

family the part played by woman will be more than a man when harassing a woman. Simply because the Act is named as protection for women from the domestic violence, women cannot be excluded.

(6) *Whether the Act is prospective and retrospective* :—Though it is settled law that any penal law is only prospective but not retrospective. But, the Protection Officers who are not properly trained without making any proper enquiry they are filing the Domestic Incident Report into the Court and the Courts were already overburdened are also entertained those cases without looking into factual aspects but the Courts could able to notice the same only at the time of enquiry. If the Act is so clear then the woman will come to give reports against the husband or any other men for the acts committed not prior to the commencement of the Act.

(7) *Applicability of the Act when the husband and wife are living separately* :—The domestic violence means if any violence has been committed by the male members of the family against women when they are living together in one roof the Act will not be applicable for those cases where both men and women are not living together in one roof. But, to my knowledge I have come across several cases pending in several Courts wherein the husband or wife are living separately but still the wife used to give complaint against the husband under Domestic Violence Act and the Protection Officers without making prior enquiry they

are filing the cases before the Courts. For example the wife and husband are living separately for the last 10 years and wife also filed complaint against the husband under Section 498-A of IPC, and wife has also filed a maintenance suit, and under Section 125 of Cr.P.C. for the maintenance and also suit for partition *etc.* But, still the women are coming and giving reports to the Protection Officers by making false allegations like harassment, causing hurt or so. Unless there is restriction in the Act or prohibition in the Act the cases will be pooled up and ultimately the Courts will be further more burdened by these cases.

(8) In my sincere opinion the Act is to be thoroughly amended by looking into various aspects in considering above all the aspects or at least it is a high time for the Hon'ble High Court of A.P. to frame certain guidelines how to proceed with the case and how the officers are to be acted when the case is filed under the Domestic Violence Act into the Court. At this point of time I am also to further add that the Act is to be amended that if any monetary relief is granted to the victim it is to be recovered from the husband or from the respondent by invoking the provisions of Section 125 of Cr.P.C. or other procedure is to be mentioned in the Act as to how the amount is to be recovered. Otherwise there is no purpose in enacting this Act which is a social welfare legislation.

“Yatra Naryantu Pujyathe Tatra Devo
Sthirobhava”

IS THE DIMENSION OF SECTION 354 IPC CHANGED ?

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“If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it ? A Judge must not alter the material of which is woven, but he can and should iron out the creases.”.....Plowden.

At the inception, the offence under Section 354 IPC dealing with assault or criminal force with intent to outrage her modesty is punishable with imprisonment of either description for a term, which may extend to two years, or with fine, or with both.

Under Article 246(2) of the Constitution, Parliament and the Legislature of any State have power to make laws in respect to any matters enumerated in List III of the Seventh Schedule of the Constitution, - say Concurrent List. It is needless to say that the Code of Criminal Procedure and the Indian Penal Code are in the Concurrent List.

Invoking Article 246(2) of the Constitution, the State of A.P. amended Section 354 IPC by Act 6/1991 with effect from 1.4.1991 whereunder the period of sentence for the offence under Section 354 IPC is enhanced to seven years, fixing a minimum of five years, and further a minimum of two years, for reasons to be recorded.

However, the entry relating to Section 354 IPC in the 1st Schedule of Cr.P.C. is amended by A.P. Second Amendment Act, A.P. Act 3/1992 which came into force with effect from 15.2.1992. According to it, the offence is cognizable, non-bailable and triable by a Court of Session and is punishable with imprisonment for a period which may extend to seven years, with riders as above.

That being so, the Parliament enacted the Cr.P.C. (Amendment) Amending Act 2006, which came into force with effect from 23-6-2006, henceforth referred to as the Amending Act. Section 42(f)(viii) of the Amending Act, reads 'in the 5th column in the entries relating to Section 354 IPC for the word 'ditto' the word bailable shall be substituted.

The reason for substituting the word 'bailable' for the word 'ditto' is not far to seek. In the 1st schedule of Cr.P.C. the offences serially from Sections 341 to 363 IPC are bailable. Section 341 IPC is shown as 'bailable' and the rest in the down are shown as 'ditto' - indicating bailable. In the Amending Act,

the erstwhile bailable offence under Section 353 IPC which is shown as bailable with expression 'ditto' is amended as non-bailable. As such, to indicate that the offence under Section 354 is bailable, as it is, the word 'ditto' is substituted with the word 'bailable'.

As such, so far as the Central Act is concerned, the offence under Section 354 IPC before and even after the Amending Act, remained bailable.

Therefore, the parent Act is not amended by the planted Act, so far as Section 354 IPC is concerned. It is as it was.

The deletion of the word 'ditto' and the substitution of the word 'bailable' in the Amending Act is nothing but a mere recognition to the pre-existing position of law, as has been held by the Orissa High Court in *Kalinga Tubes Limitd v. Shanti Prasad Jain*, reported in AIR 1963 Ori. 189 holding.

"Ordinarily, the pre-existing position of law cannot be interpreted with reference to subsequent amendment. But there may be cases where the subsequent amendment merely gives recognition to the pre-existing position of law."

The designation of an offence as bailable or non-bailable is rule of the Code, framed at the will of the State. Still it has a bearing on the personal liberty guaranteed as constitutional right.

The impact of the Amending Act on Section 354 IPC as it has been obtaining in the State of A.P. by virtue of A.P. Second Amendment Act, A.P. Act 3/1992 fell in question, as some are of the opinion that the offence under Section 354 IPC becomes bailable in view of the Amending Act, on the ground that when the State Legislature enacts a subject of Concurrent List, differing from the Central Act, and when the Central Act again enacts on the same subject, the enactment of the State Legislature goes away.

In the decision reported in *Sri S. Santhanam, LAS and another v. State of A.P. represented by Chief Secretary to Government of*

A.P., *Hyderabad and others*, 1993 (3) ALT 666, His Lordship Justice Sri Y. Bhaskar Rao held at Para 49 that

‘where the State Legislature enacts under the Concurrent List on which there is already a legislation of Parliament and the President has given his assent then the State enactment prevail to that extent *but again if the Parliament enacts on the same subject, then the enactment of Parliament prevail*’

The expression ‘but again if the Parliament enacts on the same subject, then the enactment of Parliament prevail’ needs an insignificant debate without much ado. A demarcating line is drawn, between Act and enactment. A statute is the formal expression in writing of the will of the legislative organ in a State. It is usually called an Act. An enactment may mean something other than an Act of Parliament, but Act means an Act of Parliament. In other words, enactment does not mean the same thing as Act. Act means the whole Act, whereas a section or part of section in any Act may be an enactment. Thus the scope of the Act is wider than that of an enactment.

In that view of the matter, as the Parliament enacted on the same subject then the parliamentary enactment prevails, it is debated. Even if that needle sharp interpretation is taken, it cannot be said that the Parliament lay its hands on Section 354 as the said section did not face change.

After the Code of Criminal Procedure is enacted by the Parliament, it faced amendments several times both by the Parliament and various State Legislatures. So far as Section 354 IPC is concerned, the State of A.P. made amendment by A.P. Second Amendment Act, A.P. Act 3/1992 with effect from 15.2.1992, making the offence non-bailable.

Again the Parliament enacted the Amending Act, 2006 making amendments to various parts of the Code. But no amendment is made to Section 354 IPC in any manner whatsoever, regarding the bail.

It is being commented that Section 42(f)(viii) of the Amending Act, makes a mention of Section 354 IPC reiterating offence as specifically bailable *without a clause of saving to the State Laws*, and further in view of the above decision in 1993 (3) ALT 666, the enactment of Parliament prevails and the offence under Section 354 IPC turns bailable, so long as the State does not amend the section once again and restores it to its position as it has been under A.P. Second Amendment Act, A.P. Act 3/1992.

At this juncture, it is relevant to refer to the ratio of the decision of the Hon’ble Supreme Court of India in *Ganapat Giri v. II Additional District Judge, Balia and others*, reported in AIR 1986 SC 589.

In that case, in the State of UP a decree holder, who obtained a decree against the judgment-debtor for recovery of certain amount on 29.7.1977, sought for sale of the immovable property of the J.Dr. The property was brought to sale. On 4.8.1978 the Court sale was held at public auction. The D.Hr himself participated in the auction. In view of the provisions relating to Court sales in execution, by that date, the decree holder in order to purchase the property in the Court sale need not seek the permission of the Court. The D.Hr remained the highest bidder in whose favour the sale was knocked down. Before the sale was confirmed, on 12.8.1978 the J.Dr filed application to set aside the sale on the ground that the D.Hr. did not obtain the permission of the Court to bid in the auction, basing his claim on the amendment made to the Code requiring the D.Hr. to obtain the permission of the Court before participating in the auction. The Executing Court set aside the sale, as admittedly the D.Hr did not seek the permission of the Court to participate in the bid. The D.Hr filed a revision before the District Judge, Ballia canvassing his ground under Section 3 of the Civil Procedure Code, (Uttar Pradesh Amendment Act) 1978 that came into force from 1.1.1978. The District Judge dismissed the revision of the D.Hr. The Executing Court as well as the District Judge held that

on the commencement of the Amending Act, Section 97(1) thereof, the local amendment made to Section 72 or the concerned Order of the Code, prior to that date ceased to operate and the Code as amended by the Amending Act applies to the case.

Again, aggrieved of the orders of the District Judge, D.Hr. approached the High Court of Allahabad. The High Court of Allahabad allowed the petition taking the view that since the Amending Act had not made of any kind insofar as Rule 72 of Order 21, was concerned, the State Amendment prior to the commencement of the Amending Act remains intact.

The Hon'ble Supreme Court begins its judgment with a query saying :

“we are principally concerned in this case with the effect of Section 97 of C.P.C. (Amendment) Act 1976 (104/1976) hereinafter referred to as the Amending Act, on any provision inserted in the CPC 1908, hereinafter referred to as the Code by a State Legislature or the High Court, prior to the commencement of the Amending Act, *i.e.*, prior to 1st February, 1977 in the different local areas in India *where the Code is in force if they be inconsistent with provisions of the Code as amended by the Amending Act*”.

Answering that query, the Hon'ble Supreme Court held :

The effect of Section 97 of CPC (Amendment) Act 1976 (104/1976) is that all local amendments made to any of the provisions of the Code either by a State legislature or by a High Court, which were inconsistent with the Code as amended by the Amending Act stood repealed irrespective of the fact whether the corresponding provisions in the Code has been amended or modified by the Amending Act and that was subject only to what was found to be in sub-section (2) of Section 97.

In the light of the above observation the Hon'ble Supreme Court reversed the finding of the Allahabad High Court, observing :

“Therefore, even though Rule 72 has not been amended as Rule 72-A has been added in Order 21 remaining sub-rules (2) and (3) or Rule 72 by the Amendment Act, it cannot be said that because no amendment had been made to Rule 72 or Order 21, by the Amending Act Section 97(1) had not effect on the rule, as it was in force in the State of Uttar Pradesh before the commencement of the Amending Act. Thus the amended Rule 72 or Order 21 which was in force in the State of Uttar Pradesh, prior to February 1, 1977, *i.e.*, the date on which the Amending Act came into force would not continue to be in force after the date.”

A reading between the lines of the judgment of the Hon'ble Supreme Court *vis-à-vis* Section 97 C.P.C. shows that an interpretation to the statute does not permit inconsistency or repugnancy.

So far as subject Section 354 IPC is concerned, the situation does not alter the Central Act. Even before and after the Amending Act, 2006 the offence is bailable. Hence, there is no inconsistency between the Central Act and A.P. State Act, in view of Article 246(2) of the Constitution.

In my humble view, the comment that as the Amending Act 2006 is an Act further to amend the Code of Criminal Procedure (Amendment) Act, 2005, that as the Parliament again enacted on the same subject, the enactment of Parliament prevails and the offence under Section 354 IPC remains bailable, so long as the State does not amend the section once again, does not appear to be correct.

Let the interpretative distinction among codifying, amending and consolidating statutes prevail.