

2009

Getting -498ed!

[PERSPECTIVE ON THE LAW RELATING TO CRUELTY IN MARRIAGES]

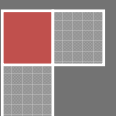
[The provisions of Section 498A of the Indian Penal Code 1860 has been Misused/ Abused for narrow ulterior motives. This has led to diverse legal strategies. A perspective is given in this Article]

Prepared by:

Ms. Gauri Prakash,

BBPM Law Associates, A-13, First Floor, Nizamuddin [East], New Delhi-110 013

Telephone: +91-11-41825911/22, Facsimile: +91-11-41825922



"Everything has been said already, but as no one listens, we must always begin again."

*Andre Gide,
French thinker and writer*

I. What the section 498A IPC envisages?

Section 498A. Husband or relative of husband of a woman subjecting her to cruelty

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation- For the purpose of this section, "cruelty" means-

[a] any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health [whether mental or physical] of the woman; or

[b] harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

II. Nature of The Offence:

This offence is-

Cognizable, which means an offence for which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant or investigation;

Non-bailable, which means the police does not grant bail. The decision is taken by a Judicial Magistrate/Judge only. The accused must appear in the court to request bail.

The Investigating Officer must produce the accused before the Judicial Magistrate/Judge concerned within 24 hours of the arrest. At that time, the accused has a right to apply for bail himself or through his representative/lawyer.

Non-compoundable, meaning he complaint cannot be withdrawn by the petitioner. It cannot be mutually settled between two parties, out of court by paying a fine, and the police or government may continue to investigate and prosecute even if the original complainant withdraws his or her statement implicating the accused.

III. The Intended Object of Section 498A:

The object for which Section 498a IPC was introduced is amply reflected in the Statement of Objects and Reasons while enacting Criminal Law [Second Amendment] Act No. 46 of 1983. As clearly stated therein the increase in number of dowry deaths is a matter of serious concern.

The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961. In some cases, cruelty of the husband and the relatives of the husband culminate in suicide by or murder of the helpless woman concerned, which constitute only a small fraction involving such cruelty.

Therefore, it was proposed to amend IPC, the Code of Criminal Procedure, 1973 and the evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by the husband, in-law and relatives. **The avowed object is to combat the menace of dowry death and cruelty.**

III. Other relevant provisions:

405/406. Criminal breach of trust

The offence under 498a is generally read with **Section 406** of I.P.C

According to Section 406 I.P.C., the offence of criminal breach of trust is committed when a person who is entrusted in any manner with the property or with any dominion over it, dishonestly misappropriates it or converts it to his own use, or dishonestly uses it, or disposes it of, in violation of any direction of law prescribing the mode in which the trust is to be discharged, or of any lawful contract, express or implied, made by him touching such discharge, or wilfully suffers any other person so to do. Thus in the commission of the offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is a misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created. [See: *The Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. S.K. Roy*]

304B. Dowry death

[1] Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal 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 relatives shall be deemed to have caused her death.

Explanation- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 [28 of 1961].

[2] Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

It is to be noted that. Sections 304B and 498a, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Sections and that has to be proved. The explanation to Section 498a gives the meaning of 'cruelty'. In Section 304B there is no such explanation about the meaning of 'cruelty'. But having regard to common background to these offences it has to be taken that the

meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Section 498a under which 'cruelty' by itself amounts to an offence. [*Sushil Kumar Sharma v Union of India & ors.*, *Judgement: Justice Arijit Pasayat, Justice H.K.Sema*]

306. Abetment of suicide

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. One other provision which is relevant to be noted is Section 306 IPC.

The basic difference between the two Sections i.e. Section 306 and Section 498a is that of intention. Under the latter, cruelty committed by the husband or his relations drag the women concerned to commit suicide, while under the former provision suicide is abetted and intended. [*Sushil Kumar Sharma v Union of India & ors.*, *Judgement: Justice Arijit Pasayat, Justice H.K.Sema*]

113B. Presumption as to dowry death - [Indian Evidence Act, 1872]

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.

Explanation - For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code [45 of 1860].

Substantive Section 498A IPC and Presumptive Section 113-B of the Indian Evidence Act, 1972 [in short 'Evidence Act'] have been inserted in the respective statutes by criminal law [Section Amendment] Act, 1983.

Section 498A IPC and Section 113-B of the Evidence Act include in their amplitude past events of cruelty. Period of operation of Section 113-B of the evidence act is seven years, presumption arises when a woman committed suicide within a period of seven years from the date of marriage. [*Sushil Kumar Sharma v Union of India & ors.*, *Judgement: Justice Arijit Pasayat, Justice H.K.Sema*]

IV. Misuse of the Section: Victim turning into the Abuser!

The Supreme Court of India says, "...by misuse of the provision [IPC 498a - Dowry and Cruelty Law] a new **legal terrorism** has been unleashed."

This provision was intended to be used as a shield and not an assassin's weapon. Laws originally meant to protect from the dowry menace are being misused by vicious and unscrupulous urban women and their families as "*an assassin's weapon*". This is a soaring social evil in Indian families. Today, the educated urban Indian women with the aid of jingoistic feminism have turned the tables. They have discovered several loopholes in the existing Indian judicial system and are using the laws which were crafted to curb the menace of torture and harassment due to dowry, to in-turn harass their husbands and the husband's family that includes fathers, mothers, sisters, elderly grandparents, and even disabled individuals.

We are not talking about the dowry deaths or physical injury cases but about dowry harassment cases that require *no investigation or evidence whatsoever* and can be filed just based on a statement by the wife. With an approximately 60,000 such accusations per year, about 200,000 people are directly affected by these false accusations. The number of such cases has increased by about 95% in the last 10 years and by more than 15% in just the last two years. This poorly formulated law is encouraging ill-intentioned women and their families to lodge false cases against innocent people vulnerable to such *gender biased laws*, finally causing the imprisonment of such people along with immense emotional, physical, financial trauma and public ignominy.

The following reasons are generally the *motives behind the misuse* of the provisions of Sec 498A of the IPC.

- **Legal Extortion** - Get-rich-quick-scheme to extort large amounts of money.
- **Prior Relationship** - Wife has a prior relationship, and cannot get out of it. She marries to satisfy her parents, and then misuses the 498a law in order to obtain a divorce.
- **Adultery** - Women who indulge in adultery use 498a as a bargaining tool
- **Domination** - Wife wants the husband to abandon his parents and siblings, and have total control over his finances and social behaviour.
- **Custody** - Deny the father and his family access to their child/children.
- **Fraudulent Marriages** - in which the bride [and her family] hides her education level or mental health; and when is justifiably asked to release the person who has gone into marriage without knowing the full facts; she files a false 498a case.

The Supreme Court observed... “..this Court has dealt with thousands of cases and matters relating to dowry deaths and cases registered under Section 498A./406/306 IPC arising out of domestic violence, harassment of women on account of inadequate dowry or coercion of the woman for not fulfilling the demand of dowry and hundred of divorce cases arising there from. Experience is not so happy nor is implementation or enforcement of these laws satisfactory or punctilious.”

While the court maintains that “...CAW cell [Crime Against Women Cell] is an agency created only to make efforts for reconciliation between families before initiation of criminal proceedings on the complaint of the wife, and

The proceedings of CAW are not judicial or quasi-judicial nor the proceedings in the investigation in the crime. They are only reconciliatory proceedings.”

The cell devises its own methods to identify the nature of offence, collection of evidence and examination of witnesses. Even vague, unspecific or exaggerated allegations bereft of any evidence of any physical or mental harm or injury inflicted upon the woman cater to the cells quest to hound the husbands with the threat of arrest, making them run here and there like fugitives and force them to hide at their friends or relatives houses till they get anticipatory bail. Thousands of such complaints and cases are pending and are being lodged day in and day out.[Justice J.D. Kapoor, Savitri Devi Versus Ramesh Chand and Ors CRL. R 462/2002 ,Date of judgement: May 19, 2003]

Take into account the case Jasbir Kaur Vs State , where instead of making an effort to bring about amicable settlement between the parties, the cell blackmailed the husband with threats of registering immediately an FIR against him. Leading dailies have been documenting statistical evidence of the number of fake cases before such CAW cells, and yet we have figures such as over **100,000 innocent women being arrested since 2004, u/s 498A!**

The amended S.437[2], CrPC lends support to the contention that in deciding the question of grant of bail, the seriousness of the offence is of no consequence unless and until the nexus between the accused and the crime is highlighted by the prima facie evidence.

But this offence being of Non-bailable nature the basic criterion that whether there is any prima facie evidence to connect the accused with the crime is overlooked. A bail plea is rejected even without giving opportunity of hearing to the defence counsel. This is a gross violation of the basic principles of natural justice. And new depths of malice and abjectness are touched when the vanguards of feminism, like Renuka Chaudhary come up with statements like “its men’s turn to suffer.”

A failed marriage is not a crime however, the provisions of Section 498A are being used to **convert failed marriages into a crime and people are using this as tool to extract as much monetary benefit as possible**. In many cases, where FIRs are filed under Section 498A IPC, petitions are being filed under Section 482 Cr.P.C. for quashing of FIRs after settlements between the parties and the allegations made of cruelties etc. are withdrawn the moment a lump sum payment is received. **Not only close relatives but distant relatives and even neighbours are being implicated** under Section 498A and other provisions of IPC in cases of failed marriages. The Courts must be very cautious during trials of such offences.

In all these cases in the name of investigation, except recording statement of complainant and her few relatives nothing is done by police. **The police does not verify any circumstantial evidence nor collect any other evidence about the claims made by the complainant**. No evidence about giving of dowry or resources of the complainant’s family claiming spending of huge amounts is collected by the police. This all is resulting into gross misuse of the provisions of law. The investigating agency in all such cases must collect all circumstantial and other evidence in respect of claims made by the complainant and similarly Courts should always be careful in considering the credibility and truthfulness of the statement of the complainant and relatives. [Justice Dhingra in Narender Kumar and Anr.Vs.State [Govt. of NCT of Delhi],

Many instances have come to light where such complaints are not bonafide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent the abuse of well-intentioned provision. Merely because the provision is constitutional and intra vires, does not give a license to unscrupulous person to wreck personal vendetta or unleash harassment. It may, therefore become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. If cry of wolf is made too often as a prank assistance and protection may not be available when the actual wolf appears. There is no question of investigation agency and courts casually dealing with the allegations. They cannot follow any straitjacket formula in the matters relating to dowry tortures, deaths and cruelty. It cannot be lost sight of that ultimate objective of every legal system is to arrive at truth, punish the guilty and protect the innocent. There is no scope for any pre-conceived notion or view. It is to be noted that the role of investigating agencies and the courts is that of watch dog and not of a bloodhound. It should be their effort to see that innocent person is not made to suffer on account of unfounded, baseless and malicious allegations. It is equally indisputable that in many cases no direct evidence is available and the courts have to rely on circumstantial evidence while dealing with such cases, the law laid down relating to circumstantial evidence has to be kept in view. [Judgement: Justice Arijit Pasayat, Justice H.K.Sema in *Sushil Kumar Sharma v Union of India &ors.*]

V. Restoration of Justice

The use of S.498A by reading in part or in isolation to each other, of the provisions of the Criminal [Amendment] Act No. 46 of 1983, is resulting in a stark deviance from the literal meaning of the section. 498A was never developed as a weapon of mass-destruction, but that is what it easily mirrors itself into, the moment the thin line between judicial activism and sheer misconstruction of law is ignored. To save such ignominy of the well-intended provision, certain authoritative observations may be taken guidance of.

Justice Malimath Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, 2003 observed the following and gave the recommendation to amend the law immediately:

In less tolerant impulsive woman may lodge an FIR even on a trivial act. The result is that the husband and his family may be immediately arrested and there may be a suspension or loss of job. The offence alleged being non-bailable, innocent persons languish in custody. There may be a claim for maintenance adding fuel to fire, if the husband cannot pay. She may change her mind and get into the mood to forget and forgive. The husband may realize the mistakes committed and come forward to turn a new leaf for a loving and cordial relationship. The woman may like to seek reconciliation. But this may not be possible due to the legal obstacles. Even if she wishes to make amends by withdrawing the complaint, she cannot do so as the offence is non compoundable. The doors for returning to family life stand closed. She is thus left at the mercy of her natal family.

This section, therefore, helps neither the wife nor the husband. The offence being non-bailable and non compoundable makes an innocent person undergoes stigmatization and hardship. Heartless provisions that make the offence non-bailable and non-compoundable operate against reconciliations. It is therefore necessary to make this offence **[a] bailable and [b] compoundable to give a chance to the spouses to come together.**

Courts must be very cautious during trials of such offences. In all these cases investigation along with recording statement of complainant and her few relatives should be done by police. The police should verify any circumstantial evidence and collect any other evidence about the claims made by the complainant. Evidence about giving of dowry or resources of the complainant's family claiming spending of huge amounts should be collected by the police. [Justics dhingra in Gyan Prakash Versus State [Govt. of NCT of Delhi]

Cruelty for the purpose of s. 498A IPC is to be established in the context of s. 498A IPC as it may be different from other statutory provisions; it is to be determined/inferred by considering the conduct of the man, **weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc.;** it is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint [Manju Ram Kalita vs State of Assam [SUPREME COURT OF INDIA, 29 May 2009]]

Demand of dowry and subjecting wife to torture and harassment *if comes out from the only testimonies of the relatives of the deceased and none of the witnesses speak anything which they have seen directly insofar as torture and harassment to deceased is concerned then the evidence of the relatives of the deceased is inadmissible u/s. 32[1] Evidence Act* and such evidence cannot be looked into for any purpose. In the case of **Bhairon Singh vs State of Madhya Pradesh [SUPREME COURT OF INDIA, 29 May 2009]** where the accused was charged u/ss. 304B, 306, 498A of IPC and s. 3 of Dowry Prohibition Act, 1961 Death of deceased was neither homicidal nor suicidal, it was accidental. Conviction was based on testimonies of the two brothers of the deceased. Since for

an offence u/s. 498a the question of death was not and cannot be an issue for consideration, evidence of the brothers is hardly evidence in law to establish offence.

VI. Circumstantial evidence to be proved:

A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra*, [AIR 1984 SC 1622]. Therein it has been held that onus was on the prosecution to examine certain guidelines. They are:

[1] The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

[2] The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

[3] The circumstances should be of a conclusive nature and tendency;

[4] They should exclude every possible hypothesis except the one to be proved; and

[5] 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." [Venkat Swamy Versus Vijaya Nehru and Anr. JUDGMENT Dr. ARIJIT PASAYAT, J., DOJ: 25-8-2008]

VII. Other provisions like Right to Information can be exercised to counter the menace of 498-A

Right to Information Act, 2005

Sec.3 - Right to information.-Subject to the provisions of this Act, all citizens shall have the right to information.

Sec.4 -Obligations of public authorities- [3] For the purposes of sub-section [1], every information shall be disseminated widely and in such form and manner which is easily accessible to the public

[4] All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.-For the purposes of sub-sections [3] and [4], "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority

In the case of *Bhagat Singh vs Saroj Nimal* [2007]

Bhagat and Saroj Nimal's marriage lasted only ten days, but for the last seven years he was trying to prove that he never took dowry. He says his former wife did not earn even enough to afford the 10 lakh she claims to have given *Bhagat* as dowry.

“My entire family was ruined after the dowry case. I lost my job and my family’s honour even though I did not do anything wrong,” says Bhagat Singh, **who won a case against his former wife by using the Right to Information Act**, by *questioning the basis of her dowry complaint by seeking evidence from Investigation Wing of Department of Income Tax on sources of income and assets acquired, which has a direct bearing on the capacity of Smt. Saroj Nimal to pay the amount of dowry mentioned above*. He mentioned that the expenditure of Smt. Saroj Nimal is not in proportion to the known or declared sources of income by her. He, therefore, requested the CPIO to provide him with the details of investigations made by the Directorate of Income Tax [Investigation] on TEP filed by him. [<http://www.ibnlive.com/news/harassed-by-dowry-related-laws-rti-can-help/53659-3.html>]

But to completely eradicate any possibility of distorting the provision of 498-a, the dilution or restructuring of the provision is required. Section 498A is intended to protect the women from cruelty of husband or his relatives. It has been widely reported that this provision has been misused and is also harsh as it is non-bailable and non-compoundable. It is desirable to provide a chance to the estranged spouse to come together and therefore it is proposed to make the offence under Section 498A IPC, a compoundable one by inserting this Section in the Table under sub section [2] of Section 320 of CrPC, wherein it can be compounded with permission of the Court. [The Law Commission, 154th report recommendations and the Malimath Committee Recommendations]

An attitude that has the potential to uncover great institutional damage is that justice is required to be done only in the courts. It should instead be taken to be that **any and every authority under the statute has to discharge its duties in a just manner, otherwise people will lose faith in the governance. Public authorities should stringently desist from unnecessarily burdening courts by placing before it frivolous and fabricated cases**. [Union of India V. Raja Mohammed Amir Mohammed Khan 2005 AIR [SCW] 5303]

To treat this malady, an amendment to the effect of making the misuse of the law as a valid ground for divorce, is suggested. Furthermore, all marriages ending up with false dowry cases should not be allowed alimony and child custody.

LORD TUCKER said-

Every act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. [Jamieson Vs. Jamieson [1952] 1 All E R 875]

A cardinal principal of the sentencing policy is that it is better to forgive ten suspected criminals than to punish one innocent person but today, the IPC 498A is powerfully working its way towards uprooting the very foundation of any such Rule of Law.
