
***Case Comment : D. VELUSAMY v. D. PATCHAIAMMAL,
(2010)10 SCC 469***

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Abstract

In a country like India where laws are biased towards preservation of marriage, often at cost of women suffering, it is not surprising that the concept of ‘live-in relationship’ has been always considered unethical and immoral. However, moral policing cannot take away the fundamental rights sanctioned by the Constitution. The case of *D. Velusamy v D. Patchaimal*¹ decided in 2010, generated a similar debate when the court through its ambiguous moral judgment, limited the scope of the expression ‘relationship in the nature of marriage’ under Section 2(f) of the Protection of Women from Domestic Violence Act² and equated it with ‘common-law marriages’. While the judgement appears to be progressive by recognizing the legality of certain live-in relationships, it ended-up disadvantaging the women it seeks to protect. This comment attempts to critically analyse the Velusamy judgement and contends that by limiting the scope of the expression ‘relationship in the nature of marriage’, the court excluded women in a diverse range of cohabiting relationships, especially those who are in fraudulent marriages or are ‘second-wives’ from seeking legal remedies.

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¹ *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469 (India). [hereinafter ‘Velusamy’].

² Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(f). [hereinafter ‘DVA’] It states; “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.”

I. The *Velusamy* Case

The case stemmed from a Section 125 Cr.P.C.³ petition filed by a wife seeking maintenance in 2001. The respondent-wife claimed that she was married to the appellant and had lived together at her father's home when she filed for maintenance. The appellant denied the claim on the ground that the marriage between them was void as he was legally married to another woman named Lakshmi. The court examined this question from the view of DVA to understand the meaning of 'aggrieved person'⁴, 'domestic relationship'⁵, 'shared household'⁶ and 'economic abuse'⁷. An aggrieved person can approach the magistrate for relief mentioned in Section 12(2)⁸ and under Section 20(1)(d)⁹ the Magistrate can grant maintenance. While the Supreme Court recognised the two separate categories of 'marriage' and 'relationship in the nature of marriage'¹⁰, as well as the Parliament's intent to protect and benefit women in both of these types of relationships, it emphasized elements of 'common-law marriage' as a test for a 'relationship in the nature of marriage' to limit the types of live-in relationships that would come under this category. The court then went on to cite merely Wikipedia for laying down the essentials of common-law marriage.

Although the facts of this case did not necessitate an interpretation of Section 2(f) of DVA, the Supreme Court did so in anticipation of "a large number of cases [which] will be coming up before the courts in our country on this point."¹¹ The Hon'ble court intended to clarify the legal ambiguity

³ The Code of Criminal Procedure, 1973, No. 2 of 1974, § 125. It states; "(1) If any person having sufficient means neglects or refuses to maintain- (a) his wife, unable to maintain herself,.... a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife ..., at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Explanation.- For the purposes of this Chapter, (b) wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

⁴ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(a).

⁵ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(f).

⁶ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(s).

⁷ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3 Explanation (iv).

⁸ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 12(2).

⁹ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 20(1)(d). It states; "While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to— (d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force."

¹⁰ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(f).

¹¹ *Velusamy v. Patchaiammal*, (2010) 10 SCC 469 ¶ 20 (India).

of the lack of a clear statutory definition of ‘relationship in the nature of marriage’. But the extent to which the court succeeded in fulfilling this goal is questionable.

II. DVA and Live-In Relationships

Understanding the legislative intent behind DVA is important. It intended to create a framework for equality by enabling remedies to prevent violence in shared households. Recognizing that not only wives, but also mothers, sisters, daughters, and women in non-marital relationships needed protection from violence and being rendered homeless, the law protects the entire household, not just the matrimonial relationship. The term ‘shared household’¹² assumes significance as it stemmed from the necessity to separate the concept of property ownership from its usage for residential purposes.¹³

In this context, by holding ‘relationship in nature of marriage’ to be synonymous with ‘common-law marriage’, the court excluded a diverse range of women in a cohabitating relationship, especially vulnerable women who are in fraudulent marriages or are ‘second-wives’, from seeking legal remedy under this act. Essentially, this creates a category of deserving women in the context of the DVA as opposed to the ‘undeserving’ women whom the law fails to protect. This reinforces the legal bias towards the protection and promotion of ‘marriage’ as the only desirable institution by safeguarding only matrimonial relationships.

Given that marriage in India is not required to be registered, this distinction between marital and non-marital relationships based on the fulfilment of some legal formalities may have unintended implications. The Hindu Marriage Act of 1955¹⁴ allows for voluntary marriage registration and

¹² Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(s). It states; “shared household means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.”

¹³ BROTI DUTTA, *Of ‘Keeps and Concubines’*, in CONFLICT IN THE SHARED HOUSEHOLD: DOMESTIC VIOLENCE AND THE LAW IN INDIA, 97,127 (Indira Jaising and Pinki Mathur Anurag ed., Oxford University Press 2019).

¹⁴ The Hindu Marriage Act, No. 25 of 1955. [hereinafter ‘HMA’].

specifically declares that non-registration has no bearing on the validity of any Hindu marriage.¹⁵ Additionally, while Section 7 of HMA¹⁶ prescribes conditions for formal validity of marriages, it grants diversity in the forms of marriage solemnization, ranging from complex ceremonies to basic rites and the simple need of living together as husband and wife. Even when there is no independent evidence to verify the formalities for marriage¹⁷, Indian courts have extensively relied on the existence of a de facto marriage, i.e., a presumption in favour of marriage, from the time of the Privy Council.¹⁸ Even the higher judiciary has consistently reinforced¹⁹ the legal position of ‘presumption in favour of marriage, where partners have lived together for a long spell as husband and wife²⁰. The rationale is that these relationships are identical to marital relationships, with all of the features and characteristics of a valid marriage except for the lack of proof to substantiate the formalities required for a legally recognised marriage. The paradox here is that, while proof of a relationship in the nature of marriage allowed a woman to claim the status of a marriage relationship in 1869, with the *Velusamy* decision in 2014, the claim would only be to a type of ‘live-in relationship’ or a relationship with a lower status than marriage, where women and children would be subjected to fewer or no rights.²¹ These factors exacerbate the vulnerability of women who are in un-solemnized marriages or who lack proof of marriage, which is a common occurrence among women with low formal and legal education.²² Even though they might have children from the ‘second-wife’, men in numerous marriages might deny the wife any rights by simply claiming that he never married her legally. Such a decision while seems progressive on the face of it as it considers a new social phenomenon, it merely gives a new label to an older phenomenon with lesser rights for women.

Velusamy judgement is in fact expressly rejecting live-in relationships simpliciter, recognising them only when they ‘resemble’ a marital relationship in a way that the courts imagine it. The implications are that homosexual relationships will continue to be excluded from ‘relationship in

¹⁵ The Hindu Marriage Act, No. 25 of 1955 §8.

¹⁶ The Hindu Marriage Act, No. 25 of 1955 §7. It states; “Ceremonies for a Hindu marriage. (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.”

¹⁷ Mohabbat Ali Khan v. Muhammad Ibrahim Khan, A.I.R. 1929 PC 135 (India).

¹⁸ Privy Council in Andrahennedige Dinohamy v. Wiketunge Liyanapatabendage Balshamy, AIR 1927 PC 185 (India).

¹⁹ Gokalchand v. Parvin Kumar, AIR 1952 S.C. 231 (India); *S.P.S. Balasubramanyam v. Suruttayan*, (1994) 1 S.C.C. 460 (India); *Sobha Hymavathi Devi v. Setti Gangadhara Swamy*, (2005) 2 S.C.C. 244 (India).

²⁰ *Badri Prasad v. Deputy Director of Consolidation*, (1978) 3 S.C.C. 527 (India).

²¹ Nidhi Gupta, *The Myth of Live in Relationships in India*, 4(2) NLUJ LAW REVIEW 23, 32 (2017).

²² BROTOTI DUTTA, *Unscrambling the images*, in CONFLICT IN THE SHARED HOUSEHOLD: DOMESTIC VIOLENCE AND THE LAW IN INDIA, 97,127 (Indira Jaising and Pinki Mathur Anurag ed., Oxford University Press 2019).

the nature of marriage' as while same-sex couples may live together but the fact that they cannot marry excludes them from protection under DVA. In addition, the objectionable language used by the court for women is reprehensible. Justice Katlu states, 'If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage.'²³ Not only is this statement disrespectful and demeaning, but it also reinforces the patriarchal notion of women as 'property' of men.

Another moral ideal that this judgement imposes is that of monogamy given the apparent uneasiness with broadening the scope of legal protection to include the 'other woman,' regardless of whether she is a victim of domestic violence. On the fact that men, who often fraudulently enter into such a marriage, can simply defeat the 'other woman's claim to maintenance or residence, Flavia Agnes notes: 'It is strange that matrimonial misconduct or 'guilt' can be flagrantly invoked by a husband to defeat the woman's economic claim, without any adverse criminal or civil consequences visiting him during court proceedings.'²⁴ When a woman, whether married or not, is in a domestic relationship with a man, the focus of the DVA is on the tangible harm inflicted to the woman and the woman's subsequent protection. Acceptance of the aforementioned category of live-in relationships as analogous to a domestic relationship under Section 2(f) of the DVA does not imply that bigamy is encouraged or that the institution of marriage is under attack. It merely reflects the reality of our society while eloquently promoting DVA's key goals of protecting women. The court fails to recognize this.

III. Maintenance under Section 125 Cr.P.C.

Finally, both legislatively and judicially, the rights to claim maintenance under the DVA²⁵ have been recognised as being similar to those under Section 125 of Cr.P.C.²⁶ But, the rights of women in live-in to claim maintenance are limited to DVA. Courts have held that a woman who is not legally married is not entitled to maintenance under Section 125 Cr.P.C., even though her husband treated her as his wife, because the legislature's objective, not the parties' attitudes, is what

²³ Velusamy v. Patchaiammal, (2010) 10 SCC 469 ¶ 34 (India).

²⁴ Flavia Agnes, 'Conjugal Property, Morality and Maintenance', *Economic and Political Weekly* xlv, 44 (2009): 61.

²⁵ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 20(1)(d).

²⁶ The Code of Criminal Procedure, 1973, No. 2 of 1974, § 125.

matters.²⁷ This would only be the case if the second wife is completely aware of her husband's previous marriage. If the woman is unaware of the prior marriage, she will be treated as a legally married wife entitled to maintenance.²⁸ But in the *Velusamy* case, (in 2010) issue arises because the term 'wife' u/s 125²⁹ requires marriage and includes divorced wives³⁰, i.e., if the 'second-wife' has not even been married she could not be divorced and thus cannot claim to be the wife of her husband unless it is established that husband was not earlier married to another woman. What the judgement essential does then is to deny women in cohabiting live-in relationships rights under both the DVA and Section 125.

IV. The Context and the Legacy

Finally, this judgement came after the *Chanmuniya v. Virendra Kumar Singh Kushwaha*³¹ decision which was given earlier in the same month. In the *Chanmuniya* case, while the Hon'ble court referred the case to a higher bench with certain questions, it observed that the term 'wife' should be given a broad and expansive interpretation to embrace even those circumstances where a man and woman have been living together as husband and wife for a long time. To fulfil the actual spirit and essence of the beneficial provision of support under Section 125, strict proof of marriage should not be a precondition for maintenance under Section 125 of the Cr.P.C. However, the *Velusamy* judgement failed to consider this position while providing an opposing judgement.

Finally, the position was settled by the courts in the *Badshah Vs. Urmila Badshah Godse*³² and the *Indra Sarma v. V.K.V. Sarma*³³ case where the court held that if the husband concealed first marriage from the second wife, then the second wife is entitled to maintenance. That is to say, "when the woman is aware of the fact that the man with whom she is in a live-in relationship and who already has a legally wedded wife and children, is not entitled to various reliefs available to

²⁷ Savitaben Vs. State of Gujarat, (2005) 3 SCC 636 (India).

²⁸ Badshah Vs. Urmila Badshah Godse and Another, (2014) 1 SCC 188 (India).

²⁹ The Code of Criminal Procedure, 1973, No. 2 of 1974, § 125 Explanation b. It states; "wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

³⁰ The Malimath Committee on Reforms of Criminal Justice System, in its 2003 report, recommended that the word 'wife' in Section 125 CrPC should be amended to include a woman who was living with the man like his wife for a reasonably long period. Some courts in recent times have started accepting this interpretation.

³¹ Chanmuniya Vs.Chanmuniya Virendra Kumar Singh Kushwaha and Anr (2011)1SCC141.

³² Badshah Vs. Urmila Badshah Godse & Another, (2014) 1 SCC 188.

³³ Indra Sarma v. V.K.V. Sarma (2013) 15 SCC 755.

a legally wedded wife and also to those who enter into a relationship in the nature of marriage.” The court also laid down certain guidelines for determining whether a live-in relationship will fall within the expression ‘relationship in the nature of marriage’ which includes the duration of the relationship, shared household, pooling of resources, domestic arrangements, sexual relationship, children, socialisation in public and intention and conduct of the parties. Based on this, the Hon’ble Supreme Court also requested the Parliament to enact new legislation so that the victims can be protected from any societal wrong caused by such relationships.

V. Conclusion

Given that our society is a dynamic one, the law governing it cannot remain static. It needs to evolve to balance and protect the interests of all parties concerned. To expand legal protections for women with reference to ‘marriage’ or ‘marriage-like relationships’ is an abysmal idea that dangers exclusion of some women. DVA's greatest accomplishment was in recognising that every woman, regardless of whether or not she was in a legally valid marriage, has a right to protection against domestic violence at the very least. The sole stipulation being that she must have lived with the perpetrator of the violence in a ‘shared household.’ Therefore, through the *Velusamy* judgement, the Supreme Court has undermined the rights of women who are in or at the risk of abusive intimate relationships. It fails to recognize the plurality of relationships and families. While the law has a protectionist goal of preventing vagrancy and destitution of women, the *Velusamy* judgement has watered down the violence against women legislation by emphasising only on rights flowing from a ‘de-facto’ relationship.