl. 96: (2003) 105 BOMLR 514; *Lingari Obulamma* v *L. Venkata Reddy & Ors.*, 1979 AIR 848: 1979 SCR (2)1019.

6 Such can be the cases where the male live-in partner may have a wife living at the time of continuation of live-in relations with another woman so that when female live-in partner claims her rights of maintenance etc. the same shall have a bearing on the quantum of maintenance that living wife may be entitled to.

7 *Supra*.

8 **7 Ceremonies for a Hindu marriage. —**

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *saptpadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

9 Butterworths, 12th Edition, at p. 605.

10 *Bhaurao Shankar Lokhande* v *State of Maharashtra*, AIR 1965 SC 1564: 1965 (2) SCR 837; *Priya Bala Ghosh* v *Suresh Chandra Ghosh*, AIR 1971 SC 1153: 1971 SCR (3) 961; *Kanwal Ram* v *Himachal Pradesh Administration*, (1966) 1 SCR 539; *Empress* v *Pitambur Singh*, (1880) ILR 5 Cal. 566; *Empress* v *Kallu*, (1882) ILR 5 All. 233; *Morries* v *Miller*, 4 Burr. 2057: 98 ER 73; *R.* v *Robinson*, (1938) 1 All.ER 301.

11 That is, seven steps of bride and groom before sacred fire, such that marriage completes on taking of the seventh step only, unless the custom of the sect to which the parties may belong.

12 Section 3(a) of the Hindu Marriage Act, 1955 which reads:

"the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family;

PROVIDED THAT the rule is certain and not unreasonable or opposed to public policy; and

PROVIDED FURTHER THAT in the case of a rule applicable only to a family it has not been discontinued by the family.

13 "*Saptapadi*" was held to be an essential ceremony for a valid marriage only in cases it was admitted by the parties that as per the form of marriage applicable to them that was an essential ceremony, but not in other cases. Where however, the parties had no such case that "*Saptapadi*" was an essential

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When parties possess requisite qualifications for a valid marriage, but not technically prove to be married

Insofar as the above stated third category of cases is concerned, *i.e.*, where no conflicting interests are involved amongst two woman, court does not require strict proof of any such marriage if other surrounding facts and circumstances of the matter loudly and irresistibly point towards the factum of marriage. In support of this proposition reference in this connection may be made to an early three judges' bench decision of the Supreme Court in *Badri Prasad* v *Dy. Director of Consolidation*[14] when speaking through Justice Krishna Iyer in his one small paragraph judgment it was observed that when an adventurist challenged marriage between a man and a woman who lived together as husband and wife for around 50 years, a strong presumption would arise in support of their marriage. And burden to prove otherwise will shift on to the person who says so. The reason stated was that law leans in favour of legitimacy and frowns upon bastardy. It was further observed that long after the alleged marriage, evidence has not been produced to sustain its ceremonial process by examining the priest and other witnesses, deserves no consideration. If man and woman who live as husband and wife in society are compelled to prove half a century later by eye-witnesses evidence that they were validly married, few will succeed. Thus, it is well settled that the law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden shall lie on a party who denies such marriage.[15] This presumption shall be reinforced with more force when they beget children out of such relationship.[16]

Offence of bigamy would stand the test of time is doubtful

in view of the recent pronouncement of the Supreme Court in *Joseph Shine* v *Union of India*[17] the issue is no more *res-integra* that the offence of bigamy as adumbrated in section 494 of the Indian Penal Code[18] being inhuman, insensitive to the aspirations of women and gender biased, cannot withstand the test of Article 14 and 21 of the Constitution; and similarly, the dictum of nine judges' bench of the Supreme Court in *Puttaswamy*[19]

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ceremony for a valid marriage as per the personal law applicable the second marriage was held to be properly solemnized in the absence of *Saptapadi* to confirm punishment under section 494 of Indian Penal Code, 1860. This observation was made by the Supreme Court in reference to a statutory amendment made by insertion of Section 7A to the Hindu Marriage Act, 1955 which did not necessarily require parties to undergo *Saptapadi* in view of their customs and usages as held in *S. Nagalingam* v *Sivagami*, 2001 Supp (2) SCR 454: VI (2001) SLT 491: AIR 2001 SC 3576: 2001 (4) Crimes (SC) 278..

Unless a subsequent certificate of registration is taken towards solemnization of marriage, a customary marriage which did not take all requisite steps shall not get validated merely by subsequently taking a certificate from the priest, *Mausumi Chakraborty* v *Subrata Guha Roy*, II (1991) DMC 74: 95 CWN 380 (Cal.).

14 AIR 1978 SC 1557: (1978) 3 SCC 527.

15 *Dhannulal* v *Ganeshram*, Supreme Court, Civil Appeal No. 3410 of 2007, dated 08-04-2015. Reliance place on *A. Dinohamy* v *W.L. Balahamy*, AIR 1927 PC 185; *Gokal Chand* v *Parvin Kumari*, AIR 1952 SC 231.

16 *Uday Gupta* v *Aysha*, Supreme Court, SLP (Crl.) No. 3390 of 2014, dated 21-04-2014 and *Tulsa* v *Durghatia*, AIR 2008 SC 1193: (2008) 4 SCC 520. Reliance place upon *Mohan Singh* v *Rajni Kant*, AIR 2010 SC 2933; *Mohabbat Ali Khan* v *Mohd. Ibrahim Khan*, AIR 1929 PC 135; *Gokal Chand* v *Parvin Kumari*, AIR 1952 SC 231; *SPS Balasubramanyam* v *Suruttayan*, (1994) 1 SCC 460; *Ranganath Parmeshwar Panditrao Mali v. Eknath Gajanan Kulkarni*, (1996) 7 SCC 681; *Sobha Hymavathi Devi v. Setti Gangadhara Swamy & Ors.*, (2005) 2 SCC 244; *Bharatha Matha & Anr. v. R. Vijaya Ranganathan & Ors.*, AIR 2010 SC 2685.

17 *Supra.*

18 [45 of 1860].

19 *Op.cit.*

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declaring that right to life would include within its fold "right to privacy" as well, implicit wherein is "right to live with dignity"; and once that be so, the present author fails to understand as to how then vires of section 494 of Indian Penal Code can withstand the same test that was put to section 497 to declare the same as unconstitutional! This aspect of the matter requires serious debate indeed. [Emphasis.]

Rights of Children born out of live-in relations etc.

Whatever may it be, one aspect of the matter that relates to the rights of children born out of "legal marriages", "illegal marriages", "live-in relations", immoral relations or relations even it they are termed as "immoral or opposed to public policy", or by any other name whatsoever, no prudent court has ever disallowed a claim for maintenance or subsistence etc. of a child born out of such relations; and therefore, this does not require further deliberation or debate to maintain meaningful disposition of this paper.[20] It would be profitable at this stage to refer to a recent decision of the Delhi High Court in *N.D Tiwari Case*[21] where the petitioner claiming to be the biological son of the defendant sought declaration of his title and character as defendant's son, to which the Court directed the defendant to subscribe to his blood sample, and for the purpose, coercive process was also directed to be issued, if defendant did not cooperate. This shows as to how the judicial mind of superior courts is working in this area these days.

"In the nature of marriage", meaning and interpretation of

Matrimonial court acting under section 12 of Hindu Marriage Act[22] declaring the marriage as void during currency of proceedings under section 125 of Code of Criminal Procedure,[23] would not be a ground to dislodge her claim for maintenance particularly in the light of provisions of section 26[24] of the Domestic Violence Act[25] while extending the benefit of the provisions of both statutes to the favour of hapless woman.[26] All contrary

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20 Though right of such children in ancestral property of his biological father, even if found doubtful by some courts, the same requires serious reconsideration.

21 *Rohit Shekhar* v *N.D. Tiwari*, dated 27-04-2012, FAO(OS) No. 547.2011. Reliance place on *Demisetti Ramchendrulu* v *Demisetti Janakiramana*, AIR 1920 PC 84, where it was observed that presumption cannot displace adequate evidence in all cases. In *Mohanlal Shamji Soni* v *Union of India,* 1991 Supp(i) SCC 217 it was held that the best available evidence should be brought before the court to prove a fact or the points in issue and the court ought to take an active role in the proceedings to find the truth and administering justice. Recently and most importantly, in *Maria Margarida Sequeria Fernandes* v *Erasmo Jack de Sequeria,* 2012 (3) Scale 550 it has been held that the trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimized was noticed. Therefore it can safely be said that the superior judicial mind indicated that the sample of DNA etc. can, therefore, be directed to be forcibly extracted from the culprit, if the circumstances of the case so warrant, and more so in such case where the son is crying for a certificate of his being biological descendant of the defendant. [Emphasis].

22 [25 of 1955].

23 [2 of 1974].

24 The provision of section 26 of the Domestic Violence Act enables any other court to apply the provisions of the Act to pending litigation between the same parties. Also, it needs mention that the need to press in service the provision of section 26 of the Act arose due to the fact that the Act has been made applicable to "relations in the nature of marriage" in addition to cases of marriage simplicitor. This aspect has already been discussed above.

25 The Protection of Women from Domestic Violence Act, 2005.

26 *Surendran* v *Najima Bindu*, II (2012) DMC 49 (DB (Ker.): 2012 Cr.L.JK. 1960 (Ker.).

For contra, see *Savitaben Somabhai Bhatiya* v *State of Gujarat*, AIR 2005 SC 2141: I (2005) DMC 503 (SC); *Madan* v *State of Rajasthan*, 1993 (3) Crimes 372; *Yamunabai* Anantrao v *Anantrao Shivaram,* (1988) I SCC 530; *K. Sivarama Krushna Prasad* v *K. Bharath*, 1986 (1) All India Hindu Law Reports 59;

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judgments were pronounced before the enactment of the Protection of Women from Domestic Violence Act, 2005 or when the provision of section 26 of the Act was not pressed in service.[27]

The Apex Court in re: *Chunmuniya* v *Virendra Kumar Singh Kushwaha*[28] has referred the question of law for consideration by a Constitution Bench of five judges of the Supreme Court as to whether a illegitimate wife, or a wife whose marriage has been dissolved by a decree of nullity, can still lodge her claim under section 125 of Cr.P.C.[29] The decision by the five judges' Constitution Bench is still awaited with some positive observations of the referral court in *Chunmuniya case.*[30]

In *Captain Ramesh Chander Kaushal*[31] the Supreme Court held that the provision of section 125 of Cr.P.C. is a measure of social justice specially enacted to protect, and inhibit neglect of women, children, old and infirm and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. Reference in this connection may further be made to another three judges' bench decision of the Supreme Court in *Vimala case*[32] that the object of the provision is to prevent vagrancy and destitution and the word `wife' includes a divorced woman who has not remarried. Malimath Committee Report[33] opined that when a man and woman live together for considerably a long time, a presumption should be drawn that they are married. Constitution Bench of the Supreme Court in *Shah Bano case*[34] was of a considerable opinion that that the said provision is truly secular in character and would equally apply to Muslim personal law as well. In *Dwarika Prasad Satpathy*[35] the Supreme Court further held that the said provision being summary in nature and also for the reason that the same does not have any occasion to decide entitlement to inheritance of a person but is only to provide for maintenance to the favour of

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Vimala v *State of Gujarat*, (1991) 2 SCC 375; *Thulasi Bai* v *C.V. Manoharan,* 1989 (2) KLT SN 18; and *Amina* v *Hassan Koya*, 1985 KLT 596.

27 *D. Velusamy* v *D. Patchaimmal*, AIR 2011 SC 479, guidelines issued as to in what cases where formal proof of marriage could not succeed, the benefit of Domestic Violence Act could be extended.

28 2011 Cr.L.J. 96 (SC): 2011 (1) JCC 185: (2011) 2 SCC (Cri.) 666. For the proposition that, where a man and a woman are proved to have lived together as husband and wife, the law will presume unless contrary is proved, that they were living together in consequence of a valid marriage and not in a state of concubinage, reference may be made to *Lieutenant C.W. Campbell* v *John A. G. Campbell*, (1867) Law Rep 2 HL 269; *Captain De Thoren* v *The Attorney General,* (1876) 1 AC 686; *Sastry Velaider Aronegary and his wife* v *Sembecutty Viagalie and others,* (1881) 6 AC 364; *A Dihohamy* v *W.L. Balahamy*, AIR 1927 PC 185.

For the proposition that, when a man and a woman cohabit continuously for a number of years, the law presumes to the favour of their marriage reference may additionally be made to *Mohabbat Ali Khan* v *Muhammad Ibrahim Khan*, AIR 1929 PC 135; the presumption is rebuttable, see *Gokal Chand* v *Parvin Kumari*, AIR 1952 SC 231; also refer, *Badri Prasad* v *Dy. Director of Consolidation*, AIR 1978 SC 1557: (1978) 3 SCC 527; *Tulsa and others* v *Durghatiya and others,* AIR 2008 SC1193: 2008 (4) SCC 520.

29 Reliance placed on *Jagir Kaur & Anr. v. Jaswant Singh*, AIR 1963 SC 1521 and *Nanak Chand v. Chandra Kishore Aggarwal & Ors*., 1969 (3) SCC 802, where it was observed that the provisions for maintenance of wives and children intend to serve a social purpose to enable a deserted wife or a helpless child, legitimate or illegitimate, to get urgent relief.

30 *Supra.*

31 *Captain Ramesh Chander Kaushal v. Veena Kaushal and Ors*. AIR 1978 SC 1807.

32 *Vimala v. Veeraswamy* (1991) 2 SCC 375.

33 The Committee on Reforms of Criminal Justice System, headed by Dr. Justice V.S. Malimath, 2003.

34 *Mohammad Ahmed Khan v. Shah Bano Begum & Ors.* reported in (1985) 2 SCC 556

35 *Dwarika Prasad Satpathy v. Bidyut Prava Dixit & Anr.* (1999) 7 SCC 675.

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neglected wives, and therefore, unlike section 494 of Indian Penal Code, the standard of proof of marriage between the parties is construed not to be very strict.

Similarly, in *Santosh Bai*[36] when female living partner without taking a formal divorce from her husband started living with the respondent and gave birth to a child, the same was held to be covered within the provision of section 125 Cr.P.C.; and where the female claimant lived openly for 14 years with the respondent and gave birth to two daughters, it was held to be not acceptable as a defense that the respondent had a lawfully wedded wife living who was not divorced.[37] Though bigamous marriages are liable to be declared as illegal being in contravention of law, polygamy being in practice before the enactment of Hindu Marriage Act, it cannot be said to be immoral to grant alimony to such a financial weak spouse.[38] Where man being a married man started living with another woman and that woman gave birth to two children, it was held that children born out of such relationship would be entitled to maintenance, whereas in determining amount of maintenance the alimony received from her erstwhile husband was liable to be taken into consideration.[39] When complainant having three children started residing with the respondent and her children also called him father for a long time, and the complainant gave specific dates and details as to when and where she lived with the respondent, the claim under the provisions of the Domestic Violence Act was held to be made out.[40]

On the same lines but on the criminal side, when in a case under section 498A and 304B of Indian Penal Code defense tried to hair splitting arguments to say that the deceased was not a fully legally wedded wife and sought discharge on that ground alone, the plea was rejected by taking recourse to purposive interpretation.[41]

For contrary judgment, it would be most profitable to refer to another three judges' bench decision of the Supreme Court in *Indra Sarma case*[42] where woman started living with a married man having his first wife

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36 *Santosh Bai* v *Gangaram,* 2015 Crl.L.J. 3600 (Chattisgarh). Reliance placed on *Deoki Panhiyara* v *Shashi Bhushan Narayan Azad*, I (2013) CCR 67 (SC): 2013 Crl.L.J. 684: IX (2012) SLT 341.

For contra, see *Narayan Janfluji Thool* v *Mala Chandan Wani*, 2015 Crl.L.J. 2353 (Bom.): III (2015) DMC 220 (Bom.).

37 *Narender Pal Kaur Chawla* v *Manjeet Singh Chawla,* I (2008) DMC 529 (DB) (Del.), By Sikri, A.K. and Suresh, Aruna, JJ. In this matter respondent husband relied upon *Savitaben Somabhai Bhatiya* v *State of Gujarat,* AIR 2005 SC 2141: III (2005) SLT 59: I (2005) DMC 503 (SC) to say that the wife should be a lawfully wedded wife and not a second wife for the purposes of section 125 of Cr.P.C.; whereas, reliance was place on behalf of the claimant on clauses (d) and (e) of section 18 of the Hindu Adoption and Maintenance Act, 1956 which read that a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance if (d) he has any other wife living; or (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere. Additional reference was made by the Court to section 2(f) of the Protection of Women from Domestic Violence Act, 2005 that defines 'domestic relationship' to include "relations in the nature of marriage" in addition to "marriage" in strict sense.

38 *Rameshchandra Rampratapji* v *Rameshwari Rameshchandra*, (2005) 2 SCC 33. Relaince placed on *Rajeshbhai* v *Shantabai,* AIR 1982 Bom. 231; *Govindrao* v *Anandibai*, AIR 1976 Bom. 433; *Manoharlal* v *Seth Hiralal,* AIR 1962 SC 527; *Sushilabai* v *Ramcharan*, 1976 Mah LJ 82.

39 *Ajay Bhardwaj* v *Jyotsna and others,* 2017 (1) JCC 360: 2017 (1) DMC 96. Reference made to, *Indra Sharma* v *V.K.V. Sarma*, (2013) 15 SCC 755; *Chanmuniya* v *Virendra Kumar Singh Kushwaha and Anr.*, 2001 (1) JCC 85: (2011) 1 SCC 141; *D. Velusamy* v *D. Patchaiammal*, 2010 (10) SCC 469; *Badri Prasad* v *Dy. Director of Consolidations and others*, AIR 1978 SC 1557.

40 In re: *Jayashri Samshuddin Talapdar* v *Samshuddin Karim Talapdar*, III (2018) DMC 239 (Bom.).

41 *Reema Aggarwal* v *Anupam,* AIR 2004 SC 1418: I (2004) DMC 201 (SC).

42 *Indra Sarma* v*V.K.V. Sarma,* 2013 (14) Scale 448: III (2013) DMC 830 (SC). Reliance placed on *Pinakin Mhipatray Rawal* v *State of Gujarat*, (2013) 2 Scale 198 (SC) and *Deoki Panjhiyara* v *Shashi Bhushan Narayan Azad and Anr.*, (2013) 2 SCC 137.

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living with two children and alleged that she was aborted thrice but the man never took him along socially, nor bought any property and rather economically exploited her, and her claim was rejected for the reason that it would otherwise run counter to the interest of married wife and children.

Obviously, there would not be much difficulty in granting maintenance in cases where it is proved on record that the husband played fraud on wife in concealing his first marriage and such wife cannot be penalized in rejecting her claim for no fault of her.[43]

Live-in Relations – Alimony and Palimony

The expression `palimony' was first used in US in re. *Marvin* v *Marvin,*[44] which is a case of famous film actor Lee Marvin, with whom a lady Michelle lived for many years without marrying him, and was then deserted by him and she claimed palimony. Subsequently the concept of palimony was developed by various superior courts of US, some for and some against, but none by the Supreme Court. The New Jersey Supreme Court in *Devaney* v *L' Esperance*[45] held that co-habitation is not necessary for a claim of palimony, and rather it is promise to support, may be implied, and the relationship is "marriage type", that entitle to a claim for palimony.

Where however, the legend film star Rajesh Khanna, having not divorced but living separately from his wife Dimple Khanna, started living with another woman, was held not to entitle such another woman to benefits under the Act for the lack of 'qualifications of marriage' as Rajesh Khanna was a married man.[46]

Woman living in adultery, claim against her lawful husband

As a person cannot be allowed to take the benefit of his own wrong, if a wife is proved to be causing mental agony to her husband by living adulterous life, the benefits of law cannot be extended to her by her conduct.[47] However, where due to ill health, vagrancy etc. the wife was forced by the circumstances to allegedly commit adultery with another man and this version was supported by her own daughter, but not by her two sons, it was held that grant of maintenance would be proper.[48]

Conclusion

Technically speaking, in the opinion of the present author, such wife who without taking a formal divorce from her first husband start living with another man may also be called to be living in adultery. However, that would

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43 *Pushpa Vishwanathan* v *State of Uttarkhand*, 2014 Crl.L.J. 4017 (Uttar.), the facts of the case were that the husband made a declaration before registrar and at various other places that he was unmarried. Similarly, in *Karihma Ravindra Kumavat* v *Ravindra Eknath Kumawat*, 2017 Crl.l.J. 4684 (Bom.) (Aur.), where witnesses stated that the husband had a wife living was concealed and that the litigation was going on with the first party was brought to the knowledge of the claimant, the onus shall lie on the respondent husband to prove that the claimant had knowledge of the first undissolved marriage of the respondent husband.

However, in *Vinod Kumar Nathwani* v *State of Rajasthan,* 2018 (3) JCC 1728 (Raj.), it was held that wife having a husband living and without taking divorce from her erstwhile husband, she shall find foul with section 494 of the Indian Penal Code, 1860. However, in the opinion of the present author, in *Joseph Shine, supra.,* it has already been held that 497 pertaining to the offence of adultery has been held unconstitutional, the validity of section 494 also seems to have come under clouds, and therefore, test of time will tell as to whether this philosophy shall hold water in future!

44 (1976) 18 C3d 660. In *Taylor* vs. *Fields,* (1986) 224 Cal. Rpr. 186, the the facts were that the plaintiff Taylor had a relationship with a married man Leo where she only used to spend her week-ends with him and her claim against his properties was disallowed on his death.

45 195 N.J., 247 (2008).

46 Single Bench decision of Bombay High Court in *Dimple Jatin Khanna* v *Anita Advani*, MANU/MH/ 0725/ 2015, decided on 09-04-2015.

47 *Bolli Babi Sarojini* v *Kolli Jayalaxmi*, 2015 Crl.L.J. 74 (AP).

48 *Vidyawati* v *Kishen*, 2013 Crl.L.J. 4469 (Cal.).

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be from the perspective of her first husband only and second husband should be considered to be the culprit of adultery.[49] The benefit of wrong done by the wife qua her first husband should not be allowed to be taken by the second husband in a given case. In other words, the charge of adultery lies in the fact that wife should not be allowed maintenance against a person whom she betrays; and not to provide escape route from responsibilities to the one who enjoys the company of such wife. Even otherwise, the present author is of considered opinion that a flat contrary postulate would not advance the cause of justice nor the intention of legislature and nor even the evil it sought to remedy. India is a rural country and the present author has seen many cases where the parental family of the woman does not care for taking divorce from a court of law and makes the woman start living with another man after socially and religiously marrying her with another man; and in such situation that another man should not be allowed to make mockery of the woman, society and cause of justice, all! In such cases of extreme hardship, intention of the parties should be seen. These days many cases are pouring in with respect to 'live-in' relationship as well which are allowed by the courts to be covered within the purview of the Domestic Violence Act that would show how the socialistic courts are interpreting this social beneficial piece of legislation to the favour of hapless woman. Regarding those cases, where man had a wife living, benefit of wrong of the husband should not be given to the husband himself by rejecting the claims of live-in partner, if the same is equitably made out.

In the considered opinion of the present author, therefore, the only postulate that can be culled out is that for claiming the benefit under the Act on the ground of parties to be in 'live-in' relationship, they must possess all the requisite qualifications for being validly married,[50] if they were not (married); the test of determination of parties living in live-in relations should be based on circumstantial evidence towards the fact that the parties lived for a considerable period of time together under a common roof with an intention of permanency and maintained relations akin to husband and wife; and if the parties in such relationship did not possess requisite qualifications for being legally married, at least such "subsistence allowance" as against "full-fledged maintenance" must be allowed to such claimants to protect them from the state of being destitute and vagrant; subject, however, to the cases where woman may have played fraud on the male live-in partner, or where she is having her sufficient means to live on her own, or where she is in receipt of maintenance from her first husband, or where she may have received a hefty one time alimony towards her past, present and future claims of maintenance from her first husband. This principle should be applied with more force also because of the recent decision of the Apex Court in re. *Joseph Shine*[51] holding section 497 as unconstitutional; and because on the same lines, section 494 also is likely to meet the same fate as met by section 497 of the Indian Penal Code; and also because nine judges bench decision of the Apex Court in re. *Puttaswami*[52] whereby "right to privacy" and "right to live with dignity" was read within "right to life and personal liberty" as ordained under Article 21 of the Constitution.[53]

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49 Though Section 497 Indian Penal Code, 1860 has been declared recently by larger bench decision of the Supreme Court as Unconstitutional on the anvil of Art. 14 of the Constitution.

50 2013 (14) Scale 448. Reference made to, *Deoki Panjhiyara* v *Shashi Bhushan Narayan Azad and Anr.*, (2013) 2 SCC 137; *Pinakin Mhipatray Rawal* v *State of Gujarat*, (2013) 2 Scale 198 (SC).

51 *Supra.*

52 *Supra.*

53 Thus, where the complainant knew that the man was married and had a child from his first marriage, the benefit of the provisions of the Act would not be available to such woman she would not be termed as a 'aggrieved woman' and not even in 'domestic relation' with such a man. [*Deepak* v *State of Maharashtra*, I (2016) DMC 160 (Bom.): 2015 Crl.L.J. 4833 (Bom.): 2016 (1) Crimes 466 (Bom.)]. Similarly, when both had a spouse living at the time when the claim under the Act was preferred, the same shall not be maintainable for the want of qualifications of parties to marry. [*Krishna Murari Singh* v *State of Bihar,* III (2013) DMC 705 (Pat.)]. Likewise, once the complainant admitted to be already

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To put it in lowest words at the highest pitch, the social beneficial legislation in India was made for laborers as we could not neglect those who may have worked for us, will it appropriate for those of us who may have enjoyed company of someone to shirk off their responsibility when that-one is in need the most. As we all have to travel one day to the other world and answer our deeds to Him who made us different from other animals, no person should be adjudged from the view point of "animal subsistence" alone but from the "human rights" point of view as well!

married, onus of proof of dissolution of her first marriage would fall on herself and in case of her failure to discharge the said onus, complaint would not be maintainable. [*Gautam* v *Ragini*, 2017 (1) LRC 459 (Bom.) (Nagpur Bench)].