

# TRAFFICKING AND THE LAW

Second edition



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**HRLN**

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Human Rights Law Network

New Delhi  
November 2011

## HUMAN RIGHTS LAW NETWORK

- To protect fundamental human rights, increase access to basic resources for the marginalised communities, and eliminate discrimination.
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### Trafficking and the Law

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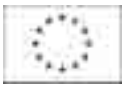
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– Anti-trafficking and Law Initiative Team

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## Foreword to the First Edition

Despite the enacting of the Immoral Trafficking Prohibition Act, trafficking of women and children rises exponentially in India. Apart from being dwelt upon at seminars and glossy publications neither the central government nor the state governments have moved to prosecute the brothel keeper, the pimp and the trafficker. A recent study published by the NHRC, shows that the prosecutions are almost down to zero. To add insult to injury the trafficked victim is often arraigned as an accused person and is put in jail. The legal system is so utterly useless that even in cases where the trafficker is arrested, bail is inevitably granted and the ultimate acquittal is a foregone conclusion. Where the trafficked victim is rescued and put into a state institution, studies have shown that the courts are releasing these girls into the custody of the traffickers posing as “relatives” anxious to claim their child.

The legal system has failed miserably in its role as a protector of the constitutional rights of the trafficked victim. In Vishal Jeet’s case (1990 3 SCC 318) the Supreme Court declined to go into the issue of rehabilitation and gave directions limited to the setting up of advisory committees which have never functioned despite the order.

In 1997 in Gaurav Jain’s case (1997 8 SCC 114) the two justices on the bench of the Supreme Court disagreed and the matter was sent ultimately to the Hon’ble Chief Justice of India to consider whether a larger bench should be constituted. From then onwards the court has not found time to address this issue.

Justice K Ramaswamy’s scathing criticism of the government’s pretence of rehabilitation is of some importance. “Ultimately it all ended in a fiasco. Unless proper arrangements are made and concerted actions taken ad-hoc attempts to enforce the law defeat the provisions of the Juvenile Justice Act. Proper planning, constant counseling and persuasion are the appropriate means, rather than abrupt, ad-hoc or

coercive steps. It is rather unfortunate that Juvenile Homes run by the government are not yielding expected results”

The principal reason why trafficking cannot be checked is because the law enforcement agency responsible for implementing ITPA is itself involved in the trafficking of women and children. Policemen throughout the country have a cosy relationship with brothels, visiting them regularly and are paid bribes as protection money. This scandalous situation known to everybody has gone unchecked for so long. But who will police the police? Not only do they protect the trafficker, pimp and brothel keeper from prosecution but when prosecutions do take place they instruct the public prosecutor in such a way, that the accused person is granted bail and ultimately acquitted and the rescued girl is given back to the traffickers only to return to the brothel.

Thousands of children are missing from the villages of India, trafficked to the cities by parents, relatives and close associates in the village. In the police stations they are merely shown as missing. As a result, apart from a casual inquiry nothing else is done and the children are treated as lost.

Those who are rescued are kept in awful circumstances. The state institutions are worse than jails. The food is worm infested, the toilets overflow and in winter the inmates sleep on the floor. Medical facilities are primitive. Counseling is not available. No wonder why trafficked victims often feel that they are better off in the brothels.

The root of the matter is that the government budget for looking after a rescued women is Rupees five hundred (\$ 10) per person per month which includes food, clothing, toiletry and medicines. It is this shocking allocation that results in trafficked victims being treated worse than animals.

### **What needs to be done?**

First of all unless there is a change in the way in which the nation sees the importance of this issue, nothing is going to happen. Combating trafficking must be the highest priority, higher even than the trafficking of drugs and the arms trade. For this change to happen poor women and children must be recognised as human beings with rights rather than things to be sexually exploited.

Government of India must form a National Nodal Agency and a Notional Centre for Missing and Exploited Children so that trafficking

is tackled not as a local issue but as a federal crime requiring a badly coordinated national response. Advisory Boards set up under the Act should evict all the government representatives who sit on these boards and do no work. Instead reputed social workers should take over. Under Section 13 of ITPA Special Police Officers should be trained and appointed to do only trafficking cases. They should not be given any other work such as VIP duty. The CBI should take its role as the implementing agency throughout India seriously and appoint an adequate number of officers to specialise in ITPA investigations and prosecutions. No victim of trafficking should ever be put behind bars or prosecuted. No trans-border trafficked victim should ever be prosecuted under the Foreigners Act or the Passports Act. All traffickers, pimps and brothel keepers should be prosecuted not only under the provisions of ITPA but also the Indian Penal Code provisions relating to rape. No victim should be called repeatedly to court over a prolonged period to give evidence. Video conferencing should be used. Bail should not be granted to traffickers because they invariably misuse this freedom to get possession of the victim once again. Following the directives of the Supreme Court in the Delhi Domestic Working Women's Forum case (1995 1 SCC 14) substantial compensation should be paid by the state to all trafficked victims. A new and comprehensive system of witness protection must be put into place. The National Legal Aid Services Authority and the State Authorities should set up a pool of trained lawyers and pay them well. Today they get a shameful pittance for their services. A special cadre of Public Prosecutors should be developed to handle ITPA cases with special emphasis in their training on the confiscation of the assets of the accused and on the prosecution of the police for misconduct.

Instead of all this a new law is proposed to be enacted which is as pathetic as the present governments efforts to tackle the menace of trafficking. Fancy provisions call for the prosecution of the customer as if he is going to enter his name, address and mobile number in a register maintained at the entrance of the brothel!

All in all, in this land where women are supposed to be revered, trafficking of poor women and children will continue unabated. Government will continue to, as we say, "pay lip service". This book will add to the considerable number of publications already out on trafficking. Perhaps the judgements herein will point towards a way of using the legal system to correct the injustice. But I doubt it.

**Colin Gonsalves**



## Foreword to the Second Edition

Since HRLN's first edition was published in 2006 the courts have made some inroads into the problem of human trafficking by setting out guidelines and clarifying the current law. However, it continues to be a huge problem. The United States released its 10th annual Trafficking in Persons Report in 2010, which outlines the continuing challenges across the globe. It placed India on the Tier-2 Watch List for human trafficking for the 7th consecutive year as India has failed to take effective measures to combat this problem. According to its report, India is a source, destination, and transit country for men, women, and children trafficked for the purposes of forced labour and commercial sexual exploitation. According to some estimates, the estimated annual turnover of human trafficking in India is around 20 billion rupees and the number of persons affected could be anywhere between 20 to 65 million. What is distressing is that as many as 80 percent are women and 50 percent are children.

To combat human trafficking several short-term and long-term measures are required. In the short-term, there is an urgent need to create awareness among the public about human trafficking for which the media could play a very effective role. More long term, there are a number of areas that require dramatic improvement, such as poverty alleviation measures, increased efforts to prosecute the traffickers and means to decrease official complicity in trafficking, including prosecuting, convicting and punishing complicit officials

The benefits of economic development have not trickled down to the marginalised sections of the society and millions of people still live below the poverty line. Women and children who are hungry and do not have sufficient resources are highly vulnerable to human trafficking. If this section of society was more aware of its rights, and the recourses available to alleviate their situations, they would be less likely to be taken advantage of by traffickers. When family members attempt to locate a

relative who has disappeared and potentially trafficked into bonded labour or prostitution they often find that the law enforcement agencies do nothing to help them. This is despite the fact that article 23 under Part 3 (Fundamental Rights) of the Indian constitution prohibits trafficking of human beings in the territory of India and there being more than 20 provisions in the Indian Penal Code, 1860 which deal with various aspects of human trafficking. These disadvantaged members of society only chance of help is from NGOs and activists who take up their cause.

The Government of India has undertaken some measures to try to combat human trafficking. The central Government has encouraged the expansion of a number of Anti-Human Trafficking Units at the State and District levels, which have the potential to significantly increase law enforcement activities. The Ministry of Women and Child Development was made the nodal agency by the government to deal with human trafficking in India. The National Human Rights Commission has formulated an integrated plan of action to prevent and combat human trafficking with a special focus on women and children. However there is still a lack of clarity in government policies. The existing laws have not been properly defined and there are several loopholes which the perpetrators of human trafficking use to escape from being punished.

The Government is starting to realise that there is a huge potential benefit in developing an institutionalised system of co-ordination between the law enforcement agencies and non governmental organisations (NGOs) who sometimes prove to be more effective in exposing human trafficking networks. There have been some efforts by the courts to utilise NGOs, as can be seen in the case of *Bachpan Bachao & Ors. vs. Union of India & others*. In this case, the Delhi High Court directed that NGOs working in the area of exploitative labour should co-ordinate the current system to try and ensure that placement agencies are more regulated. The aim being to prevent such agencies from offering women and children positions as domestic workers and then moving them into prostitution or hazardous work. The Government also often relies on NGOs to ensure post-rescue rehabilitation of the victims in terms of providing them with healthcare, education and other employment opportunities. The central and state Governments should be implementing protection programs and compensation schemes to ensure that certified trafficking victims actually receive benefits and the compensation they are entitled to.

However, while the NGOs continue to bring cases of human trafficking to the courts attention, very few perpetrators are being punished. The Delhi High Court in 2009 issued a judgement resulting in the investigation, rescue and rehabilitation of 66 bonded child labourers but the traffickers, though arrested were not prosecuted. The involvement of public officials in human trafficking also remains a significant problem which remains largely unaddressed by central and state governments. There were no recent reported convictions or sentences of government officials for trafficking related offences.

In addition, while the number of government shelters has increased, they continue to be of poor quality and do not have proper supervision leaving the women and children placed there just as vulnerable as they were outside the home. This is evidenced by Chandrika Prasad Yadav vs. State of Bihar and Others (1991)4SCC177. In this case, a minor girl was placed in a women's protection home, but she and other girls escaped. No one from the home or law authorities took steps to locate the girls and it became apparent during the testimonies that such incidents were commonplace.

There is a need to have greater co-ordination between different states in India as trafficking has a long trail from the source point to the destination with several transit points in between. In the case of Bachpan Bachao & Ors. vs. Union of India & others the courts realised this to an extent by ensuring that the directions applied to placement agencies in Delhi as well as those that are located outside the capital but employing people within Delhi. All investigations into cases involving human trafficking should be carried out with the aim to destroy this long trail. Increased co-ordination between Government departments like police, public welfare, health, women and children is required to ensure an effective response. Further work is also needed to protect foreign victims of trafficking in India. Foreign trafficking victims are not offered special immigration benefits such as temporary or permanent residency status. The Government has reported that in cases of deportation, it worked in conjunction with NGOs to place victims in a shelter in their home country however, there were no reports this happened in practice. Foreign victims are not offered legal alternatives to their removal to countries where they may face hardship or retribution.

What is clear is that although India has the necessary legislation to tackle human trafficking it has a long way to go to combat this menace.





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# PART I

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# 1 Introduction

**T**rafficking in human beings is considered a contemporary form of slavery. It is a growing phenomenon globally. In recent years it has become the third largest source of transnational illegal activities after arms and drugs<sup>1</sup>.

Historically, trafficking in human beings was associated with slavery and bonded or forced labour. With time, it almost become synonymous with prostitution of commercial sexual exploitation. It is, however, important to note that trafficking is not confined to the commercial sexual exploitation of women and children alone. It has a myriad of forms and the number of victims has been steadily on the rise over the past few decades. It takes place through and for marriage, sexual exploitation, begging, organ trading, military conflicts, drug peddling and smuggling, labour, adoption, entertainment and sports. While there is no precise date, estimates provide that approximately 800,000-900,000 persons are traded annually across national borders<sup>2</sup>. Of these, 70 percent are women and 50 percent are children<sup>3</sup>.

The term trafficking needs to be understood along with its linkages, like to the exploitative slave-like conditions, where the victims of trafficking suffer untold exploitation and misery. The party that benefits from this entire exercise are the traffickers. They gain in terms of cash, labour or any other kind of service. This problem cannot be understood merely as the buying and selling of human beings but must be extended to include all processes that precede and follow such trade.

Trafficking is a growing business within an organised crime set-up. This flourishes with due sanctions from state functionaries. In various

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- 1 Malhotra Divya, *Trafficking of Women and Children: A Culture of Silence*, Eastern Book Company, PL Web Jour 1,2005.
  - 2 Asian-African Legal Consultative Organisation, *Establishing Cooperation Against Trafficking in Women and Children*, AALCO Secretariat, New Delhi, pp 3.
  - 3 *Trafficking in Persons Report*, US Department of State, 2004. Available at [http://www.amnestyusa.org/women/hot\\_topic/102005](http://www.amnestyusa.org/women/hot_topic/102005), last visited on April 17, 2006.

instances of trafficking, the State personnel turn a blind eye and a deaf ear to these crimes, thus, silently abetting trafficking. If not indifferent or silently involved, the State personnel are largely insensitive towards the entire issue and end up victimising the victims of trafficking. In short, these so-called protectors, contribute actively and considerably to facilitate the process of de-humanisation.

Despite trafficking being illegal worldwide, it takes place regularly violating national and international laws. It occurs within countries and across international borders, regions, and continents. It is a multidimensional complex issue encompassing a whole range of varied and complex economical, social and cultural factors, intertwined with each other.

Men, women and children have been victimised in the trade of trafficking. Many of these unfortunate people are lured into the net by traffickers with offers of jobs, marriage or fortune, only to end up entangled in the suffocating web of exploitation and virtual slavery for the rest of their lives. Some, forced by circumstances of poverty and dearth and lack of any other alternatives, often ignorant of the exploitation and sheer misery lying ahead in their path. Women and children, who are rendered vulnerable owing to the prevailing social, economic, cultural and political conditions of the day; have especially been targeted and are trafficked in large numbers. Moreover, the patriarchal society which treats and renders women inferior and reduces them to a vulnerable and disadvantaged position works in the favour of the traffickers on the prowl and ends up encouraging the entire process of trafficking. Traffickers have taken advantage of unequal status of women and girls in the source and transit countries, including harmful stereotypes of women as property, commodities, servants and sexual objects. Historically, the traffickers have rarely been accountable for the numerous human rights violations that accompany trafficking including servitude, slavery, rape, physical and psychological abuses. Instead, victims of trafficking have been treated as criminals, as illegal immigrants or as people with low moral values and have had to face grave consequences.

### **The Definition**

According to the Oxford English Dictionary the term trafficking constitutes a deal or trade in something illegal<sup>4</sup>. Thus terms like drug

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4 [http://www.askoxford.com/concise\\_oed/traffic?view=uk](http://www.askoxford.com/concise_oed/traffic?view=uk)

trafficking, arms trafficking or human trafficking mean illegal transfer of drugs, arms or human beings from one place to another. The concept of trafficking in people refers to the criminal practice of exploitation of human beings, when they are treated as commodities for profit and after being trafficked, are subjected to long-term exploitation.<sup>5</sup>

We have no legal definition of trafficking at the national level, but trafficking is illegal and is prohibited under Article 23, of the Constitution of India. Being a signatory to the International Convention for the Prevention of Immoral Traffic, which was signed in New York on 9th May 1950, India developed a specific Act against trafficking; the Immoral Trafficking Prevention Act 1956 (ITP Act). However, even in this Act the definition of trafficking is vague and only deals with the commercial sexual exploitation of women and children.

There has been a sincere attempt to define trafficking in some, more recent national legislations like Goa Children's Act 2003. This indicates the State's attempt to acknowledge the problem of trafficking and thus move towards challenging it through legislative provisions. Section 2 of the Goa Children's Act defines child trafficking as:

'Child trafficking means the procurement, recruitment, transportation, transfer, harbouring, receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of the person having control over another person, for monetary gain or otherwise'.

Similarly, section 9 explicitly states that child prostitution shall be prohibited. Section 9(4) penalises anybody who exploits a child for commercial sexual exploitation.

In India, action research on human Trafficking is carried out by the National Human Rights Commission and studies are conducted by various NGOs. The National Human Rights Commission adopts the definition by the United Nations in its action research report "Women and Children in Trafficking 2003". The report states that the concept of trafficking in people refers to the criminal practice of exploitation of human beings where they are treated as commodities for profit and after being trafficked are subjected to long-term exploitation.

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5 2003, NHRC-UNIFEM-ISS, A Report of Trafficking in Women and Children in India.

According to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, also called the *Palermo Protocol*, trafficking in persons is defined as:

- a) Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion or abduction or fraud or deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph a) shall be irrelevant where any of the means set forth are used.
- c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph a).” (foot note to be added)

Trafficking is all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons; within national or across international borders; through force, coercion, fraud or deception; to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage.<sup>6</sup>

### **The Difference between Trafficking and Migration**

Conventionally, trafficking is understood as migration of people from one place to other for the purpose of work. Migration has been a feature of all societies since the ancient time. There are different forms of migration – nomadic migration, migration for labour, migration due to war, displacement, etc. Migration comes under one of our constitutional rights of movement.

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6 1999, Amy O’Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organised Crime*, DCI Exceptional Intelligence Analyst Program: An Intelligence Monograph, Center for the Study of Intelligence.

Migration is usually movement of people from one place of abode to another, either from one district to another or one state to another or to a different country altogether. It may be seasonal and therefore temporary or permanent. There are great expectations behind migration like obtaining a good job, a better life etc.

Trafficking in human beings, especially women and children is a contemporary form of slavery prevalent worldwide. Traffickers use threats, intimidation and violence to force sex or labour under conditions comparable to slavery.

There is a very thin line separating the concept of migration from trafficking, the intent and consequence cannot be traced while the person is being moved from one place to another. The outcome of movement decides whether it is safe migration or trafficking.

In order to tackle the issue of trafficking, we need to make clear conceptual distinctions of the different elements involved. Voluntary migration should not be collapsed into trafficking, nor should commercial sexual exploitation be seen as the only site where trafficking and violence take place. The victims of trafficking always end up in exploitative and slave like conditions whereas migration could provide better opportunity, if it is safe. The State is accountable for safe migration.

### **Purposes of Trafficking**

There are various purposes for which women and children are trafficked, some of which are discussed below. The phenomenon may be old, but it has taken on new forms as globalisation has fuelled growth in certain economic sectors with demands for cheap labour, particularly of women and children in the sex industry and other service sectors. The opening up of national borders has spurred the activities of the traffickers, who much like terrorists operate boldly across sovereign borders. They have not only capitalised on technological and communication advancements but have also exploited the economic crises. Since strict immigration laws have increasingly restricted entry into the labour markets of developed countries, labour migration is being driven underground<sup>7</sup>. Some of the more common forms that trafficking has grown to include are discussed below.

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7 2005, *United Nations Population Division, Trafficking in Human Beings*, (UN/POP/MIG/2005/15) by Irena Omelaniuk.



### **Commercial sex work / forced sexual exploitation:**

This is the most common destination of the victims of trafficking. Most of the victims who are trafficked find themselves in forced and/or commercial sex trade. This can result through two different ways. Firstly, they are directly sold through a chain of criminal activities. Here, the owner/s further sell their services to the clients. Unlike the common perception, boys are also equally vulnerable. Depending on the age, look and likeability the price is fixed. The level of exploitation here is such that the unit owner owns the children/women and they do not have any ownership on the money that they earn. One of the recent and very popular avenues for trafficking is also 'sex tourism'. The World Tourism Organisation, a specialised agency of the United Nations, defines sex tourism as *"trips organised from within the tourism sector, or from outside this sector but using its structures and networks, with the primary purpose of effecting a commercial sexual relationship by the tourist with residents at the destination."* The "residents" are mostly women, girls and children, who are primarily victims of trafficking and are sexually exploited to promote tourism and broadcast the beauty of their nation.

Secondly, the victims land up in commercial sexual exploitation through 'incidental exposure'. Isolated from family, community and normal protection mechanisms, often unable to speak the language and deprived of legal status, children trafficked for any purposes are at high risk of sexual exploitation.<sup>8</sup>

### **Forced / Exploitative Labour**

Trafficking commonly takes place for the purpose of forced labour / exploitation. Trafficked people are employed in the entertainment industry, domestic work, carpet industry, garment industry, fishing and brick industries, camel jockeying, circuses etc. The victims trafficked for such purposes are exploited at the risk of their health and life, especially children who are employed as camel jockeys and in circuses. They are made to work for an inhumane number of hours; the working conditions are pathetic, especially for those working in factories. These people are kept devoid of basic amenities in life and are tied to tiresome jobs for their entire lives. In short, these trafficked victims live and die as brutally exploited slaves.

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8 Fast Fact about Trafficking available at <http://www.traffickingandhiv.org/PDF/trafficking%20FAQ.pdf>

## Marriage

The falling sex ratio in various parts of India like Haryana, Rajasthan and other states has given rise to a peculiar problem of trafficking of women for marriage. The demand for a male child over the years has resulted in a situation in which entire villages in these states do not have any women of marriageable age. This has created a highly lucrative market for traffickers who supply women to meet the growing demand for brides. Numerous instances of women being abused both physically and sexually and in some documented cases, murdered due to their inability to bear a male child.

Another form of trafficking for marriage is also gaining prominence. Girls from poor villages are married off to wealthy sheikhs from the gulf countries in a temporary form of marriage sanctioned by the Shariat called a "*mutah*" marriage. It is a temporary marriage lasting for an indefinite period from 24 hours to 99 years. In most cases, the family of the girl is given a lump sum as a "*mehr*" and middlemen play an active role in getting the girls. In most cases, after the marriage has been consummated, the girl is either sold into commercial sex work or abandoned.

## Adoption

Illegal adoption of children is one of the reasons why the children are trafficked. The proper procedure of adoption is very cumbersome but the demand of children is very high. To fulfill these demands children are taken for illegal adoption. These children are then used for various other purposes ranging from labour exploitation to sexual exploitation.

## Organ Transplantation

The advancement in the field of medical science has given rise to the possibility of life-saving technology of organ transplantation. However, the high expense associated with this technology has made this very exploitative. Moreover the involvement of the organised crime has given the issue of trafficking a graver dimension. People are trafficked also for the purpose of organ transplantation. In most of the cases, the victims are completely unaware of what is in store for them. In some cases, they give their consent for some pressing needs.

## **Begging**

Trafficking is also done for the purpose of begging. Children and women are placed in various spots in public places to beg. Handicapped children and disabled people are of special value for traffickers. This has led to children having their hands and legs forcibly cut off to make them disabled.

## **Petty crimes**

Children are also trafficked for the purpose of petty crime. Children below the age of seven years are deemed to be incapable of criminal offence according to section 82 of the Indian Penal code. The Indian Penal Code acknowledges that anything done by a child under the age of seven years is not an offence. The same applies to children under twelve years but over 7 years old, who have not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion. This has led to trafficking of children for the purposes of petty crime.

## **Drug peddling**

The involvement of organised crime in trafficking has also led into trafficking for the purpose of drug peddling. Since the investment in children is not much and the traffickers can afford getting these children caught by police; children are often used extensively for the purpose of drug peddling.

Every year, hundreds of women and children are forcibly used for the purpose of drugs and smuggling to various destinations around the world. In many of the instances, they are forced to carry the drugs in capsules inside their bodies.

Abducted or bought from the open markets, these women and children are threatened, beaten, starved and even warned with the death of family members if they hesitate in any way. In some instances, young children of the women involved are kept behind with the smugglers to insure full cooperation. The women, along with the kids, are then given new identity cards and given bags full of drugs to be transported to various sites across the country. At other times, the women are paired with men and their false passports indicate that they are married and the children they are with as their biological children. They are then forced to swallow capsules contained full of drugs and then transported to foreign countries; where even after full cooperation

and delivery of drugs, they are likely to be sold for commercial sex work and slave labour. If caught, they face prison and in some countries, the death sentence.

### **Magnitude**

The clandestine nature of trafficking makes it very difficult to measure the magnitude of the issue. According to NCRB data, in 1999 there were 9368 cases of trafficked women and children in India. The International Organisation for Migration estimates that the global trafficking industry generates up to US \$ 8 billion every year. Rough estimates by the UN suggest that between 700,000 to 2 million persons trafficked across international borders annually are women and children.

The majority of the empirical research on trafficking within the Indian context pertains to trafficking for prostitution. The Mahajan Committee found that as many as 60% of persons in prostitution are inducted as children. The Committee further found that in India's major metropolitan areas, more than 75% of brothels comprised of children below 20 years of age, and 34% out of these entered prostitution below 18 years of age.

### **Cross border trafficking in India**

In recent years, India has become a major source and destination for trafficking as well as a point of transit for the trafficking of men, women and children for sexual or labour exploitation. Indian men and women are forced into coercive labour in Middle East countries and children, especially young boys are frequently made to work as camel jockeys. Bangladeshi women and children are trafficked to India or transit through India en route to Pakistan and the Middle East for purposes of sexual exploitation, domestic work and forced labour. Nepalese women and girls are trafficked to India for sexual exploitation, domestic work, forced labour or work in the circus industry. India is fast becoming a favored destination for sex tourists from the western hemisphere specially Europe and the United States. Internal trafficking of men, women and children for the purposes of sexual exploitation, domestic or forced labour, sports or entertainment is widespread.

### **Effects of Trafficking**

Trafficking is a process of de-humanisation and involves a severe violation of human rights. The victims who are trapped in the snare are led in to a way of life wherein they are exploited in many for the rest of

their life. The trapped victims are physically and emotionally abused, exposed to severe health risks, treated cruelly, deprived of basic needs, highly discriminated, exposed to very hazardous work and materials and economically exploited.

Victims of trafficking often suffer from a multitude of physical and psychological health problems. Women are specifically vulnerable to reproductive and other gender-specific health problems as they have little or not access to reproductive health care. Trafficking into the sex industry also has serious societal consequences as it contributes to the spread of HIV and AIDS, as they are often coerced to have unprotected sex. Gradually, victims start developing coping skills to survive in the conditions she/he in.

The exploitation, irrespective of the labour demanded risks the person's life dignity and health on both the physical and the psychological level. The victims are degraded to an inhuman status wherein they are a mere pawn in the hands of the traffickers, slaving away, working in undesirable conditions for undesirable ends and have no hope whatsoever for redemption or a scope for leading a life of their own.

The trafficking industry worldwide is also closely intertwined with other related criminal activities, such as extortion, racketeering, money laundering, bribery of public officials, drug use and gambling.

The impact of trafficking, thus extends not only to the hapless victims in specific but the overall society in general. This crime of trafficking which is an affiliate of the slavery system goes against the basic tenets of humanity. The barbaric sale and purchase of human beings for vile and anti-social purposes occurring in the most developed of countries and in these most advanced times is a direct insult to the human civilisation and the conscience. The further escalation of trafficking is further evidence of the deterioration of human kind and the restoration of humanity demands such a shocking vice to be wiped out forever. An effective and comprehensive approach therefore needs to be adopted to tackle the grave problem in all its dimensions and proportions. Trafficking stands as a challenge to the very notion of humanity and the hour demands the entire global village to rise up to the challenge.

This book is an attempt to compile various Indian and international definitions, legislations, jurisprudence and case laws on trafficking to help NGOs and human rights activists understand and deal with the

issue. Human Rights Law Network while working extensively on human rights violations, women's justice and child protection established the linkages between trafficking, gender violence and child abuse. During our entire experience a key challenge has been a dearth of literature on trafficking and national legal perspectives, which can provide information on trafficking, in a holistic manner.

We have also made efforts to incorporate the perspectives and experiences of the organisation. This book is a unique attempt to collate case laws on different forms of trafficking. We hope that this book will be a significant contribution in the existing pool of knowledge on trafficking in India, which will further strengthen the struggle to combat human trafficking.



## 2 Dynamics of Trafficking

Trafficking in women and children is a reflection of the unequal status they share in the society. The causes and effects of the issue are multifarious; trafficking stems from a complex set of power imbalances, which reflects in widespread social norms. Infact, it is this intricacy of the issue that has led to many discussions and differences in the opinion around it.

The popular perception of trafficking is the sexual exploitation of women and children who are taken from one place to another having been promised supposedly legitimate work but who find themselves forced into prostitution or similar forced labour. But in addition to this, children are trafficked for a variety of reasons, including sweatshop labour or, especially if they are below the age of criminal responsibility, petty crimes.

The complexity of dynamics that goes within the process of trafficking is such that it is not possible to single out the causes of trafficking and pin it down for scrutiny. While it is true that the causes are multifarious, there are some common factors that lead women/children to become victims of this inhuman act. There are series of social, economic or political conditions which create a situation of vulnerability for the women and children that they unknowingly or knowingly get trapped into trafficking. The traffickers take full advantage of these situations for their own benefit. While it is not possible to point out causes of trafficking concretely, some push and pull factors have been discussed below.

### **The Push Factors**

The vulnerability of the women and children gets increased due to various conditions that they find themselves in – these have been discussed below as the ‘*push factors*’. In many instances, though they would not want to leave the place of origin and move on to other places, the undesirable living conditions makes it impossible for them to remain



in the present situation. In the hope for a better future, the women get easily trapped in trafficking.

*Poverty* is the major and most common reason for why women or children get pushed into trafficking. While this is not the only reason for trafficking, it holds a huge potential in making the victims vulnerable. Poverty leads to deprivation of basic needs and difficult living conditions leading them to look for better options elsewhere. The greater the degree of impoverishment, the higher is the risk of falling prey to trafficking.<sup>1</sup>

Increasing trends of *migration* also make the victims get attracted to the hope of good life in some other place. Poverty and economic disparities between different places encourage migration in search of survival or better opportunities.

*A limited economic opportunity of the primary caregiver of the family* is also one of the reasons why children/women are in need of employment to aid the needs of the family. The prospect of an additional income to the family creates a situation where they willingly jump into the trap of trafficking. Similarly, lack of enough opportunity in the place of origin makes them vulnerable to shift to other places looking out for employment opportunities.

*Dysfunctional home environment* – breakup of the family, physical abuse, sexual abuse, drug use and discrimination within family also increases the vulnerability to trafficking. An abusive family environment encourages the family members to leave home, thus putting them at risk of being trafficked.

*Marriage* is one of the main reasons in the garb of which trafficking takes place. Parents are more than eager to 'dispose off' girls for marriage. If the groom is not demanding high dowry and instead ready to bear the cost involved, it becomes a great deal. The children thus get easily trafficked under the guise of marriage.

The vulnerability of women and children gets accelerated also due to the high prevalence of *domestic violence*. Women feel pressured to escape from the existing conditions to free them from physical, psychological and mental torture. The situation gets more aggravated if the woman is single, divorced, widowed or sexually abused. The social stigma makes them getting unaccepted in the society leading to frustration, isolation

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<sup>1</sup> 1996, Warburton, J. and Cruz, M.T.C.d.L.. "Vulnerability factors: Experts from prevention and psycho-social rehabilitation of child victims of commercial sexual exploitation." *Child Workers in Asia* 12:5-7.

and with no support system to provide them security, they fall an easy prey to the traffickers.

Recent trend of *decline in the sex ratio* has toppled the balance in many states. This has increased the demand of the women and girls in many locations and thus women are trafficked from one place to other for marriage or commercial sexual exploitation.

*Traditional prostitution*, though banned in the country still exists in a clandestine manner. Minor girls are forced into prostitution in the name of faith especially in the States of Maharashtra and Karnataka. *Bedia, Nat, Kanjar* and other such communities follow a traditional form of prostitution. Here, the women and girl is already devoted to a traditional form of prostitution.

*Political and social insecurity* in the place of origin makes it very difficult for them to continue to reside in that place. The constant threat to life pushes them to leave the place and go away. In this situation, the hopes raised by the traffickers seem to be the most viable one and a better escape from the existing situation. In a time of unrest where society is fighting or trying to survive the situation, it is the women and the children who suffer the economic hardships as well as the lack of security, due to the loss of family support system and safe shelter. The traffickers take advantage of this vulnerability.

### **The Pull Factors**

*Lack of informed choice* regarding the place and occupation makes them vulnerable. Limited access to education and information aggravate these situations. Since they are unaware of the hardships of migration, the traffickers' bait easily entraps them.

*Commercial sex work* is the most common pulling factor for trafficking. The nature of this industry necessitates regular fresh supply of women, which keeps trafficking profitable. In addition, growing *demand of commercial sex work* due to increased trend of migration and separated family also contributes equally in pulling out the women for trafficking. The viable market encourages traffickers to lure women/ children into it.

Urbanisation and globalisation has increased the demand for *cheap labour*. People trafficked from suburban areas find it the more viable alternative to fulfill the labour requirements from the nearby areas. In this process, many middlemen reach the place of origin in search of the potential labour force. Thus, a whole lot of unprotected labour flow from

the rural areas. This increases the prospects for trafficking to the great extent and their vulnerability to exploitation.

The victims also get pulled by the forces of *consumerism*. The desire for acquiring and accumulation of consumer goods creates a desire for more money. Thus, attracting a whole range of population readily available to move from one place to other.

Increased *migration* also serves as a cover for traffickers transporting women. Privatisation and liberalisation of markets have created wider and more open market places.

Trafficking requires low investment and ensures high returns. This *economics of trafficking* makes it a viable business.

Along with these push and pull factors, insufficient or inadequate laws and their poor implementation, ineffective penalties, minimal chances of prosecution, the relatively low risks involved, corruption and complacency, invisibility of the issue, the failure of government to implement policies and provide adequate services for victims— all play a role in perpetuating trafficking.<sup>2</sup>

### **Dynamics of Trafficking**

Traffickers use a wide range of methods to move their victims from the place of origin to the place of destination. In many cases, it is word-of-mouth and personal connections that are used to attract and convince people. Some traffickers are individuals or small groups that traffic people for specific purposes. Husband-wife teams often traffic women in domestic servitude and keep them in slavery-like conditions for years. Traffickers can be friends, family members or neighbors. Some of the tactics used for trafficking are discussed below.

### **Deceit /False Promises**

This is the most popular tactic used by the trafficker to convince the victim. The traffickers befriends the victim and persuades her to accompany them. The trafficker uses the bait of false promises and lure of job/marriage/love to trap the victim. The victim who is already in a situation from which she/he wants to escape very easily believes the trafficker in the hope of a better future. They willingly and happily accompany them and in turn find themselves in the worst situations.

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2 1996, Warburton, J. and Cruz, M.T.C.d.L.. "Vulnerability factors: Experts from prevention and psycho-social rehabilitation of child victims of commercial sexual exploitation." *Child Workers in Asia* 12:5-7.

## **Material Inducements**

To lure the victim more, the traffickers use the tool of material inducement. Usually, the traffickers are the people who seem to be prosperous and well connected. They display a lot of wealth and become a symbol of success. They often offer some kind of monetary support as advance to the family. The trafficker convinces the victim that it will lead to high material gain and prosperity. The trafficker also gifts to the victim so as to make it appear real. After this 'grooming' process, the victims are easily taken from one place to another.

## **Force or Coercion**

Other common means used by the traffickers is physical, legal, psychological or mental coercion. The victim is posed in front of a very difficult situation, where she doesn't have any option but to give in to the traffickers, knowingly or unknowingly. This also includes forceful methods like use of drugs, kidnapping and abduction.

## **Threats**

Similarly, traffickers also use threats of force, harm or violence to the victim or the victim's family or unlawful restriction of movement and liberty. The victim then finds herself in a situation where there is no other option than to comply with the demand of the trafficker for the safety and happiness of her dear ones.

## **Abuse of Authority**

Trafficking in many instances also results through the abuse of authority. The people who are in authority – parents, relatives, guardians, employer, teacher, religious-political-social leader or anyone else with an authority force the victim to get trafficked. Here the victim gets pushed into it willingly or unwillingly because of the pressure exerted by the person in authority.

## **Bleak Hope Regarding Future**

The trafficker uses the strategy wherein she/he makes the victim to believe that there is a very bleak hope regarding the future. The victim usually believes that she/he has no viable alternative but to perform the work, service or activity, whether that is objectively correct or not. Therefore, the option that is being offered is the most appropriate option for the victim.

## **Debt Bondage**

An extortionate extension of credit and *debt bondage* is also used in entrapment of the victim for trafficking. When the person finds him/herself in such a situation where it is difficult for the person to run away from the intent of the trafficker. Thus, the victims knowingly get into it.

### **Why don't they break free and run away?**

Traffickers typically maintain subservience through debt-bondage, physical and psychological abuse, rape, torture, threats of arrest and threats to the trafficked person's family. Victims often find themselves cut off from the outside world, unable to figure out where they are and to find a way out. Consequently, they find themselves in a situation where it is very difficult to find help. In many instances, trafficked people fear approaching the law enforcement system because they are usually victimised for their own situation. Trafficked people are often afraid to return because of fear of public humiliation upon disclosure of the work that they do, and their possible further victimisation as well as of their families. And moreover, they get very little money from the work that they are involved in, so they can hardly come back on their own. In case of commercial sexual exploitation, a woman may be sold from one pimp to another, where her debt starts all over again.

### 3

## Rescue and Rehabilitation

Rescue of the victims out of their situation has been one of the popular approaches that have been adopted. They are pulled out of the present location, transferred in a transit/rehabilitation home and then return them to their place of origin for a long-term social reintegration. Although done with good intentions, it has often been found that they are back into the hands of the same or other traffickers.

The provisions for rescue and rehabilitation is clearly spelt out in Immoral Trafficking Prevention Act. According to this act, if a Magistrate has reason to believe that any person is living, or is carrying, prostitution in a brothel he may direct a police officer to remove such person from there and produce before him, (Section 16). Similarly, section 15 empowers Special Police Officers to enter and search premises without warrant if she/he has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay.

When the police officer is unable to produce the removed or rescued person under Section 15(4) or 16(1), he shall produce the person before the nearest Magistrate of any class for the issuance of appropriate orders. No person can be detained in custody for more than 10 days from the date of the order. (Section 17)

Under Section 18, if a Magistrate comes to know that a place within a distance of 20 metres of any public place is being used as brothel by any person or being used by prostitutes, he may issue a show-cause notice to the owner, lessor or occupier of such place or premise that why the same should not be attached and after hearing the concerned person, the Magistrate may pass appropriate orders for the eviction of offenders and closure of brothel. Section 19 enables a person who is carrying on, or is being made to carry on prostitution to apply to the Magistrate for

an order that she may be kept in protective home or provided care and protection by the Court.

Section 21 of the Act enables the State Government to establish as many protective homes and corrective institutions as it thinks fit and such homes and institutions when established shall be maintained, as prescribed. The State can also issue license to other person for the establishment of protective homes and for their maintenance. No license issued or renewed under this Act shall be transferable. Under Section 21-A, every person or authority who is licensed to establish or maintain or as the case may be for maintaining a protective home or corrective institution shall whenever required by the Court produce the records and other documents maintained by such home or institution by the Court.

However, the experience of rescue and rehabilitation has not been very encouraging. The victims of trafficking, instead of benefiting from the above-mentioned provisions, have suffered more. The present trends of rescue and rehabilitation have essentially remained victim unfriendly. The petition— *Prajwala vs. Union of India* - filed in the Supreme Court of India deals extensively on the issue of rescue and rehabilitation. The following section presents the relevant excerpts from the petition.

The rescue of the trafficked victims has lately acquired the form of 'mass raids' on the brothels carried out by the police. The rescued women and girls are treated like criminals, with no dignity and respect. Their need for information, counselling or any medical treatment is completely overlooked and are housed in sub-human condition. Though these rescues are done in good spirits of helping the victims of trafficking, but the intricacies of the issue makes it far from being this simple.

There is no protection from the brothel keepers, pimps and other traffickers. The lack of confidentiality makes them more vulnerable to the threats, blackmails and luring by the same traffickers to the same brothels. There is no understanding of the fact that the victims of trafficking undergo an immense trauma and no support whatsoever is provided for the emotional, mental, physical or social healing and recovery. Rescue without these reintegration aspects is incomplete.

As a result, the rescued children/women end up going back to the same or similar workplaces. Most of the cases land up in more exploitative conditions, sometimes to be rescued again and to undergo the same cycle of revictimisation.

## Rescue Attempts in the Past

The landmark *Bombay mass raids* from 1996 onwards till 1999 provide an example where after the mass raids on the brothels, the girls were hurriedly put into various charitable homes in the city. These homes were not informed in advance and hence were unprepared for the volume – they were mixed with other women giving rise to the tension. Most of the girls were on alcohol or drugs and had withdrawal symptoms but no counselling was provided, many of them were HIV positive and had sexually transmitted infections or were pregnant and needed medical attention.

The government took the easy way suggesting to the High Court that they should be sent to various states from where they originally came. They were ordered for repatriation without being properly guided. This played directly into the hands of the brothelkeepers and the pimps who were at all times harbouring around the women/children trying to get them back.

Hyderabad went through similar exercise in 1997. Based on a newspaper report, the Andhra Pradesh High Court ordered the rescue of minor girls. They were then kept in a jail for some time and then some of them who were HIV positive were sent to an NGO and others were released. Most of them are back in commercial sex work again.

The Delhi Government also made similar rescue attempts between 2001 and 2003. Hon'ble High Court acting with the best of intentions ordered the rescue of girls. They were once again kept in most appalling conditions, in *Nirmal Chhaya* and *Nari Niketan*, the State protective homes. After that they were sent home. Now, many are already back at GB Road red light area, Delhi.

Pursuant to the Bombay High Court, Goa bench ordered dated 21<sup>st</sup> July 2003, wherein once again without application of mind as to the onus of responsibility and duties, held: 'the government of Goa is not bound to rehabilitate them except to the extent provided by specific directions in the judgement of the Apex Court. The rescued commercial sex workers be deported to the states from where they come'. The stage seems set for those rescued to go through the same cycle of humiliation at the hands of the state so that it is highly unlikely they will ever be reintegrated and likely high that they will stay on in flesh trade.

The Mumbai High Court clearly pointed out that children rescued from brothels should be treated as victims in need of care and protection,



but that children 'soliciting' or 'voluntarily' in prostitution should be treated as child offenders under the Juvenile Justice Act. The petition '*Prerna vs. Union of India*', has questioned the existing system, failure of implementation of enforcement agency, inadequate guidelines for rescue, relief, rehabilitation and implementation of various acts.

*Shakti Vahini vs. Union of India* challenged the actions of the Union of India and different States based on their failure to protect the rights and interests of trafficking victims.

### **Gaps in the Present System**

Thus at present, the law and practice relating to raids of the brothels, rescue of the prostitutes therefrom and their rehabilitation in the aftermath is highly inadequate. Because a near absence of any guidelines, the rescue and rehabilitation is carried out in the most insensitive, abusive and degrading manner, throughout treating the rescued women and children as criminals' instead of 'victims' of heinous crime of trafficking, subjecting them to severe trauma, indignity and violations during the entire process, and without extending them any protection from the traffickers.

The UNIFEM-ISS-NHRC study clearly indicates that the 're-trafficking' of the victims was of a common occurrence. The excerpt from the research reads as follows:

24.2 percent of the respondents of the study said that they had been rescued earlier also. *'These survivors had been booked on the charges of soliciting under section 8 of ITP Act, after release on bail, they were brought back by the brothel keepers. 22.5 percent had been rescued once before and the rest had been rescued twice or more before'*<sup>1</sup>

*The vast majority of the survivors said that even after being returned to their community, they had no alternatives sources of income of livelihood options. The sheer force of circumstances including pressure from the brothel keepers, led to their re-trafficking. One of the reasons included the debt bondage of the victim vis-à-vis the brothelkeeper.*<sup>2</sup>

The basic reason, which leads to this vicious cycle is clear, since there is no component of 'victim protection' in the present methodology of raids, rescue and rehabilitation, due to which several safeguards which

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1 2003, NHRC-UNIFEM-ISS, A Report of Trafficking in Women and Children in India. page 97

2 Ibid

ought to be integral part of these exercises are totally missing. It is therefore imperative to identify the safeguards and measures to prevent such self-defeating exercises and to make the rescue and rehabilitation truly effective and fruitful. This must be laid down as mandatory guidelines with the consistent incorporation of victim-protection protocol throughout.

### **Rehabilitation of the victim**

Rehabilitation and social reintegration of the victim of trafficking is a multifaceted issue. A linear of sending the victim to the place of origin and assuming that they have been rehabilitated, does not address the issue. The social, psychological, physical and mental damage that a victim of trafficking under goes is tremendous. It, therefore, calls for a multi-pronged and holistic approach.

Each initiative to rehabilitate the victims of trafficking should be founded on the principle of making the choices available to them, providing them with needed services and empowering them to make decisions for themselves over their own lives.<sup>3</sup> Having control over their own life would enable them to come out of the situation of vulnerability, thus breaking the vicious cycle of being trafficked repeatedly.

The nature of trauma that the victim undergoes requires a systematic psychological intervention. There could be instances of drug abuse, which requires an exclusive approach of detoxification and de-addiction. Similarly, the experience of psychological and mental trauma also needs a sensitive therapeutic approach. The alternate choices of livelihood opportunities would then be of relevance in terms of shifting the profession, if they desire to do so.

The victim also needs to be enabled to address the violations they have undergone. Their access to justice and right to legal redressal must be addressed so as to ensure that the opportunities for securing justice are not denied and their human rights get protected. The legal redressal could include the issues like obtaining compensation and conviction of the traffickers. Law enforcement agencies cannot fight trafficking effectively by simply moving trafficked persons from one system of control to another. They have to be empowered to take decisions regarding their lives.

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3 2002, Anti Slavery international, *Human Traffic, Human Rights: Redefining Victim Protection*, London SW9 9TI, United Kingdom.



## 4

# Witness/Victim Protection Protocol

The analysis of present approach of dealing with trafficking does not have any component of ‘*victim protection*’, the safeguards for the victim is completely missing. It is, therefore, imperative to identify the safeguards and measures to make rescue and rehabilitation truly effective with the consistent incorporation of victim-protection protocol. The current models of protection offered to trafficked persons prioritise the needs of law enforcement over the rights of the trafficked persons. The studies have shown that law enforcement officials have tended to be the most successful in securing convictions when trafficked person’s rights have been respected rather than disregarded.<sup>1</sup>

The role of victim/witness to combat trafficking is also very critical. In order to stop it from taking the form of self-perpetuating cycle and punish the traffickers, the victims need to break the silence. However, if this has to be encouraged, there needs to be strong provision for witness protection. Unless the witness feel protected, the attempt to break the silence will always be curbed by threat to victim. This means both ensuring police provide protection from reprisals, and that victims are given access to a range of measures and different levels of protection. The absence of these will adversely turn them hostile making it very difficult to reach the traffickers. In terms of giving evidence at trial, countries need to ensure victim witnesses are able to give evidence safely, and make efforts to reduce the secondary trauma that victims often face in the courtroom.<sup>2</sup>

India follows the adversary system of trial, which is based on two basic principles, first that the burden of proof lies on the prosecution and secondly, the accused is presumed to be innocent until proven guilty. In

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1 2002, Anti Slavery international, *Human Traffic, Human Rights: Redefining Victim Protection*, London SW9 9TI, United Kingdom.

2 Ibid.

the complex issue of trafficking, this position makes it very difficult for the victims and the witnesses who try to bring the traffickers to the book.

### **Provisions Made Under Various Legislations**

Article 19 of International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949 makes specific provisions for the victims of trafficking. The Convention calls on state parties to punish traffickers and to protect all persons against such abuse. It also calls on state parties “so far as possible” to “make suitable provisions for [trafficking victims] temporary care and maintenance”, to repatriate trafficked persons “only after agreement... with the State of destination”, and where such persons cannot pay the cost of repatriation, to bear the cost “as far as the nearest frontier”. [Convention for the Suppression of the Traffic in Persons, Article 19].

Victims of prostitution may be parties to any legal proceedings against perpetrators. Women in situations of prostitution may be parties to proceedings against those who exploit them, according to the offences mentioned in *Articles 1, 2, 3 and 4*. This provision is also valid for foreign women in situations of prostitution.

The *Indian Evidence Act, 1872* and the *Code of Criminal Procedure, 1973* lay down a comprehensive legal framework for recording the testimony of witnesses in criminal cases. The Evidence Act refers to direct evidence by witnesses. Examination of witnesses is dealt with in sections 135 to 166 of the Act.

In the Code of Criminal Procedure, 1973, Section 200 of the CrPC provides that a magistrate shall examine upon oath the complainant and the witnesses present if any, section 327 provides for trial in open court 327 (2) provides for in-camera trials for offences involving rape under Section 376 of IPC and under Section 376 A to 376 D of the IPC. Further, under Sec.173 (6) the police officer can form an opinion that any part of the statement recorded under Sec.161 of a person the prosecution proposes to examine as its witness, need not be disclosed to the accused if it is not essential in the interests of justice or is inexpedient in the public interest.

For ensuring a fair trial elaborate provisions have been made in section 207 (supply of copies of police report and other documents to the accused), section 208 (supply of copies of statements and documents to accused in other cases triable by Court of Sessions), section 273 evidence to be taken in presence of the accused and section 299 wherein

the accused has the right to cross examine the prosecution witness. In certain exceptional circumstances, an accused may be denied his right to cross-examine a prosecution witness in open court.

### **Anonymity of Victim / Witness**

At present, India does not have a comprehensive law on witness protection. The Supreme Court has observed that in cases of serious criminal offences “witness anonymity” and “witness protection programs” are necessary wherever the life and property of the victim and his or her family are in danger. With regard to the issue of protection of witnesses in a criminal trial, barring rape cases there are no general statutory provisions in the CRPC on this subject.

### **Victim and Witness Protection Protocol**

There are two aspects to the victim and witness protocol. One arises from legal procedures, which is re-victimisation of the victim during the trial and the other is when victims are subject to intimidation, pressure tactics, alluring by the traffickers, pimps leading to the inevitable consequence of the collapse of the trial.

### **Physical Protection of the Victim**

Often witnesses turn hostile on account of the failure to protect their evidence due to complete lack of physical protection of the witness at all stages of the criminal justice trial till the conclusion of the case. Justice Wadhwa<sup>3</sup> in *Swarn Singh vs. State of Punjab* AIR 2000 SC 2017 has observed:

“A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required whether it is direct evidence or circumstantial evidence. Here are the witnesses who are harassed a lot....not only that witness is threatened, he is abducted, he is maimed, he is done away with or even bribed. There is no protection for him”.

The 154<sup>th</sup> report of the Law Commission (1996), while dealing with the ‘Protection and Facilities to Witnesses’ commented that there is plenty of justification for the reluctance of witnesses to come forward to attend court promptly in obedience to the summons not only due to lack of facilities but by doing so they have to incur the wrath of the accused and jeopardise their life.

3 Law Commission of India, Consultation paper on Witness Identity Protection and Witness Protection Programmes, Law Commission of India, August, 2004, Page 24.

The report recommends that the treatment afforded to them right from the stage of investigation up to the stage of conclusion of trial should be in a fitting manner giving them due respect and removing all causes, which contribute to any anguish on their part. Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.

### **Support to the Victim**

The 172<sup>nd</sup> report of the Law Commission dealing with the review of rape laws suggested that the testimony of a minor in the case of child sexual abuse should be recorded at the earliest possible opportunity in the presence of a judge and a child support person.

### **Use of Video Screen and Video Recorded Evidence**

Section 273 is not without exceptions. The Supreme Court referred to section 273 of the CrPC, 1973 in *Sakshi vs. Union of India* and observed that in spite of section 273, which requires evidence to be taken in the presence of the accused, it is open to the court to examine the witness using a video screen in as much as video recorded evidence has now been held to be admissible by the Supreme Court in *State of Maharashtra vs. Dr. Praful B. Desai* (2003) (4) SCC 601.

The 172<sup>nd</sup> report of the Law Commission urged that the court should permit the use of video-taped interview of the child or allow the child to testify by a closed circuit television and that the cross examination of the minor should be carried out by the Judge based on written questions submitted by the defence. The Commission also recommended insertion of a proviso to section 273 CrPC to the effect that it should be open to the prosecution to request the court to provide a screen so that the child victim does not see the accused during the trial.

### **Recording of Statement before the Magistrate:**

The 178<sup>th</sup> report of the Commission recommended insertion for section 164(a) to provide recording of statement in the presence of magistrates where the offences are punishable for over ten year period. These statements have evidentiary value and are recorded *in camera* in the Magistrate's own handwriting. The report has been silent on the issue of protection measures for the physical safety of witnesses and in what manner the Court could keep the identity of the witness secret without compromising the rights of the accused.

In the Criminal Law (Amendment) Bill, 2003 introduced in the Rajya Sabha in August 2003, the recommendation of recording statement before a Magistrate where the sentence of the offence could be seven years or more is being proposed and a further provision for summary punishment of the witness by the same court if the witness retracts his or her statement has also been incorporated.

Analysis of various recommendations of the law commissions shows that the issue of 'protection' and 'anonymity' has not been addressed and the absence of any concrete procedural law the Supreme Court has had to step in to give various directions.

### **Directions given by the Supreme Court**

The Supreme Court has, from time to time, laid down various rules or guidelines for protection of witnesses, which do not have the same efficacy as a special statute on victim protection. Four notable cases, *Delhi Domestic Forum case (1995) 1 SCC 14*, *State of Punjab vs. Gurmit Singh 1996 (2) SCC 384*, *Sakshi vs Union of India 2004 6 SCALE 15* and *Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Others (2004) 4 SCC 158*, decided by the Apex court gives important guidelines in terms of witness protection.

In *Sakshi vs. Union of India*, the Supreme Court while dealing with the plea of enlargement of the definition of the word rape, and protection of victims of child sexual abuse, referring to the 172<sup>nd</sup> Law Commission Report laid down that certain procedural safeguards had to be followed to protect the victim of child sexual abuse during the conduct of the trial.

In *Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Others (2004) 4 SCC 158*, (the Best Bakery Case), the Supreme Court made several observations on the question of protection of witnesses. The Supreme Court reiterated that "...*legislative measures to emphasise prohibition against tampering with witnesses, victim or informant have become the imminent and inevitable need of the day*".<sup>4</sup> The court also referred to Witness Protection Programs being imperative in the context of alarming rate of somersaults by witnesses.

In *Delhi Domestic Women's Forum case (1995) 1 SCC 14*, the Supreme Court has emphasised that in all rape trials "anonymity" of the victim must be maintained as far as necessary so that the name

4 Law Commission of India, Consultation paper on Witness Identity Protection and Witness Protection Programmes, Law Commission of India, August, 2004, Page 59.



is shielded from the media and the public. The Court found that the experience of giving evidence in the court can be traumatic and the ordeal of facing cross examination on the criminal trial to be even worse than the rape itself.

The Supreme Court in *State of Punjab vs. Gurmit Singh*, 1996 (2 SCC 384) while dealing with a case of rape has said, 'the courts should, as far as possible, avoid disclosing the name of the prosecutor in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained, as far as possible to throughout'

In the order dated 08.08.2003 made by the Supreme Court in *National Human Rights Commission vs. State of Gujarat and Others*, 2003 (9) SCALE 329, the Supreme Court referred to the need for legislation on the subject.

A landmark judgement *Delhi Domestic Working Women's Forum vs. Union of India (UOI) and others* has been made in the context of victim protection. It makes detailed direction for legal representation of the victim. It highlights that it is important to have someone who is well acquainted with the criminal justice system.

- *Legal assistance at the Police Station:* Legal assistance will have to be provided at the police station since the victim of (sexual assault) might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.
- *Right to representation:* The police should be under a duty to inform the victim of her *right to representation* before any questions were asked of her and that the police report should state that the victim was so informed. A *list of advocates* willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable. The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.
- *Anonymity of the victim:* In all (rape) trials anonymity of the victim must be maintained, as far as necessary.

- *Compensation for victims:* Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.
- *Role of Lawyer:* The judgement directs that the role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance.
- *Role of Police:* It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represents her till the end of the case.

### **Public Interest Litigation for Further Action**

Furthering the cause for witness protection for trafficked victims, a Public Interest Litigation (PIL), *Prajjwala vs. Union of India* has been filed in Supreme Court for formulating a pre-rescue, rescue and post-rescue victim protection protocol for the entire country

The PIL has been filed in the wake of mass raids being conducted by the police in the brothels under severe repressive conditions. Housed in sub-human jails the rescued victims are treated like criminals, violating their basic human rights. Total absence of any victim protection programs deprives them from access to legal aid, information, counseling, compensation or protection from traffickers. Trials are long and tardy, causing further trauma to the victims.

The aforementioned PIL reiterates that since there is no component of 'victim protection' in the present methodology of raids, rescue and rehabilitation, the same women and minors, rescued with so much zeal and expense, end up going back to the same or other red-light areas subject to the same exploitative conditions and undergo the same cycle of re-victimisation.

Under the present circumstance, if a raid happens in the night, the girls are taken to the police station and are kept there throughout the night. The facilities for victim protection and recovery in these police

stations is non-existent and wherever found is abysmally low and sub-standard. The victims are huddled together in a small room and it is, indeed, in such an uncaring and hostile environment that the victims are forced to give their initial statement about their name, address, and how they came to the brothel.

Accessibility of traffickers to the victims even during the judicial process renders them totally vulnerable. Usually the traffickers and their associates can easily intimidate the victim and their families, while the state does not provide any effective security to either.

During their prolonged stay in protective homes after the rescue, the girl is provided minimum facilities of food or care, in many protective homes the victim is not even provided a change of clothes, and she is told to comply with all the rules and regulations of the home. Expert counseling for trauma reduction is completely lacking and girls are forced to go for medical examinations to verify their age and all kinds of medical tests are done on them without their informed consent.

The PIL notes that in the absence of any victim protection protocol in this country, more often than not, rescue becomes a totally abortive exercise. The rescued victim is subjected to trauma and harassment, by the police and perpetrators of the crime. As a result, most of them end up going back to the flesh trade soon after the rescue.

In view of the above, the directions sought from the Supreme Court of India in the above PIL includes *inter alia* trauma counseling, rights of a child victim of trafficking, right to confidentiality and information for victims, right to minimum standards of health, nutrition, diet clothing at the Protective Home and provision of sustainable livelihood skills and options.

## 5

# Understanding the National Legislations on Trafficking

The Constitution of India has recognised the right to freedom from forced labour and trafficking as a fundamental right. The Article 23 of the Indian Constitution prevents trafficking of all forms—“Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.” Right to life and personal liberty is also a fundamental right of all citizens, which has been guaranteed by Article 21 of the Constitution.

Responding to the growing menace of trafficking, a separate national legislation was brought into force in the name of Suppression of the Immoral Trafficking Act, 1956. This was later amended to bring in the present Immoral Trafficking Prevention Act [ITP Act 1956]. The Immoral Trafficking Prevention Act 1956 (amendment to Suppression of the Immoral Trafficking Act, 1956) was also in response to the ratification of the International Convention on Suppression of Immoral Trafficking and Exploitation of Prostitution in 1950 by India.

The Government of India has also made very few attempts to formulate plans and policies to combat trafficking. In 1998, a National Plan was formulated by Department of Women and Child Development to combat trafficking and the commercial sexual exploitation of women. The plan covered various aspects such as prevention, awareness raising, economic empowerment, rescue and rehabilitation. However, the plan has been criticised for lacking an integrated perspective on intelligence relating to trafficking-rescue-rehabilitation-reintegration.<sup>1</sup>

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1 2003, NHRC-UNIFEM-ISS, A Report of Trafficking in Women and Children in India.

The national legislations like Indian Penal Code 1860, Immoral Traffic Prevention Act 1956, Juvenile Justice (Care and Protection of Children) Act 2000, Child Labour (Prohibition and Regulation) Act 1986, Child Marriage Restraint Act 1929, Bonded Labour System (Abolition) Act 1976 make attempts at addressing the issue of indirectly.

Indian Penal Code criminalises the activities like selling and buying of minors for the purpose of prostitution, kidnapping, abduction, inducing, procuring, importing for the purpose of illicit intercourse, slavery among others.

Juvenile Justice (Care and Protection of Children) Act, 2000, protects the children in need of care and protection, which includes the child who is found vulnerable and is likely to be inducted into trafficking. It also empowers the State Government to constitute Child Welfare Committees to look into the matters of children in need of care and protection. It also provides them the authority to dispose cases for the care, protection, treatment, development and rehabilitation of the children.

Forced labour and child labour is prohibited under the Bonded Labour System (Abolition) Act, 1976 and Child Labour (Prohibition and Regulation) Act, 1986 (CLPRA). CLPRA prohibits the employment of children in specific activities as listed in Part A of the schedule of the act.

Various states have taken measures to combat trafficking like Karnataka Devdasi (Prohibition of Dedication) Act, 1982, Andhra Pradesh Devadasi (Prohibiting Dedication) Act, 1989. The two acts render illegal the very system of dedication of a woman (with or without consent) for the ultimate purpose of engaging them in prostitution. Goa Children's Act, 2003 addresses child trafficking in an impressive manner. It takes strong step in preventing commercial exploitation of children even under the garb of adoption or dedication of girl.

ITP Act although is the only Act dealing specifically with the issue, it fails even to define the term trafficking. This Act criminalises the act of living off the earning of a prostitute, brothel keeping, procuring etc., it completely neglects the various purposes of trafficking other than prostitution. This Act, therefore, has been criticised for being against prostitution than against trafficking, although—prostitution *per se* has not been declared an offence.

Furthermore, it does not address the issue as a human rights violation. The approach that is followed is to criminalise and further victimise the victims of prostitution. There are no attempts to bring the traffickers to

book and the entire network that supports this system goes unnoticed and unattended. The legal process which is initiated trial of the offenders/traffickers, is also very often long and tardy and conducted in the manner that easily lets the traffickers escape with impunity while the victims get further victimised in the process. A detailed critique of this Act is presented as a separate chapter in this book.

Nevertheless, our experiences in working on the issue have led us to the understanding that the proper implementation of the existing laws is critical to social change. If an exemplary decision is taken in a particular case, it not only benefits the victim but also has a larger implication to improve the condition of all affected. In order to curb this evil, there is a need to invoke all relevant sections of Indian Penal Code (IPC), 1860 and Immoral Traffic Prevention Act, 1956 and Juvenile Justice (Care and Protection of Children) Act, 2000 against the trafficker and brothel owners.

The relevant sections from some of these Acts are discussed below.

### **A. The Process of Trafficking**

In a typical case of trafficking, the victims may give consent for being taken from one place to another. But the consent is usually given under circumstances where the victim does not know where and for what they are being taken. According to the section 90, IPC, "consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact". Similarly, if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception is also liable for criminal proceedings. In some of the cases, trafficking takes place while the victim is drugged or intoxicated. Section 90 also says that "if a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; unless the contrary appears from the context," if the consent is given by a person who is under twelve year of age.

It has been commonly noted that in most of the cases of trafficking, women are trafficked for the purpose of marriage or for commercial sexual exploitation. The studies in the field of trafficking have clearly indicated that majority of the population in the arena of commercial sexual exploitation are minors. This is also clearly punishable under the law as IPC 366A states that "whoever, by any means whatsoever, to induce any minor girl under the age of 18 years to go from any place

or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment, which may extend to ten years, and shall also be liable to fine."

IPC 366B punishes anyone "whoever imports into India from any country outside India or from the State of Jammu and Kashmir, any girl under the age of 21 years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person. This offence is punishable with imprisonment, which may extend to ten years and shall also be liable to fine."

When the person is taken from one place to another, she/he is either unaware or partially aware of the place of destination. In a typical case of trafficking, the trafficker traffickes the victim knowing fully well the situation in which the victim would be in, while the victim is completely unaware of it. According to the section 366 of Indian Penal Code "whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid." The victim 'may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of'. This offence is punished with imprisonment of either description for a term, which may extend to ten years, and shall also be liable to fine.

Similarly, the **Immoral Trafficking Prevention Act section 5** punishes the person who procures, induces or takes person for the sake of prostitution. According to the section 5 of ITP Act

"Any person who—

- (a) procures or attempts to procure a person whether with or without his/her consent, for the purpose of prostitution; or

- (b) induces a person to go from any place, with the intent that he/she may for the purpose of prostitution become the inmate of, or frequent, a brothel; or
- (c) takes or attempts to take a person or causes a person to be taken, from one place to another with a view to his/her carrying on, or being brought up to carry on prostitution; or
- (d) causes or induces a person to carry on prostitution; shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine, which may extend to two thousand rupees, and if any offence under this sub-section is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years:

Provided that if the person in respect of whom an offence committed under this sub-section—

- (i) is a child, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life; and
- (ii) is a minor, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years and not more than fourteen years.

(3) An offence under this section shall be triable

- (a) in the place from which a person is procured, induced to go, taken or caused to be taken or from which an attempt to procure or taken such persons made; or
- (b) in the place to which she may have gone as a result of the inducement or to which he/she is taken or caused to be taken or an attempt to take him/her is made."

Most often, during the journey the victim is unaware of the nature of work they have to undertake in the place of destination.

## **B. Selling/Transfer of the Victims for any Form of Exploitation**

After the victim is induced, forced or coerced to move from one place to another; the traffickers then transfer them to the place where the actual act of exploitation takes place. **IPC section 370** states that buying or disposing of any person as a slave is a criminal activity. According to this section, "whoever imports, exports, removes, buys, sells or disposes



of any person as a slave or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may entered to seven year, and shall also be liable to fine.” Further, if the person is involved in habitual dealing of slaves then the section 371 of IPC provides more rigorous punishment with the imprisonment upto 10 years.

IPC 371 states that “whoever habitually imports, exports, removes, buys, traffics or deals in slaves, shall be punished with imprisonment for life, or with imprisonment of either description for a term not exceeding years, and shall also be liable to fine.”

Similarly **section 372 and 373** of the IPC declares the selling and buying of minors for the purpose of prostitution as an offence. The sections also applies if a minor is bought or sold with the intent that such minor, at any age, shall be employed or used for illicit intercourse or for any unlawful and immoral purpose.

### **C. Keeping Victims of Trafficking for any Form of Exploitation:**

The victims of trafficking come to know about actual intention once they reach the place of destination. They are often forcefully detained, either by physical coercion or by means of debt etc. According to the **IPC 340**, “whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said “wrongfully to confine” that person”. **IPC 341 and 342** illustrates that whoever wrongfully restrains or confines any person shall be punished with imprisonment and/or fine. If a person wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as here in before mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

This is ‘wrongfully concealing or keeping in confinement, kidnapped or abducted person’. Even in the cases where the victims want to run away it becomes impossible for them to do so, and are forced to remain in the same situation. **IPC 368** states that “whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if

he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.”

Similarly, **IPC 347** prohibits wrongful confinement to extort property or constrain to illegal act. It states that “whoever wrongfully confines any person for the purpose of extorting from the person confined or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information, which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term, which may extend to three years, and shall also be liable to fine.”

As far as use of the victims of trafficking for the purpose of prostitution is concerned, ITP Act clearly states punishment for keeping a brothel or allowing premises to be used as a brothel. **ITP Act section 3** says that any person who keeps or manages, or acts or assists in the keeping or management of a brothel, shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine, which may extend to two thousand rupees and in the event of a second or subsequent to conviction with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine, which may extend to two thousand rupees.

Similarly, ITP Act also punishes person who is living on the earnings of prostitution. **ITP Act section 4** states that “any person over the age of 18 years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than 10 years.”

Even in such situations where the victims are unaware of what they would be doing, detaining a person in premises where prostitution is carried on is also identified as crime. According to **ITP Act section 6**, “any person who detains any other person, whether with or without his consent, in any brothel or in or upon any premises with intent that such person may have sexual intercourse with a person who is not the spouse of such person, is punishable on conviction, with imprisonment of either

description for a term which shall not be less than seven years but which may be for life or for a term which may extend to 10 years and shall also be liable to fine.”

#### **D. Use of force on Victims of Trafficking**

In the place of destination, the victim is forced to live in exploitative conditions. If she resists, she faces extremely brutal and violent forms of physical, mental, psychological and sexual torture. After days of resistance and attempts to escape, the victim finally succumbs to the torture.

According to *IPC 350*, “whoever intentionally uses force on any person, without that person’s consent, in order to the committing of any offence or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.” This is punishable with imprisonment and/or fine. Similarly, *IPC 354* states that, “whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby, outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.”

Similarly, *Juvenile Justice Act 2000* also lays down punishment for cruelty to juvenile or child. As per **JJ Act 23**, “whoever, having the actual charge of, or control over a juvenile or the child, assaults, abandons, exposes or willfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both.”

**JJ Act 25** also ensures “penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to juvenile or child- Whoever gives, or causes to be given, to any juvenile or the child any intoxicating liquor in a public place or any narcotic drug or psychotropic substance except upon the order of duly qualified medical practitioner or in case of sickness shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.”

#### **F. Use of Victims of Trafficking for any Form of Exploitation**

The use of victims of trafficking for any form of exploitation is a violation of fundamental rights guaranteed under the Constitution of India.

**Article 21** of the Constitution of India guarantees protection of life and personal liberty. In the case of the victims of trafficking, this right violated. Trafficking in human beings is in direct contravention of the **Article 23** of the Constitution, which prohibits the trafficking of human beings and forced labour. Trafficking is done for various purposes, whatever is the destination of the victims of trafficking and the act of trafficking in itself is an infringement of law. Following section presents the various legislations available to protect the victims of trafficking, who are used for various purposes.

*i) Commercial Sex Work / Forced Sex Exploitation*

ITP Act does not identify prostitution *per se* as an offence, but it penalises prostitution related activities by third parties, which include brothel keeping, living off earnings of prostitutes and procuring prostitutes.

The Immoral Trafficking Prevention Act, 1956 makes provisions on the prevention of the use of any one for the commercial sex work. According to the **section 3 of ITP Act**, if anyone keeps or manages or acts or assists in the keeping or management of a brothel, the person shall be punishable with rigorous imprisonment and also with fine. It is also assumed that until the contrary is proved, that any person is knowingly allowing the premises or any part thereof to be used as a brothel or, as the case may be, has knowledge that the premises or any part thereof are being used as a brothel.

According to **IPC 373** when a female under the age of 18 years is sold, let for hire or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

The victims of trafficking are usually unaware of the fact that they would be forced into sexual intercourse as a service to the clients. In this kind of situation where force, coercion, deception, threat, lure or material inducement is used to establish a sexual relationship with the people, it is Rape under section **375 of IPC**. Any sexual intercourse with a woman is considered to be a rape if it is against her will, without her consent, with her consent- when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. The sexual act is a rape also when it is commenced with her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him

personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. When a trafficked victim is used for the purpose of sexual exploitation, one or all these situations are true. Thus, the offender can be punished making use of the punishment that has been laid down under this section.

*ii) Forced / Exploitative labour*

The practice of selling of human beings for slavery is an ancient evil it still exists but goes unnoticed, as the form and image of such exploitation have changed. Though there is not a relationship of owner and slave yet the forced employment of individuals and more specifically that of children, in exploitative and harmful occupation puts them in much the same positions as slaves.

The IPC makes a number of provisions in preventing the trafficking of individuals in general and their employment in forced labour in particular. Apart from the sections that prohibit the activities of traffickers the IPC prohibits forced labour as well. **Section 374** states that “whoever any person who unlawfully compels another to labour against the will of that person, punishable with imprisonment of either description for a term, which may extend to one year, or with fine or with both.”

The most essential of these is the **Bonded Labour System (Abolition) Act of 1976**. **Section 4** of the act abolishes the practice of bonded labour. However, the Act goes further and increases its scope to abolishment of all forms of forced labour in sub-clause (b) of Clause 2 of the respective section. Thus, the Act takes into account the change in the situation from bonded form of slavery and other forms of forced labour of trafficked victims and abolishes such form of forced work.

With respect to children there are more specific Acts that protect them from economic exploitation. The trafficked children under the age of 14 are protected from being made to work as per the provisions of the **Child Labour (Prohibition and Regulation) Act**. The Act lists processes and occupations in which children below the age of 14 cannot be employed. Section 7 of the Act also specifies the hours and period of work for children.

Another Act that protects the children (care and protection) 2006 from being forced into labour and exploited is the **Juvenile Justice (Care and Protection of Children) Act, 2006**. The Act seeks to prevent exploitation of children that are employed and protect them from cruelty

that they may be subjected to by their employees. **Section 23** of the Act criminalises cruelty towards a juvenile or a child. Most trafficked children are subject to inhumane conditions that this act criminalises. This section protects the children from assault, abandonment, exposure or wilful neglect and their procurement for the same that leads to unnecessary mental or physical suffering.

**Section 26** of the JJ Act protects the exploitation of children by their employees. The Section prohibits the procurement of a juvenile or the child for the purpose of any hazardous employment keeping him in bondage and withholding his earnings or using such earning for private purposes.

However, the most sacred of all provisions against trafficking is the constitutional provision under Article 23. **Article 23** prohibits the traffic in human beings and forced labour thus making the practice illegal. It mentions that the practice of *begar* prohibits similar forms of forced labour. The constitution recognising the particular vulnerability of children prohibits their employment in hazardous work. Section 24 prohibits the employment of children below the age of 14 in factories mines and other hazardous occupations. Trafficking of children for the purpose of employment is prohibited according to Goa Children's Act, 2000 section 7 (9).

### iii) Marriage

In the cases, where the trafficking is taking place for the purpose of marriage – and if the person getting married is a child– then it is punishable under the **Child Marriage Restraint Act 1929**. According to the section 6- where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine.

Similarly, according to the **IPC 496** “whoever dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.” As per **IPC 498** “whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that

she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term, which may extend to two years or with fine or with both.”

Forcible marriage of a minor is a crime as per law and any marriage that is entered into by an individual by force or by any other means other than her own *free will* is null and void in all the marriage laws in India. Women are, however, often trafficked and are forced into marriage. Most of these women are minors. Such a practice is criminalised by the **IPC** under **section 366**. Under this section, anyone who kidnaps or abducts a woman being aware of the fact that she will be forced to marry against her will is criminally liable.

Apart from this, the Child Marriage Restraint Act protects the minor girls from being forced into marriage. **Section 3 and 4** of the Act provide for punishment of a male adult below 21 years but above 18 years and male above 21 years respectively, that marries a girl below the age of 18 years. **Section 5** punishes any form of conscious assistance in the performance, conduction and direction of a child marriage. **Section 6** of the Act provides for the punishment of any parent or guardian of a minor that undergoes marriage. “Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised or negligently fails to prevent it from being solemnised, shall be punishable...”. The Act presumes negligence of the guardian in any child marriage until proven otherwise.

In the proposed the Prohibition of Child Marriage Bill, 2006, section 12 is deals with voidability of the marriage of a child under certain circumstances. Section 12 of the Act states that “marriage of a minor child to be void in circumstances where a child being a minor (a) is taken or enticed out of the keeping of the lawful guardian; or (b) by force compelled, or by any deceitful means induced to go from any place; or (c) is sold for the purpose of marriage and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

#### iv) *Begging*

Young children are often abducted and made to beg. Beggary and using of children for criminal activity thus becomes a peculiar form of

exploitation of children for which they are often trafficked. Children are even used as carriers and peddlers of drugs putting them at grave risk.

The **Juvenile Justice Act under section 24** prohibits the employment of children for begging and makes such an act punishable with imprisonment and fine. Section 25 of the Act protect children from being abused as drug peddlers as it prohibits the giving of intoxicating liquor or narcotic drug or psychotropic substance to juvenile or child.

v) *Petty crime*

The children below the age of seven years are deemed to be incapable of criminal offence as per *section 82 IPC*. *IPC 83* acknowledges that “nothing is an offence, which is done by a child under the age of seven years of age and under 12 years, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.”

The decreased level of culpability of young children for a criminal act allows criminals to use them as effective tools. This has led to trafficking of children for the purposes of petty crime.

As per **JJ Act, 24 (2)** “whoever, having the actual charge of or control over, a juvenile or the child abets the commission of the offence punishable under sub-section (1), shall be punishable with imprisonment for a term which may extend to one year and shall also be liable to fine.”

Similarly, according to **JJ Act 26**, “whoever ostensibly procures a juvenile or the child for the purpose of any hazardous employment keeps him in bondage and withholds his earnings or uses such earning for his own purposes shall also be punishable with imprisonment for a term, which may extend to three years and shall also be liable to fine.”

**Section 108 of the IPC** that criminalises abetment in a crime protect the children from being engaged in criminal activity. The point is much clearly illustrated in illustration (b) of the act. Section 108, illustration (b) “A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z’s death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z’s death. Here, though B was not capable by law of committing an offence. A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder and he is therefore subject to the punishment of death.” Thus, those criminals that make use of young children to carry out criminal activity are liable under this act to be penalised.



vi) *Trafficking for Human Organ Trading*

Poverty stricken persons are often brought to the cities and made to sell their body organs for money. With increase in the demand for organ transplants such form of exploitation is increasingly growing. The commercial dealing in human body parts is not just exploitative but life threatening as well.

In India any form of commercial transfer of organs is prohibited by the **Transplantation of Human Organ Act, 1994**. Section 19 of the Act provides for punishment of offender who carry out dealings for profit in human organs. The various clauses and sub-clauses seek to put a comprehensive ban on the practice.

“The Act punishes any person who:

- (a) Makes or receives any payment for the supply of or for an offer to supply, any human organ;
- (b) Seeks to find a person willing to supply for payment any human organ;
- (c) Offers to supply any human organ for payment;
- (d) Initiates or negotiates any arrangement involving the making of any payment for the supply of or for an offer to supply, any human organ;
- (e) Takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any arrangement referred to in clause (d); or
- (f) Publishes or distributes or causes to be published or distributed any advertisement—
  - (i) Inviting persons to supply for payment of any human organ;
  - (ii) Offering to supply any human organ for payment; or
  - (iii) Indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d).”

In order to check the growing trade in human organs and the trafficking of individuals for the same, the various legislations such as the IPC and in cases of children acts such as the Juvenile Justice Act, must be used together with the provisions of the Transplantation of Human Organ Act, 1994 to effectively check the growing problem.

## Gap in the Existing System

As discussed in the above section, the term trafficking has not been defined in any national statute except Goa Children's Act. In the case of *Prerana vs. Union of India* pending in the Supreme Court, there is a specific prayer made to adapt the definition of the Palermo protocol as the definition for trafficking.

The international standards like United Nations Protocol to Prevent, Suppress and Punish Trafficking in persons, especially Women and Children provides guidelines to deal with the issue. However, unlike the criminal provisions in this Protocol, which are obligatory on State Parties, the human rights protection is discretionary under the protocol.

The existing law although tries to address the issue of trafficking to a certain degree, but is largely focused on penalising the victims. And moreover, the existence of some trafficking provision in the law is not indication of the prosecution of traffickers. The mechanisms to trace the traffickers and others who take benefit from the victims are not devised well in the legislations. Inadequacy in the law and insensitiveness towards victims has remained the major flaw in our system. This low risk of consequence to the traffickers makes them more actively operate in impunity.

After being trafficked, women and children are subjected to the worst abuse. The gross violation of their rights is further exacerbated when the victims are arrested as accused, prosecuted and even convicted. Revictimisation ensues from the same process meant to redress their grievances.<sup>2</sup>

Protection from exploitation is a fundamental right under the constitution of India. Article 14 provides for right to equality before law, Article 15 provides for prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Directive Principles of State policies in the Constitution like Articles 39, 39(f) and 43 are also equally relevant. Thus, there is an urgent need to make effective use of these current legislations and take necessary provisions to protect the right of the trafficked victims.

2 2003, NHRC-UNIFEM-ISS, A Report of Trafficking in Women and Children in India.



## 6

# Critical Analysis: Immoral Trafficking Prevention Act, 1956

### **The Present Law - The Immoral Traffic (Prevention) Act 1956**

The Immoral Traffic (Prevention) Act 1956 was enacted in the pursuance of the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of Others, 1950. Article 23 of Part III of the Indian Constitution related to fundamental rights - 'Rights Against Exploitation' prohibits trafficking of the human beings and provides that any contravention of this right shall be an offence punishable by law. The Directive Principles of State Policy under Part IV of the Constitution in Article 39 (e) and (f) declare that state policies should be directed towards securing that the "childhood and youth are protected against exploitation and material abandonment." Building on the constitutional principles the Suppression of Immoral Traffic in Women and Girls Act was enacted in 1956.

The fundamental approach of the SIT Act was tolerance of prostitution. The Act was amended twice. It was first amended in 1978, and then amended and renamed as the ITP Act in 1986. The amended Act continues to prohibit prostitution in its commercialised form without making prostitution *per se* an offence.

### **Salient Features of the Act**

The section 2 of the Act provides definitions to be used in the context of the implementation of the Act. "Brothel" is defined as "any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes." According to ITP Act, a 'child' "as a person who has not completed the age of sixteen years," 'major' "as a person who has not completed the age of eighteen years" and 'minor' "as a person who

has completed the age of 16 years but has not completed the age of 18 years." The provisions mentioned in the act are to be read accordingly. 'Prostitution' means "the sexual exploitation or abuse of persons for commercial purposes," and the expression 'prostitute' shall be construed accordingly. 'Protective home' means "an institution, by whatever name called (being an institution established or licensed as such under Section 21), in which persons who are in need of care and protection, may be kept under this Act and where technically appropriate qualified persons, equipments and other facilities have been provided but does not include a shelter where undertrials may be kept in pursuance of this Act, or a corrective institution."

According to section 3 of the Act, any person who keeps or manages or assists in the keeping or management of a brothel shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees. It further provides that any person who being the tenant, lessee, occupier or person in charge of any premises, uses or knowingly allows any other person to use, such premises as a brothel shall be punishable on first conviction with imprisonment for a term which may extend to two years and with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which may extend to five years and also with fine.

According to section 4 of ITP Act, any person who is above the age of 18 years and who knowingly lives on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend up to two years or with fine which may extend to one thousand rupees or both and if such an earning is related to the prostitution of a minor, then the term may extend to not less seven years and not more than 10 years.

Similarly, section 5 of the Act of procuring or attempting to procure or inducing of a person whether with or without his consent for the purpose of prostitution or inducing a person to carry on prostitution is punishable with rigorous imprisonment for a term not less than three years and not more than seven years and fine of two thousand rupees and if the offence is committed without the will of any person than the term may

exceed upto 14 years. In case the aforesaid, offence is committed in respect of a child the punishment extends to rigorous imprisonment for a term of not less than seven years but may extend to life and if it is minor, the punishment extends to rigorous imprisonment for a term not less than seven years and not more than 14 years.

According to section 6 of the Act, detaining a person whether with or without his consent in any brothel or in any premise so that such person may have sexual intercourse with a person other than his spouse is punishable with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine. If any person is found with a child in a brothel, it shall be presumed, unless the contrary is proved, that he has committed the above-mentioned offence. (Section 6)

Section 7 of the Act provides that any person who carries prostitution in the area or areas within a distance of two hundred meters of any place of public religious worship, educational institution, hotel, hospital, nursing home or such other public place as notified by the state government that prostitution shall be carried out in such areas shall be punishable with imprisonment for a term which may extend to three months and when such an offence committed is in respect of a child or minor, then the term of imprisonment may extend to seven years or for life or a term which may not exceed ten years and shall also be liable to fine.

Attracting the attention of any person by words, gestures, wilful exposure of the person or soliciting or molesting any person so as to offend against public decency for the purpose of prostitution is punishable on first conviction with imprisonment for a term, which may extend to six months or with fine which may extend to five hundred rupees or with both, and in the event of a second or subsequent conviction, with imprisonment for a term which may extend to one year and also with fine which may extend to five hundred rupees according to Section 8.

Section 9 states that "any person who having custody, charge or care of any person causes or aids or abets the seduction for prostitution of that shall be on conviction with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term, which may extend to 10 years and shall also be liable to fine." In case, a female offender is found guilty of an offence under Section 7 or 8 and the character, state of health and mental condition of the offender and the other circumstances of the case being conducive to her

correction, it shall be lawful for the court to pass, *in lieu* of a sentence of imprisonment, an order for detention in a corrective institution for such term, not being less than two years and not being more than five years, as the court thinks fit.

As per Section 13(1), the State Government shall appoint a *special police officer* for each area to be specified by the Government to deal with the offences under this Act. Section 13(4) of the Act empowers the Central government to appoint trafficking police officers with nationwide jurisdiction for the investigation of cases of interstate trafficking in women.

Section 14 provides that offences under this Act are cognisable and arrest without warrant may be made only by the special police officer or under his direction or guidance, or subject to his prior approval. Under section 15 of the Act, such trafficking police officers are empowered to enter and search premises without warrant if he has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a person living in any premises and that search of the premises with warrant cannot be made without undue delay.

If a Magistrate has reason to believe that any person is living or is carrying prostitution in a brothel, he may direct a police officer to remove such person from there and produce before him. (Section 16) When the police officer is unable to produce the removed or rescued person under Section 15(4) or 16(1), he shall produce the person before the nearest Magistrate of any class for the issuance of appropriate orders. No person can be detained in custody for more than 10 days from the date of the order. (Section 17)

Under Section 18, if a Magistrate comes to know that a place within a distance of 20 metres of any public place is being used as brothel by any person or being used by prostitutes, he may issue a show-cause notice to the owner, lessor or occupier of such place or premise that why the same should not be attached and after hearing the concerned person, the Magistrate may pass appropriate orders for the eviction of offenders and closure of brothel. Section 19 enables a person who is carrying on or is being made to carry on prostitution to apply to the Magistrate for an order that she may be kept in protective home or provided care and protection by the Court.

Section 21 of the Act enables the State Government to establish as many protective homes and corrective institutions as it think fit and such homes

and institutions when established shall be maintained, as prescribed. The State can also issue license to other person for the establishment of protective homes and for their maintenance. No license issued or renewed under this Act shall be transferable. Under Section 21-A, every person or authority who is licensed to establish or maintain or as the case may be for maintaining a protective home or corrective institution shall whenever required by the Court produce the records and other documents maintained by such home or institution by the Court.

Further, under section 22-A and section 22-AA, if the State Government and Central Government respectively are satisfied that it is necessary for the purpose of providing for speedy trial of offences under this Act and committed in more than one State, they may, by notification in the official Gazette and after consultation with the High Court concerned, establish one or more courts of Judicial Magistrates of the first class or Metropolitan Magistrates for the trial of such offences.

ITP Act has faced criticism for not addressing to the issue of trafficking in a holistic manner. Recently, a series of changes have been brought in the ITP Act and amended ITP Act bill has been made public. (see annexure for the copy of amended bill).

### **The ITP Act and its Amendment**

As amended, the ITP Act merely extends the SIT Act's application to both women and men and increases the punishment for certain offences especially those concerning children. During the amendment process, there was no rethinking of the SIT Act's underlying policy. Hence, in legal terms, the act of sexual intercourse *per se* is not illegal. Instead, every other act required to carry out prostitution is a crime under the ITP Act. The aim of the legislation, as made abundantly clear from the Preamble to the 1956 version of the Act, is "to inhibit or abolish commercialised vice namely, the traffic in women and girls for the purpose of prostitution as an organised means of living." In other words, a woman can carry out prostitution on her own within her own premises without it being considered a criminal act. However, the Act punishes anyone maintaining a brothel (section 3) or living off the earnings of a prostitute (section 4) or procuring or detaining a woman for the sake of prostitution (sections 5 and 6). Moreover, section 15 allows the Trafficking Police officer or Special Police Officer, who can not be less than Sub Inspector rank to conduct raids on brothels without a warrant based on the mere belief that an offence under the ITP Act is being committed on the premises. The Act also punishes any person



who solicits or seduces for the purpose of prostitution (section 8) or who carries on prostitution in the vicinity of public places (section 7). In the maximum raid and rescue police use these sections against women. The victims again victimised by these sections. Under section 20 of the ITP Act, which is vaguely written, a Magistrate can order the removal of a prostitute from any place within his jurisdiction, if he deems it necessary to the general interest of the public. In addition, the Act provides for the establishment of corrective institutions in which female offenders are detained and reformed and envisages the appointment of Special Police Officers to enforce these provisions. There is no punishment whatsoever for the client. In the Act there is no clear direction to catch the trafficker.

### **Critique of the Amendment to the ITP Act**

A more detailed critique of the amendment to the ITP Act is attempted as under:

**Section 2(a)** of the ITP Act defines a “brothel” to include ‘any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for the purposes of sexual exploitation or abuse for the gain for another person or for the mutual gain of two or more prostitutes.’ A solitary instance of prostitution does not make the place a “brothel” as was held in *Sushila vs. State of Tamil Nadu*.<sup>1</sup> The court has also emphasised that for a place to be called a brothel, the prostitution of a woman should take place for the gain of another person in *re: John (AIR 1966 Mad 167)*. This definition of a brothel as a place for ‘the mutual benefit of two prostitutes’ converts commercial sex workers who work voluntarily into criminals who have to be penalised. This is clearly violative of their right to freedom of employment under Article 19 of the Constitution. The amendment to the Act also does not alter the definition of the term ‘brothel’ thereby continuing to disregard this fundamental right.

**Section 2(aa)** defines ‘child’ as a person under the age of 16 years while **Section 2(ca)** defines a ‘major’ as a person who has completed the age of 18 years and **Section 2(cb)** defines ‘minor’ as a person who has completed the age of 16 years but is below the age of 18 years. These distinctions are unnecessary and this needless segregation has been done away in the amendment, which defines ‘child’ under Section 2(aa) as a person below the age of 18 years in consonance with international law and does away with the classifications of ‘major’ and

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1 1982 Cri LJ 702 (Mad)

‘minor’. This will bring all persons under the age of 18 years within the ambit of the ITP Act and reduce needless procedural delays.

The ITP Act does not address children directly as a separate category. It unfortunately does not contain any special provision related to children, particularly the treatment of rescued children. However, **Sections 6(2)** provides that “where any person is found with a child in a brothel, it shall be presumed unless the contrary is proved, that he has committed an offence under **Section 6(1)**.<sup>2</sup> In addition, **Section 6 (2A)** under the Act provides that any child or minor found in a brothel, if on medical examination is detected to have been sexually abused, it shall be presumed that the child or minor has been detained for purposes of prostitution or, as the case may be, sexually exploited for commercial purposes unless the contrary is proved. Again, since the ITP Act does not define ‘persons’, it is understood to include children.”<sup>3</sup>

The amendment to the ITP Act also fails to address the issue of children being trafficked for the purposes of sexual exploitation. Except for a change in the definition of child as any person under the age of eighteen years in consonance with the Convention on the Rights of the Child (CRC)<sup>4</sup>, the amendment is silent on the issue of the commercial sexual exploitation of children. This is in spite of the findings of the Mahajan Committee Report, which stated that as many as 60% of the persons in prostitution are brought into prostitution as children.<sup>5</sup> It further found that in India’s major metropolitan areas, more than 75% of persons in brothels were below the age of 20<sup>6</sup> and that 34% of these persons entered into prostitution before the age of 18.<sup>7</sup> Field research by Prajwala, an NGO, found that in some areas most girls are brought into brothels when they are 12-13 years of age.<sup>8</sup>

The ITP Act, the only central Indian legislation that deals with trafficking, inexplicably fails to provide a definition for the same. The amendment

2 Section 6 (1) makes a person liable for punishment if he or she detains a person in premises where prostitution is carried on. It could be in a brothel or in any premises with intent that such person may have sexual intercourse with that person who is not the spouse of such person. It lays down the punishment also.

3 Immoral Trafficking Prevention Act, section 2(f)

4 G.A res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989). Entered into force on September 2, 1990

5 Gaurav Jain vs. Union of India 1997 (8) SCC 114 at 130

6 ibid 5

7 ibid 5

8 Vetticattil and Krishnan, *The Shattered Innocence: A Field Study on Inter State Trafficking for Commercial Sexual Exploitation from Andhra Pradesh*, September 2002.

to the Act inserts the following definition of trafficking as clause 2(k) as per the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children<sup>9</sup>, also called the Palermo Protocol.

- a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph a) shall be irrelevant where any of the means set forth are used.
- c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a)".

In this definition, the consent of the victim of trafficking is immaterial. Trafficking is in itself a human rights violation, irrespective of the end purpose, and involves a number of issues including mobility, migration within and across borders, and volition or consent. However, the inclusion of a definition of trafficking in a law that deals with not only trafficking but also prostitution itself, conflates the issues of prostitution (included under the category of exploitation in the definition) and trafficking, which according to a significant number of activists, NGOs and even prostitutes themselves need to be looked at separately. The phrase 'position of vulnerability' included in the definition of trafficking is highly ambiguous and could be interpreted to disregard the right to self-determination of a prostitute or sex worker.<sup>10</sup>

9 Available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf) last visited on April 7, 2006. The Protocol was adopted by General Assembly resolution A/RES/55/25 of November 15, 2000. It entered into force on September 29, 2003 and has been 117 signatories.

10 Vetticatil and Krishnan, *The Shattered Innocence: A Field Study on Inter State Trafficking for Commercial Sexual Exploitation from Andhra Pradesh*, September 2002.

In addition, it is debatable whether the incorporation of the Palermo Protocol definition that covers all forms of trafficking in a legislation, which deals solely with trafficking for commercial sexual exploitation shall be of much help. If this definition is incorporated, the character of the ITP Act shall have to change completely and it would become a new legislation on all forms of trafficking in human beings.

The amendment to Section 3(1) of the ITP Act increases the fine and punishment for keeping a brothel or allowing one's premises to be used as a brothel. Unfortunately, the amendments do not contain similar provisions for increasing the penalties attached to living off the earnings of a prostitute (under Section 4) and procuring for prostitution (under Section 5). This omission dilutes the effectiveness of the amendment and sends conflicting signals. The omission violates the premise based on which the ITP Act was enacted, namely to penalise all activities related to prostitution carried on by third parties.

Section 7 of the ITP Act criminalises prostitution in the vicinity of public places and section 7(1A) imposes a higher penalty if a minor is involved. The amendment to the Act increases both the term of imprisonment as well as the amount of the fine attached to an offence with respect to a person below the age of 18 years. This is a welcome step recognising the gravity of the offence and providing some protection to the rights of children. However, the failure of the amendment to provide any specific provision for the protection of children trafficked for prostitution is a glaring lapse and an appalling display of official apathy.

The Section 8 of ITP Act makes outward manifestations of sex work such as 'soliciting' and 'public disturbance' illegal. The majority of arrests made under the provisions of this Act are of women soliciting customers.<sup>11</sup> Traffickers are seldom identified, much less prosecuted. Prosecution requires that sex workers testify against traffickers and third parties like pimps and brothel owners. Since the livelihood of these women depend on these third parties, they are extremely unwilling to do so and this makes their prosecution almost impossible. The amendments to ITP Act do not address this issue at all.

Section 20 of ITP Act allowings the magistrates to order removal of prostitutes from any place, a complete violation of the fundamental rights of liberty, freedom of movement and right to reside. This is further

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11 ITPA section 8

criminalised in the form of enhanced punishment for activities such as brothel keeping.<sup>12</sup> The enhanced penalties for brothel keeping and other activities related to sex work seem indicative of the legislation's view of prostitution as a criminal activity.

Increasing the maximum period of stay of female offenders in corrective institutions is another amendment to Section 10(b), which further criminalises prostitutes. The ITP Act and its amendment provide that every woman whose 'character', 'state of health' and 'mental condition' requires 'corrective treatment' shall be placed in a corrective institution regardless of whether they themselves want such a placement.<sup>13</sup> It should be noted that neither the Act nor the amendment defines the aforementioned terms. The use of these terms is indicative of a gender-biased legislation and the amendment does nothing to rectify it. It also leaves room for the abuse of powers by the police. Also when rescued women commercial sex workers are admitted to institutions it impinges on their right to life, liberty and freedom of movement, a violation of Articles 19 and 21 of the Indian Constitution.

Section 13 of the ITP Act calls for the state governments to appoint special police officers to deal with offences under the said Act. The most significant problems faced by sex workers across the country are related to police harassment and detention. The amendment to ITP Act, instead of recognising and addressing the issues of arbitrary police raids, seizure of money and material belongings, physical assault, torture and rape and other human rights violation of prostitutes by police personnel, has lowered the rank of the special police officer dealing with offences under ITP Act from inspector to sub-inspector.<sup>14</sup> This amendment is likely to result in greater abuse of power by the police. The amendments should instead have focused on increasing police accountability to ensure that the rights of trafficked victims are adequately protected.

Although the amendments to the ITP Act have, to a certain extent, recognised the procedures inherent in the said Act that led to a delay in legal proceedings and compromised the delivery of justice, the steps taken to modify the same can at best be described as inadequate. Under the amendment to **Section 13(3)(b)**, it is now made mandatory for the State government to consult a non-official advisory body consisting of five leading social welfare workers of that area on questions of general

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12 Amendment to Immoral Trafficking Act, section 3

13 Amendment to Immoral Trafficking Act, section 10(b)

14 Amendment to Immoral Trafficking Act, section 13(2)

importance regarding the working of the Act. However, the composition criteria and membership procedures of the non-official advisory board are not specified, nor are the specific areas of consultation. This raises the fear that the recommendations of the advisory board may be dismissed without adequate consideration merely on account of their non-official status.

To be really effective, the amendments need to ensure that adequate legal aid and representation is provided to prostitutes and trafficked women. Additional provisions for setting a time limit to be set for speedy record of evidence have also been made under the amendment to **Section 21A** of the ITP Act. While the need for speedy access to justice cannot be denied, the amendments should contain safeguards to ensure that proper procedures are followed and human rights are not violated. Also, a clause ensuring that the court protects the dignity and privacy of the indicted through the provision of mandatory in camera proceedings has been added. However, the crucial issue of the sensitisation of the judiciary and law enforcement agencies to the plight of prostitutes and the need for approaching such cases without a moral bias resulting from social perceptions has not been addressed by the amendments.

The amendments have failed to take note of the appalling conditions prevailing in the protective homes set up by the state governments under **Section 21** of the ITP Act. The provision of protective homes for victims of trafficking is in keeping with the duties of a welfare state. But care needs to be taken to ensure that conditions prevailing in the homes make them fit for habitation. Most prostitutes who have been rescued are sent to such protective homes. Yet, in the homes they are treated like criminals, forced to wear uniforms and pimps and brothel keepers have easy access to them.<sup>15</sup> In this scenario, the very notion of “protective homes” seems ludicrous.

Since the ITP Act does not make any provision for the care and protection of victims, civil society groups have turned to the court for help. Numerous Public Interest Litigations have been filed in the Supreme Court such as *Prajwala vs. Union of India* and *Perna vs. Union of India* seeking guidelines from the court regarding a victim protection protocol and trying to safeguard the rights of trafficked victims who are

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15 Sen, Shankar, A Report on Trafficking in Women And Children in India 2002-2003, NHRC, UNIFEM and ISS. Available at <http://www.ashanet.org/focusgroups/sanctuary/articles/ReportonTrafficking.pdf> last visited on March 20, 2006.

more often than not, exploited by traffickers and pimps in spite of being in the custody of the police.

The amendment contains an additional clause to confiscate the property and assets of traffickers and agents of prostitutes and also provides protective mechanisms, immunities and safeguards for members of voluntary agencies taking initiatives to prevent trafficking, facilitating rescues and carrying out victim protection activities. Unfortunately the amendment does not make any provision for the scrutiny of the conduct of voluntary agencies to ensure that they do not violate any human rights while in the process of protecting rescued prostitutes.

It is a well-documented fact that the number of prostitute women arrested under the ITP Act is significantly higher than the number of pimps, procurers and brothel keepers. Thus, it is clear that the Act is enforced discriminatorily against prostitutes. It is doubtful whether the provisions of the amendment will be able to address this. The rehabilitation homes and the protective homes set up under the ITP Act are a failure.<sup>16</sup> They are ill equipped to deal with the sheer number of women convicted or arrested under the ITP Act. The vocational training imparted to them is largely inadequate and fails to provide practical skills needed in today's world. The amendments do call for an increase in the participation of voluntary agencies in the rescue of prostitutes but there is no provision for their participation in the rehabilitation process.<sup>17</sup>

One of the most controversial amendments is the addition of **Section 5C** that punishes clients of prostitutes for the first time. It penalises those persons '*who visit or are found in a brothel for the purpose of sexual exploitation of any victim of trafficking*' with a term of imprisonment and/or fine. The Section has ostensibly been drafted to penalise clients who seek sexual services from a trafficked victim and in the words of the Department of Women and Child Development, which has drafted the Amendment Bill, will provide a penal remedy against clients who stimulate the demand for trafficking for commercial sexual exploitation yet remain untouched by existing law.

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16 Kotiswaran, Prabha, Preparing for Civil Disobedience: Indian Sex Workers and the Law, available at [http://www.bc.edu/bc\\_org/avp/law/lwsch/journals/bctwj/21\\_2/01\\_FTN.htm](http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FTN.htm) last visited on March 20, 2006.

17 Kotiswaran, Prabha, Preparing for Civil Disobedience: Indian Sex Workers and the Law, available at [http://www.bc.edu/bc\\_org/avp/law/lwsch/journals/bctwj/21\\_2/01\\_FTN.htm](http://www.bc.edu/bc_org/avp/law/lwsch/journals/bctwj/21_2/01_FTN.htm) last visited on March 20, 2006.

The intention behind inserting Section 5C is undoubtedly noble but the section itself is quite ambiguous. The term 'sexual exploitation' has not been defined anywhere in the Amendment Bill. Furthermore, neither the ITP Act nor its amendment takes into account the issue of consent. The definition of trafficking as laid down in Section 2(f) fails to make a distinction between consensual prostitution and sexual exploitation. It brings any form of commercial sex work or prostitution within the ambit of trafficking for sexual exploitation, thereby denying sex workers who have willingly entered the profession for economic reasons their rights to earn a livelihood and freedom of choice and profession. The failure to make this distinction further conflates the issues of trafficking and induction into commercial sexual exploitation and voluntary sex work or prostitution. The insertion of Section 5C is likely to hurt the interests of those workers the most who have willingly entered the profession by punishing clients, on whom they depend on to make a living as it can be interpreted to punish all clients who visit brothels. Moreover, the amendment does not specify how law enforcement personnel shall distinguish between clients found in a brothel who avail the services of a trafficking victim and clients who are found with sex workers who have voluntarily entered the profession. In practice, Section 5C is likely to become another tool for the harassment and extortion of persons found in the vicinity of brothels. This section, instead of empowering sex workers, further denies them their rights. It also completely negates the purpose of deleting Section 8. If the clients themselves are liable to be arrested then decriminalising soliciting serves no real gain and fails to empower sex workers as it was meant to. Instead, the section threatens the very existence of sex workers. Moreover, the section does not require the client to have sex with the trafficked victim; the act of visiting a brothel is sufficient ground for arrest. This gives wide ranging discretionary powers to the police that might be misused, further victimising sex workers.

The proposed definition of 'trafficking in persons' to be inserted under **Section 5A** of the amendment has been drafted in accordance with the definition of trafficking provided in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. It must, however, be noted that while the UN Protocol covers all forms of trafficking in persons, the proposed section is restricted to trafficking for commercial sexual exploitation. The definition reads as follows:



“Whoever recruits, transports, transfers, harbours or receives a person for the purpose of prostitution by means of:

- (a) threat or the use of force or coercion, abduction, fraud, deception; or
- (b) abuse of power or a position of vulnerability; or
- (c) giving or receiving payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons.

Explanation: - where any person recruits, transports, transfers, harbours or receives a person for the purpose of prostitution, such person shall, until the contrary is proved, be presumed to have recruited, transported, transferred, harboured or received the person with the intent that the person shall be used for the purpose of prostitution.”

According to this definition, for an offence of trafficking to be committed, the offending trafficker should have employed the measures set for in sub-clause (a), (b), (c) to force the victim into sex work. The use of the phrase “*abuse of power and position of vulnerability*” in sub-clause (b) is filled with ambiguity and has no clearly defined legal meaning. Many civil society groups have expressed the concern that the use of this ambiguous phrase could bring persons who have joined this profession for economic reasons within the fold of this Act as their entry into prostitution can be interpreted to be due to a “position of vulnerability.” The insertion of this provision shall further blur the distinction between trafficking for commercial sexual exploitation and voluntary prostitution.

In conclusion, the amendment to the ITP Act does not change the character of the Act. The law still remains punitive instead of being protective. In most cases, the amendments have increased the penalties attached to certain offences. Yet, the legal status of sex workers still remains shrouded in uncertainty. The law increases the punishment of people living off the earnings of prostitutes and unwittingly brings their children within its ambit and deprives them of their only means of support while failing to target pimps, agents and brothel keepers, for whom it was originally meant. In addition, the law must take cognisance of the fact that the enforcement of the ITP Act discriminates against women and provide safeguards to check the abuse of powers by law enforcement agencies. The provisions of the amendment to the ITP Act further blur the distinction between voluntary prostitution and trafficking

for commercial sexual exploitation and instead of empowering sex workers or prostitutes, infringe their right to livelihood and freedom of profession. A greater role has to be played by NGOs in the protection and rehabilitation of prostitutes arrested or convicted under the Act. The Palermo Protocol definition should either be a part of the IPC or a separate legislation to comprehensively deal with all forms of trafficking in human beings. But most importantly, the amendments have to be implemented properly for the law to be truly effective. Till then, the ITP Act whether amended or not, still remains an adversary for a victim of trafficking.



# 7

## Judicial Response in India

Judicial activism in the issues of social concern has distinctly marked today's era. Whenever the executive and the legislature have failed or slowed down in carrying out their duties, the judiciary has actively intervened in translating the fundamental rights of citizens into practice. This judicial activism is evident in various landmark judgements that have changed the direction in which the issues are addressed. There have been several judgements of social relevance, which have been proactive in protecting the dignity and liberty of the people.

The Constitution of India guarantees certain fundamental rights to its citizens. Article 23 specifically prohibits trafficking in human beings and forced labour. The Right to life and personal liberty and dignity is an essential fundamental right guaranteed by Article 21. The Directive Principles of State Policy as stated under Articles 39, 39A and 43 of the Constitution, are also equally relevant for the protection of the rights of victims of trafficking.<sup>1</sup> While there is a very clear constitutional foundation under Article 32<sup>2</sup> to move the Supreme Court by appropriate

<sup>1</sup> Article 39 Certain principles of policy to be followed by the State  
The State shall, in particular, direct its policy towards securing -  
(a) that the citizen, men and women equally, have the right to an adequate means of livelihood;  
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;  
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;  
(d) that there is equal pay for equal work for both men and women;  
(e) that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;  
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39A Equal justice and free legal aid

The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or

proceedings for the enforcement of rights including the right to be free from forced labor and trafficking the current trend shows that the reality it is far from it.

A critical issue like trafficking in human beings is marked by blatant judicial inaction. Though the judiciary has been involved in most issues and has shown proactive interest, trafficking in persons has remained neglected. Firstly, hardly any case of trafficking comes to the notice of the judiciary due to under-reporting of cases. Secondly, the present law is such that it allows criminals to escape punishment. Thirdly, the inaction of the police in collecting evidences and proving the accused guilty is shocking. In addition to the above lack of victim protection, the ease with which culprits escape and insensitivity of the entire machinery in dealing with cases of trafficking emerge as major hazards.

The pervasiveness of the issue is such that it cannot be isolated from other issues of social concern. There is a direct link between issues like right to education, right to health, standard of living, right to live with dignity, right to employment, right to food and the protection of child rights. All these rights are compromised in cases of trafficking. Migration may take two form: that with free will and that in cases of trafficking. The thin line between migration and trafficking is often tricky to distinguish.

There is an urgent need for active judicial interest and involvement to ensure justice. While the need for judicial intervention is overwhelming, it requires utmost care and social sensitivity. The cases need to be understood in the given social context and the complexity of the situation needs to be appreciated.

schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 43 Living wage, etc., for workers

The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

- 2 Article 32 Remedies for enforcement of rights conferred by this Part (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

The current judicial response to trafficking does not present a very encouraging picture. Though Courts have passed few important judgements, there exists huge scope for judicial intervention. Given the complex nature of the issue, this needs to be dealt with sensitively rather than merely as a technical aspect of law, based on evidence. In the sections to follow, we will discuss some significant judgements pertaining to trafficking and try to trace the trends followed.

### A. Trafficking and Commercial Sex Work

Sex workers, usually referred to as prostitutes, have occupied an anomalous position in societies throughout history.<sup>3</sup>

Section 2(f) of The Immoral Traffic (Prevention) Act, 1956 (ITP Act) defines “prostitution” as ‘the act of a female offering her body on hire for promiscuous sexual intercourse, whether in money or in kind’. The Act applies only to females carrying on the business of prostitution. A prostitute should be convicted only if it is proved beyond reasonable definition doubt that she falls under the above section. It is to be understood that most of the time, women are forced into this profession because of their poor economic conditions.

As per the ITP Act, only a Special Police Officer can conduct the investigation. This is to ensure that the Act is not misused and the real culprits are prosecuted. But this doesn’t mean that Courts have rejected secondary evidence. The Court held in the case of *Vanga Seetharamamma vs. Chitta Sambasiva Rao and Anr*<sup>4</sup> that matters need not be proved by direct evidence. The evidence may be indirect but should be of a clear and convincing nature.

In the same, case, the validity of Section 20 of the ITP Act, which allows the removal of prostitute from any place within the local limits of a Magistrate’s jurisdiction, was challenged. However, Section 20 was not held to be unconstitutional. In the case of *Kaushaliya vs. State*<sup>5</sup> in the High Court of Allahabad, section 20 of the Suppression of Immoral Traffic in Women & Girls Act, 1956 (SIT Act) was imposed on six applicants on the ground that they were prostitutes and that in the interest of the general public they should be asked to remove themselves from the places where they were residing.

3 Jo Bindman, “Redefining Prostitution As Sex Work in International Agenda” accessed from <http://www.walnet.org/csis/papers/redefining.html#2> (last visited on 27.04.2007).

4 AIR 1964 AP 400

5 AIR 1963 All 671

The contention of the applicants was two fold: firstly, the Magistrate was not entitled to take action against them under Section 20 of the SIT Act on the basis of reports submitted by a Sub-Inspector of Police who has not been appointed under Section 13 of the Act as a 'Special Police Officer', with power to deal with offences under the Act; secondly Section 20 of the Act is unconstitutional as it infringes Article 14 and Clauses (d), (e) and (g) of Article 19(1) of the Constitution. The appellants argument was that under Section 20 of the aforementioned act, even prostitutes who have committed no offence whatsoever and who are scrupulously observing the letter of the law can be asked to remove themselves from the places resided in or frequented by them. The Court held that Section 20 of the SIT Act must be struck down under Article 13 (2) of the Constitution for taking away or abridging the fundamental rights conferred by clauses (d) and (e) of Article 19 (1), as well as for infringement of Article 14.

In the case of *Smt. Shama Bai and Anr vs. State of Uttar Pradesh, Lucknow and others*<sup>6</sup> the constitutional validity of the SIT Act, 1956 was challenged. It was held that the Act was not ultra vires the Constitution.

The judiciary in a few cases has laid down several directions and has emphasised the care, protection and rehabilitation of victims of trafficking.

In the case of *Dr. Upendra Baxi vs. State of Uttar Pradesh*,<sup>7</sup> the Supreme Court held that women and girls rescued should be sent to protective homes and housed under proper conditions. They should be medically examined and treated with care.

Two Supreme Court judgements – *Vishaal Jeet vs. Union of India*<sup>8</sup> and *Gaurav Jain vs. Union of India*<sup>9</sup> have been landmark judgements on trafficking. The 1990 Supreme Court judgement in *Vishal Jeet vs. Union of India* directed the government to ensure care, protection, development, treatment and rehabilitation of victims of commercial sexual exploitation and to set up a central advisory committee. The Court also directed that steps should be taken to appoint trained personnel in rehabilitation homes. The Central Government was directed to look into the inadequacies of the law, system, and institutions relating to trafficking to make appropriate amendments.

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6 AIR 1959 All 57

7 (1983) 2 SCC 308

8 AIR 1990 SC 1412

9 AIR 1998 SC 2848

In this case, the Supreme Court issued the following directions:

1. "State Government and the Union Government should direct their law enforcement authorities to take strict action to eradicate child prostitution.
2. A separate advisory committee should be formed in different zones consisting of the Secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologist, members of the women's organisations, members of the Indian Council of Child Welfare and the Indian Council or Social Welfare as well as members of various voluntary social organisations, associations etc. whose function will be to suggest measure to eradicate child prostitution and to implement programmes for the care, protection, treatment, development and rehabilitation of young children rescued either from brothel houses or from the vices of prostitution.
3. The State and Union Governments should take steps to provide adequate rehabilitation homes, manned by well-qualified, trained social workers, psychiatrists and doctors."

The Court also gave directions to the State and Union Governments to check the *Devadasi* system.

In *Gaurav Jain vs. Union of India*, improvement of the conditions of commercial sex workers and their children was sought. The Supreme Court directed that:

"segregating the children of prostitutes by locating separate schools and providing separate hostels would not be in the interest of the children and the society at large"

"...be allowed to mingle with others and become a part of the society."

The Court also constituted a Committee to submit a report giving suggestions for appropriate action, called the Mahajan Committee. The Mahajan Committee submitted a detailed report along with well drawn out guidelines addressing the issue. In its report, the Mahajan Committee found that a large number of persons carrying on prostitution were children. As a result, the Supreme Court enhanced the scope of the petition and passed directions with respect to the treatment of children who are victims of commercial sexual exploitation during trial as well as their rehabilitation. The case also examined the legal framework within



the ITP Act, which was deemed incomplete and concluded that it did not provide for the proper prosecution, of guilty person, or for the better treatment of children during trial or their rehabilitation.

In the Public Interest Litigation (PIL) *Prerna vs. Union of India*,<sup>10</sup> broad guidelines were sought from the court on the implementation of the Immoral Traffic Prevention Act, 1956. Some of the directions include—(1) *inter alia* establishment of a National Nodal Agency involving the Ministries of Women and Child, Labour, Social Justice, Health, Home, Tourism, Railways, Information and Broadcasting and Law and Justice to monitor cases of trafficking and missing persons, (2) the establishment of an Advisory Body in every State/Union Territory under Section 13 (3) (b) of ITP Act, (3) issuing a General Notification under Section 13 of the ITP Act, specifying a class of police officers as Special Police Officers to deal with offences under the Act, (4) directing District Magistrates to pay particular attention to the vice of trafficking and, if necessary, exercise jurisdiction under Section 13 (2A) of the ITP Act by conferring on retired police or military officers, the powers of a Special Police Officer as provided for in the aforementioned Section, (5) training of all police officers, verification of the age of victims, special prosecutors for cases involving trafficking, confiscation of the assets of guilty persons misconduct of the police, a plan of action to be drafted to tackle sex tourism and international trafficking are some of the directions sought from the court.

Similarly, another PIL *Prajwala vs. Union of India*<sup>11</sup> seeks directions for action at the pre-rescue, rescue and rehabilitation stages of trafficking. Directions sought from the Court include the right to confidentiality of victims, the need for trauma counseling, minimum quality requirements for the diet and nutrition, adequate clothing, livelihood options, the right to information and proper follow up of cases of rehabilitation.

In connection with the same case, the Court in *Court on its own motion vs. Union of India* has attempted to intervene in the issue of re-trafficking. An application was moved before the Delhi High Court asking for its intervention in the matter whether the statement of trafficked girls could be recorded through video conferencing. The Court was of the opinion that an appropriate application has to be filed before the Sessions Judge where the trial was pending. Following the

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10 2003 (2) MhLj 105

11 Writ Petition (Civil) 56 of 2004, Supreme Court

dismissal of the application pending before the Sessions Court, another application was moved before the High Court asking for the facility of video conferencing for recording evidence in this case. On the basis of submission made before the court, the High Court directed that the evidence of these girls and other victims of trafficking relating to the case should be recorded through video conferencing.

## **B. Trafficking and Adoption**

The case of Lakshmi Kant Pandey was a landmark judgement, wherein it was brought to the notice of the government how children were exploited during the process of adoption. The Honorable Supreme Court of India gave certain directions to ensure that children are not exploited under the guise of adoption.

In the case of *Lakshmi Kant Pandey vs. Union of India*,<sup>12</sup> the Supreme Court laid down several guidelines to be followed during the process of adoption which were followed in the cases of *St. Theresa Tender Loving Care Home vs. State of Andhra Pradesh*<sup>13</sup> and *Indian Council of Social Welfare vs. State of A.P.*<sup>14</sup>

In the case of *St. Theresa Tender Loving Care Home vs. State of Andhra Pradesh* an organisation involved in the adoption of children in India obtained a fake relinquishment certificate from the mother of the child and a case was registered against the organisation. The adoptive parents, citizens of the Union States of America, didn't follow the guidelines/directions as given in the case of *Lakshmi Kant Pandey vs. Union of India*. Therefore, the Supreme Court didn't allow the adoption process to take place.

In the case of *Indian Council of Social Welfare vs. State of A.P.*, the Supreme Court allowed children to be sent to their guardians for whom guardianship certificates have been issued, and said that a guardianship certificate should not be issued until and unless a letter of relinquishment and a no objection certificate have been issued. Four Petitioners who were adoption agencies were prevented from proceeding with applications for guardianships filed by them before Family Court/District Court. The four Petitioners were listed with the Department of Women Development and Child Welfare, Andhra Pradesh and were

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12 AIR 1984 SC 469

13 AIR 2005 SC 4375

14 (1999) 6 SCC 265

recognised under the guidelines of Central Adoption Resource Agency. There were no allegations of any malpractice against the petitioners. On the ground of absence of any malpractices, the Court directed the petitioners to allow children under their custody to be sent to their appointed guardians. Further, the court held that before a guardianship certificate is issued by the Family/District Court concerned a letter of relinquishment and a no objection certificate required. Thereafter, the court would decide whether guardianship should be granted or not.

There is an urgent need for the government to closely monitor the process of adoption, including the obtaining of a no objection certificate from the Central Adoption Resource Agency (CARA), the Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the scrutiny of inter-country adoptions by a recognised Voluntary Coordinating Agency (VCA).

Several directions were given in the case of **Laksmi Kant Pandey vs. Union of India** regarding inter-country adoption and it can be seen that through the directions, an initiative was launched to check trafficking of children across borders in the guise of adoption. The Court in the case emphasised that prior to inter-country adoption; every possibility of adoption within the country must be exhausted. Moreover, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for adopting a child should be entertained directly by any social or child welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by juvenile courts.

### **C. Trafficking and Exploitative Labor**

In the case of *People's Union for Civil Liberties vs. Union of India*,<sup>15</sup> children below 15 years of age were trafficked and forced to work as bonded labourers. Children were being precured from Madurai in Tamil Nadu for the purpose of child labour by paying a paltry sum ranging between Rs. 500 to Rs. 1500 to the poor parents. The children aged below 15 years were forced into bonded labour. In this case Article 21 of the Constitution of India, guaranteeing the right to life and personal liberty was violated. A few children were also beaten to death. The

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15 (1998) 8 SCC 485

Court while condemning the practice, directed the State to pay a specific amount of compensation to the respective parents.

In the case of *Bandhua Mukti Morcha vs. Union of India*,<sup>16</sup> it was observed that the workmen were engaged on an almost full time basis, and the bulk of the workmen were not prepared to return to their States. The Court gave instructions to the State to ensure for them reasonable housing, supply of water, a reasonable provision store at hand, schooling facilities, hospital facilities, recreational facilities and attention to the law and order problem.

In the case of *Neerja Chaudhary vs. State of Madhya Pradesh*<sup>17</sup> a petition was filed against the non-implementation of legislative provisions made for the rehabilitation of bonded laborers after they had been freed. It was argued by the petitioners that the State Government cannot be permitted to repudiate obligation to identify, release and rehabilitate bonded labourers on the ground that not owe any obligation to them unless and until they show in appropriate legal proceedings conducted according to the rules of the adversary system of justice that they are bonded laborers. The Court held that the failure of the State Government to implement legislative provisions would be violative of Articles 21 and 23 of the Constitution of India. Direction were given to the State Government to ensure the implementation of legislative provisions.

In *Public Union for Civil Liberties vs. State of Tamil Nadu & others*,<sup>18</sup> the main issue of the petition was the rehabilitation of migrant labourers. Section 13 of the Bonded Labour System (Abolition) Act, 1976 was argued upon. The petition was filed to bring to the notice of the Supreme Court the plight of migrant bonded labourers from Tamil Nadu, who were being subjected to exploitation in Madhya Pradesh. These problems were common to bonded labourers in all States and Union Territories of the country. The Court gave directions to the NHRC to undertake suitable measures to solve the problem of bonded labour and also to address the issue of the rehabilitation of released bonded labourers. Moreover it was held that services of philanthropic organisations or Non-Governmental Organisations could be utilised for rehabilitating released bonded labourers. Directions were issued to all States and Union Territories to submit status reports every six months in

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16 (1984) 3 SCC 6

17 AIR 1984 SC 1099

18 (2004) 12 SCC 381

a format prescribed by the NHRC and to make proper arrangements for the rehabilitation of released bonded laborers either by themselves or with the involvement of such organisations or NGO's.

#### **D. Trafficking and Marriage**

Section 5(iii) of the Hindu Marriage Act, 1955 prescribes the minimum age of bride and groom to be 18 and 21 years.

Section 18 of the Act punishes child marriage, it overlooks marriages fraudulently performed, or 'fake-marriages' Section 370 of the IPC has made punishable buying and selling any person as a "slave" and by Section 372 of the IPC, selling of a minor for "prostitution" is also made punishable. These provisions unfortunately, do not adequately meet the challenge posed by caste-customs.

## 8

# International Instruments Against Trafficking and the Response of Indian State

Globalisation has opened up borders and this in turn has resulted in increased trafficking in human beings throughout the world in the recent years. Both the size and the seriousness of the problem are augmented by the growing involvement of organised crime groups in the trafficking process. Trafficking in human being more so in women and children, is one of the fastest growing forms of criminal activity, next only to drugs and weapons trade, annually. For organised crime groups this implies the transfer of knowledge, facilities and networks used for smuggling drugs and other goods to a newly emerging, highly profitable market. The persons who are bought into another country could be seen as parties to a criminal transaction. In reality, however, persons transported by organised crime groups are often victimised economically, physically or otherwise. They are often deceived about the destination country and at times forced to engage in prostitution and criminal activities in the destination country in order to pay for the expenses incurred.

The international community has recognised the growing threat posed by trafficking in human beings and its ramifications and there are a number of international conventions and protocols prohibiting trafficking. These conventions and protocols take note of the human rights violations and abuses suffered by a victim of trafficking and provide safeguards for the same.

The prohibition on slavery and slave trade was one of the first rights to be recognised under public international law. *The 1927 Convention*

on *Slavery of the League of Nations*<sup>1</sup> is widely acknowledged to be the first modern international treaty for the protection of human rights. The *1933 International Convention for the Suppression of the Traffic in Women of Full Age* is notable for the provisions that punish traffickers without regard to whether the victim in some way gave consent. The *1948 United Nations Universal Declaration of Human Rights*<sup>2</sup> extended the prohibition against slavery and the *1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*<sup>3</sup> further expanded the prohibition, making it applicable to debt bondage, serfdom, servile forms of marriage and the exploitation of children, practices that are held to be “similar to slavery.”<sup>4</sup> Although many aspects of slavery or servitude are present in trafficking like the detention or sale of the victim, degrading treatment, absolute control over the victim, it has been difficult to sustain claims that trafficking is included in the *jus cogens* norm prohibiting slavery and the slave trade.<sup>5</sup>

In 1930, the *ILO Forced Labour Convention (Convention 29)*<sup>6</sup> was signed by the international community to take measures to prevent compulsory labour “from developing into conditions analogous to slavery.” The definition of forced labour, as present in this Convention, is widely accepted even today. However, no United Nations body has ever formally invoked this international prohibition on forced and compulsory labour to in relation to a case of trafficking or commercial sexual exploitation.

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1 Available at <http://www.ohchr.org/english/law/slavery.htm> last visited on April 15, 2006. The Convention was signed on September 25, 1926 and entered into force on March 9, 1927. It was amended by the Protocol done at the Headquarters of the UN on December 7, 1953 and the amended convention entered into force on July 7, 1955.

2 Available at <http://www.un.org/Overview/rights.html> last visited on March 15, 2006. It was adopted and proclaimed by General Assembly Resolution 217 A (III) of December 10, 1948.

3 Available at <http://www.ilo.org/public/english/comp/child/standards/supcons.htm> last visited on March 7, 2006. It was signed on September 7, 1956, and entered into force on April 30, 1957.

4 Dale Huntington, *Anti Trafficking Programmes in South Asia: Appropriate Activities, Indicators and Evaluation Methodologies*, UNIFEM, Population Council, USAID, PATH. Available at [http://www.popcouncil.org/pdfs/rr/anti\\_trafficking\\_asia.pdf](http://www.popcouncil.org/pdfs/rr/anti_trafficking_asia.pdf) last visited on April 7, 2006, pp 3.

5 *ibid.*

6 Available at <http://www.ilo.org/ilolex/english/convdisp1.htm> last visited on April 7, 2006. The convention was adopted on June 28, 1930, and entered into force on May 1, 1932. It has been ratified by 168 countries including India.

In the early 20<sup>th</sup> century, the understanding of trafficking for commercial sexual exploitation was almost exclusively confined to the trafficking of white women for prostitution or commercial sexual exploitation. During the first half of the 20<sup>th</sup> century, many international conventions dealing with the traffic of women and children were concluded and in 1949, they were all incorporated in the *Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*.<sup>7</sup> This convention has numerous important provisions dealing with international cooperation and protection of foreign victims. However, the Convention has been strongly criticised for being ineffective as it focused only on prostitution, including consensual prostitution, rather than trafficking and for having no implementation and supervision mechanisms to guarantee its effectivity. This Convention views organised prostitution as the sole precursor for trafficking. Minimising demand through the control of prostitution, it is assumed, can control trafficking. The Convention proved unable to protect the rights of trafficked women and in combating trafficking. Further, by confining the definition of trafficking to 'trafficking for prostitution' the Convention excludes a vast number of women from its protection as trafficking is undertaken for myriad purposes. The Convention also does not contain any strict implementation mechanisms for compliance with treaty provisions. No independent body has been established to monitor the implementation and enforcement of the treaty.

The prohibition of forced prostitution and the commercial sexual exploitation of women have been incorporated into other instruments like the *Convention for the Elimination of Discrimination Against Women (CEDAW)*.<sup>8</sup> Article 6 of the Convention states that all states party to it shall take all appropriate measures, including legislation, to suppress all forms of traffic in women.

Trafficking of children is on the rise globally and recognising this, the *Convention on the Rights of the Child* provides comprehensive safeguards for children who have been trafficked. It stipulates the actions states party to the convention are to take to prevent the abduction, sale or trafficking of children for any purpose including economic or sexual

7 The Convention was approved by General Assembly Resolution 317 (IV) of December 2, 1949, and entered into force on July 25, 1951. Available at <http://www.ohchr.org/english/law/trafficpersons.htm> last visited on April 7, 2006.

8 Available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> last visited on March 7, 2006. It was adopted in December 18, 1979, and entered into force on September 3, 1981. It has been ratified by 176 states.



exploitation or abuse. The prohibition on trafficking and the exploitation of children has been reiterated and its scope expanded through the *1999 ILO Convention on the Worst Forms of Child Labour*.<sup>9</sup>

*The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and Children*<sup>10</sup> supplementing the *United Nations Convention Against Transnational Organised Crime*,<sup>11</sup> also called the Palermo Protocol, provides the definition of trafficking in human beings as currently agreed upon by the international community. Trafficking in persons is defined as under:

- “a) Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion or abduction or fraud or deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph
  - a) shall be irrelevant where any of the means set forth are used.
- c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph.”

The Protocol requires ratifying States to prevent and combat trafficking in persons, especially women and children, and assisting victims of trafficking while protecting their human rights.

9 Available at <http://www.ilo.org/ilolex/english/convdisp1.htm> last visited on April 7, 2006. The convention was adopted on June 17, 1999, and came into force on November 19, 2000. 158 countries have ratified it.

10 Available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf) last visited on April 7, 2006. The Protocol was adopted by General Assembly resolution A/RES/55/25 of November 15, 2000. It entered into force on September 29, 2003, and has been 117 signatories. It has been ratified by 44 states.

11 Available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf) last visited on April 7, 2006. The Convention was adopted by General Assembly resolution A/RES/55/25 of November 15, 2000. It entered into force on September 29, 2003, and has been 147 signatories.

The Palermo Protocol defines the crime of trafficking and lays emphasis to the vulnerability of women and children to trafficking for commercial sexual exploitation. It carries special safeguards for the care of children who have been victims of trafficking including legal protection. It also lays emphasis on the fact that persons who have been trafficked are victims and should not be punished for any offences or activities that are related to their being trafficked, such as prostitution or immigration violations.

The definition of trafficking as given in the Palermo Protocol also clarifies that trafficking includes not only the transportation of a person from one place to another, but also their recruitment and receipt so that anyone involved in the movement of another individual from his/her exploitation is part of the trafficking process. It also states that trafficking in humans is not restricted to commercial sexual exploitation alone but also takes place for forced labour and other practices akin to slavery. Hence, people who migrate for work in agriculture, domestic work, construction and other occupations, who are deceived or coerced into working under conditions they did not agree to, fall within the ambit of the definition of a person who has been trafficked.

On comparison with the 949 Convention, it is evident that the Palermo Protocol takes cognisance of the importance of consent and does not confine the definition of trafficking to prostitution alone. It combines traditional crime control measures for investigating and punishing offenders with measures to protect victims of trafficking. The only situation in which non-coerced movement is regarded as trafficking is when the individual being exploited is a minor.

The existing international law pertaining to trafficking provides limited protection, though crucial, to persons who have been trafficked or smuggled through their status as migrants or aliens or as migrant workers. Yet, the distinction between trafficking and migration for work is hardly ever made. Consequently, the rights of a trafficked person as a worker are rarely articulated or protected.<sup>12</sup> The *International Convention for the Rights of All Migrant Workers and Members of their*

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12 Dale Huntington, *Anti Trafficking Programmes in South Asia: Appropriate Activities, Indicators and Evaluation Methodologies*, UNIFEM, Population Council, USAID, PATH. Available at [http://www.popcouncil.org/pdfs/rr/anti\\_trafficking\\_asia.pdf](http://www.popcouncil.org/pdfs/rr/anti_trafficking_asia.pdf) last visited on April 7, 2006, pp 6.

*Families*,<sup>13</sup> adopted by the UN General Assembly in 1990 provides many safeguards for the rights of migrant workers, it has been ratified by only 23 countries and is thus not in effect.

There is a marked reluctance on the part of most states to enact legislation protecting anything but the basic human rights of migrants. Most governments have dealt with the problem of an increase in the international demand for migrant workers and the rapid growth of trafficking in persons by imposing tighter immigration controls, which just increase the incidence of trafficking and smuggling and aggravate the problems faced by migrant workers and the violation of their human rights continues unabated. Having said this, the international community has time and again accepted that the problems of trafficking and migration are inter-linked.

The Palermo Protocol is the primary international instrument against trafficking in humans. It represents a significant development in the global battle against trafficking due to its consensus on the need to develop national policies and programmes that effectively prevent trafficking but do not inhibit labour migration. The major limitation of the Protocol is that the protection and support elements are not binding on the States that have ratified the Convention. In addition, the effectiveness of any protection that is offered depends on ensuring that all organisations and officials concerned refer any person they believe has been trafficked to the relevant agency for advice and assistance, regardless of their willingness to assist in a prosecution or their illegal immigration status.

In 1996, the ECPAT movement in collaboration with UNICEF and the NGO Group for the Convention on the Rights of the Child organised the First World Congress against Commercial Sexual Exploitation of Children in Stockholm, Sweden. At the Congress, 122 countries adopted the **Stockholm Agenda for Action**, which calls for States, all sectors of society, and national, regional and international organisations to take action against the commercial sexual exploitation of children. In particular, it calls on countries to develop National Plans of Action against Commercial Sexual Exploitation of Children and to implement the Agenda for Action in six areas: coordination,

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13 Available at [http://www.unhchr.ch/html/menu3/b/m\\_mwctoc.htm](http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm) last visited on April 8, 2006. The Convention was adopted by General Assembly Resolution 45/158 of December 18, 1990, and entered into force on July 1, 2003.

cooperation, prevention, protection, recovery and reintegration, and child participation. The National Plans of Action provide governmental and child-care agencies an opportunity to cooperate in devising strategies through national policy to eliminate the sexual exploitation of children and promote children's rights in their country.

In December 2001, the Government of Japan in Yokohama hosted the Second World Congress. One hundred and fifty-nine countries reaffirmed their commitment to the agenda for Action by adopting the outcome document, the **Yokohama Global Commitment**. Further, the Second World Congress participants recognised and welcomed the positive developments that had occurred since the First World Congress in 1996, including better implementation of the CRC and increased mobilisation of national governments and the international community to adopt laws, regulations and programs to protect children from commercial sexual exploitation.

### Regional Instruments Against Trafficking

The incidence of trafficking has grown to alarming proportions globally in the past two decades, especially within South Asia. The region has become a major source and destination as well as a transit point for trafficking victims.<sup>14</sup> Persons, especially women and children, across this region are trafficked within their own countries and across international borders against their will in an essentially clandestine slave trade.

In view of this alarming trend, there have been important steps taken at the regional level to address this issue in the past five years. Presently, international conventions are invoked to protect the rights of trafficked persons within the region, especially women and children. Simultaneously, regional instruments like the *Rawalpindi Resolution of 1996*<sup>15</sup> and the *SAARC Convention on Preventing and Combating Trafficking in Women and Children*<sup>16</sup> have been developed to specifically address the problem of trafficking.

14 Sinha Indrani, *Trafficking and Children at Risk*, Sanlaap, January 2006. Available at [http://www.ashanet.org/focusgroups/sanctuary/articles/sanlaap\\_trafficking.doc](http://www.ashanet.org/focusgroups/sanctuary/articles/sanlaap_trafficking.doc) last visited on April 8, 2006.

15 The Rawalpindi Resolution of 1996 calls for commitment from member states of the SAARC on issues related to child trafficking in the region. Available at <http://www.ilo.org/public/english/region/asro/newdelhi/ipec/responses/govtinit.htm> last visited on April 7, 2006.

16 Available at <http://www.december18.net/traffickingconventionsSAARC2002.pdf> last visited on April 7, 2006. The Convention was adopted on January 5, 2002 at the Eleventh SAARC Summit held at Katmandu, Nepal. It has yet to be ratified by India, Pakistan, Sri Lanka and Nepal.

South Asian countries first expressed their commitment towards the elimination of human trafficking at the *1997 SAARC Summit in Male, Maldives*, through a declaration that expressed grave concern at the trafficking of women and children and pledged action on the part of member nations.<sup>17</sup> Discussions on trafficking in humans also occupied a prominent place in the 1998 SAARC Summit in Colombo, Sri Lanka.

The international significance of a SAARC Convention on trafficking in persons cannot be underestimated. It is an important step forward in the fight to prevent and combat trafficking, especially since it recognises the need for extraterritorial application of jurisdiction and extradition laws including a provision that the Convention shall be effective and that state parties to the Convention shall be bound to prosecute or extradite offenders in the absence of extradition treaties between the concerned states.

Nonetheless, there are some pertinent issues that have been overlooked in the Convention. The Convention has been strongly criticised for limiting its application only to the commercial sexual exploitation of women and children and for not addressing trafficking in the broader perspective. An instrument meant to combat trafficking, whether at the international, regional or national level, must give cognisance to the fact that trafficking no longer takes place only for the commercial sexual exploitation of women and children. Further, the Convention lacks a strong treaty body and does not clarify the rights of victims. It also does not clarify the recipient country's accountability in the rescue, rehabilitation, repatriation and reintegration of persons who have been trafficked. A country that is a destination point for trafficking must be made accountable for the well being of trafficked victims by providing physical and mental health care, legal advice and financial assistance and compensation. The immigration policies of the member countries should be modified in a way so as to facilitate a victim of trafficking to initiate legal proceedings against the trafficker in the country of residence. In addition, assistance should be provided to the victim even in case of her being unwilling to cooperate in legal proceedings against the trafficker. Pornography, which is one of the major reasons for trafficking, is not included in the Convention as an offence. This is a glaring lapse in view of the fact that trafficking of children for pornography is a major concern in the countries of South

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17 Article 27 of the Declaration of the Ninth SAARC Summit in Male, Maldives, May 1997. Available at <http://www.saarc-sec.org/main.php?id=55&t=4> last visited on April 18, 2006.

Asia, especially countries like Thailand, Cambodia and India. The provisions of the Convention fail to adequately protect the rights of victims such as the confidentiality of records, right to privacy, identity protection and access to justice.

### **Action Initiated by the Indian State**

In recent years, India has become a major transit point as well as a source and destination point for the trafficking of women, children and men sexual or labour exploitation. Indian men and women are forced into coercive labour in the Middle East countries. Children may be forced to beg or work as camel jockeys. Bangladeshi women and children are trafficked to India or transit through India en route to Pakistan and the Middle East for purposes of sexual exploitation, domestic work and forced labour. Nepalese women and girls are trafficked to India for sexual exploitation, domestic work, forced labour or work in the circus industry. India is fast becoming a favoured destination for sex tourists from Europe, the United States and other Western countries. Internal trafficking of men, women and children is widespread. Numerous studies show that the majority of women in the Indian commercial sex industry are victims of sexual servitude or were originally trafficked into commercial sexual exploitation. India is also home to millions of victims of forced or bonded labour.<sup>18</sup>

The Government of India does not fully comply with the minimum standards for the elimination of trafficking. India has consistently affirmed its commitment to SAARC declarations but has yet to ratify the 2002 Anti Trafficking Protocol. India's only central legislation against trafficking, The Suppression of Immoral Traffic in women and Girls Act, 1956 (SITA), was originally passed as a result of the United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, to which India is a signatory. The Act was amended twice. It was first amended in 1978, and then amended and renamed as The Immoral Traffic (Prevention) Act (ITP Act) in 1986.

The quality and extent of the government's response to trafficking, particularly in the area of law enforcement, is grossly inadequate relative to the magnitude of trafficking that takes place in the country each year.

18 Trafficking In persons Report 2005, Office to Monitor and Combat Trafficking in Persons, U.S. Dept. of State, June 3, 2005. Available at <http://www.state.gov/documents/organisation/47255.pdf> last visited on April 7, 2006, pp 122-125.

The cities of New Delhi, Mumbai and Chennai and the states of Maharashtra and Tamil Nadu have shown an improvement Anti-Trafficking law enforcement efforts. There has been an increase in the prosecutions and convictions in Tamil Nadu and New Delhi.

The U.S. Dept. of State Trafficking in Persons Report 2005<sup>19</sup> places India on the Tier 2 Watch List for a second consecutive year for its lack of progress forming a national law enforcement response to inter state and transnational trafficking and the lack of coordination between law enforcement agencies across states. Though comprehensive statistics on trafficking related investigations are not available, data from major cities and states across India showed 195 prosecutions and 82 convictions were obtained for different offences related to trafficking for sexual exploitation in 2004.<sup>20</sup>

The proposed amendments to the ITP Act seek to remove those sections from the Act that criminalise prostitutes while protecting their rights as victims of trafficking. The Juvenile Justice Act, 2000, provides modest criminal penalties for sexual offences committed against minors, including commercial sexual exploitation, but provides protection to victims of trafficking through the Child Welfare Committees in each State and care provided in state run or approved protection homes. Indian laws against trafficking for labour are inadequate and fail to provide sufficient protection to those forced into bonded labour. In addition, children who are trafficked for domestic work find no protection in any Indian legislation. Widespread corruption amongst law enforcement officials and their complexity in many trafficking cases are a major impediment to Indian efforts to eliminate trafficking.

In 2004, the Central government designated the Secretary for Women and Child Development as the country's nodal officer to coordinate and oversee all national anti trafficking programmes and policies. The National Central Advisory Committee on Trafficked Persons, which includes civil society groups and state level agencies, has introduced much needed amendments to the ITP Act and has created a national plan of action on trafficking that calls for greater coordination between collaboration with the NGO sector to combat trafficking in India. In 2004, the National Human Rights Commission released a comprehensive report on the trafficking situation in India and

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19 Avai at <http://www.state.gov/documents/organisation/47255.pdf>

20 *Supra*, pp 123.

recommended action for the government to prevent and put an effective end to trafficking in the future.

The international community has time and again demonstrated its commitment to fight trafficking. Individual states need to pass comprehensive legislation to prohibit and punish all forms of trafficking. Yet, states must also realise that these initiatives alone cannot counter the problem of trafficking and that policies need to be designed to strike at the root causes of trafficking.

India too has recognised the need for urgent action to fight the growing problem of trafficking. However, it has proved to be an uphill task for the Indian government. There is an urgent need for a comprehensive legislation that seeks to combat all forms of trafficking while embodying the standards by the Palermo Protocol and the SAARC Trafficking Convention.





## 9 The Way Forward

There is no doubt that the gravity of the issue of trafficking is intensifying every passing day. Present form of trafficking is a manifestation of the systematic economic crisis, political divisions and social disintegration. In addition other reasons responsible for its growth and failure of state to control it and judicial systems. Vulnerability of women and children in social structure who forms the major portion of trafficked human beings more of women and children trafficked.

There has been growing concern at different levels for a more holistic and victim centric perspective. However, critical and concerted efforts has been lacking in order to prevent human trafficking.

There is a strong need for a 'human rights framework' to combat trafficking. Unfortunately, the current models of protection offered to trafficked persons too often prioritise the needs of law enforcement over the rights of the trafficked persons. There is a need to support and empower those who have been trafficked. Protection of victims per se is not the same as protection of victims' human rights. The challenge for government is to live up to their obligation and make protection of all human rights a reality for trafficked persons who escape their situation.<sup>1</sup>

To deal with this issue concretely, it is important to be clear on the definition of trafficking in women, as the characterisation of the issue will determine the strategies to combat the problem and protect the victims.

The petitions like *Prerna vs. Union of India* and *Prajwala vs. Union of India*, which are filed in the Supreme court, have made some suggestions. Following section contains the excerpts of the prayers made in these petitions.

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1 2002, Anti-Slavery international, *Human Traffic, Human Rights: Redefining Victim Protection*, London SW9 9TI, United Kingdom.

Direct the Ministry of Social Justice, Government of India to set up by the end of 2005, a **National Nodal Agency** involving the departments of Women and Child, Labour, Social Justice, Health, Home, Tourism, Railways, Information and Broadcasting and Law and Justice to monitor cases on trafficking and missing persons by linking up the various government agencies and NGOs and others so that adequate national and State level data is at all times available on trafficking and missing persons and is made available to the public through a website and otherwise.

Direct the Union Government to establish a **National Center for Missing and Exploited Children** to exclusively work on missing persons with a view to monitor and recover missing persons in a professional manner.

Direct the Union of India to appoint a National Rapporteur to combat trafficking to report to the Union Cabinet from time to time on the situation with respect to trafficking, the measures taken, difficulties faced and the reform required in future. Likewise, direct the respondents to appoint a rapporteur in each state/UT.

### **Advisory Body**

Every State/Union Territory shall constitute an advisory body under Section 13 (3) (b), consisting of not more than five leading social welfare workers of that area (including women social welfare workers wherever practicable).

### **Special Police Officers (SPOs)**

Apart from issuing General Notification under Section 13 (ITP Act) specifying a class of police officers as Special Police Officers to deal with offences under the Act, the State government shall also notify under Section 13, an adequate number of SPOs in the State who will exclusively specialise and work on offences under ITP Act, taking care to ensure that an adequate number of women police officers are also notified.

The State shall also appoint a civil society member as SPO from a reputed organisation.

All District Magistrates are hereby directed to pay particular attention to the vice of trafficking and, if necessary, exercise jurisdiction under Section 13 (2A) of ITP Act by conferring on retired police or military officers the powers of a special police officer as provided for in the Section.

It appears that by notification dated 28-8-2001, the CBI has been appointed as Trafficking Police Officers (TPOs) under Section 13 (4) of ITP Act to implement the act throughout India. Despite this, National level coordination of trans border investigations and prosecutions hardly exist. The CBI be, therefore, directed to appoint an adequate number of officers to exclusively specialise and work on investigations and prosecutions under ITP Act and to *suo moto* investigate and prosecute cases relating to trafficking on a priority basis.

The CBI be directed to set up a Special Cell involving experienced and sensitive persons and give them specialised training so that they may act in collaboration with Interpol and others to stamp out the vice of trafficking.

### **Training**

All SPOs, TPOs, Judicial Officers and staff concerned with the issue of trafficking shall be given regular and specialised training to adequately equip them to fully tackle the menace of trafficking and to deal with the victims with dignity. Adequate resources and specialised infrastructure shall be made available in every State/UTs for this.

### **Age Verification**

In cases where the age of the trafficked victim is doubtful, age verification ought to be carried out by the authorities within a period of three days. The report ought to be made public. If the NGOs, police officers, guardians of victims have any disagreement about the report, the Judicial magistrate of the Child Welfare Committee shall constitute a medical board consisting of lady doctors to carry out a fresh age verification test.

### **Prosecution**

Direct the police in all the States/Union Territories not to treat the victims of commercial sexual exploitation as accused persons and to concentrate on the prosecution of brothel-keepers, pimps and traffickers.

Victims trafficked from other countries to India ought not to be treated as illegal migrants under the Foreigners Act and the Passports Act.

In situation, where clients in a brothel are apprehending having sex with a minor, direct the police to prosecute the client in the offence of rape.

While prosecuting persons under ITP Act, relevant I.P.C Sections should also be added.

In cases where the testimony of the victim is required, and the victim has been sent to a place other than the place where the court exercises its jurisdiction, the facility of video conferencing shall be used so as not make the process inconvenient for the victim.

All trafficking cases shall be treated as if on a fast track and shall be conducted on a day-to-day basis so that it will generally not be necessary to enlarge the accused on bail.

Care must be taken by the court to ensure that anti-social elements parading as relatives are not attempting to obtain possession of the trafficked victim. Court should attempt as far as possible to take the assistance of NGOs in this regard.

Following the reasoning of the Supreme Court in Delhi Domestic Working Women's Forum vs. Union of India (1995 1 SCC 14), the court hearing cases under ITP Act should ensure that the victim is represented by a socially committed advocate of her choice if possible or a NGO working on trafficking issues to guard against her falling into the hands of anti-social elements once again and prevent her re-trafficking.

The Free Legal Aid Services authority at the Centre and the State shall earmark adequate resources to pay for the fees of the lawyers representing trafficked victims and for the expenses incurred by the NGOs involved in this work so that all those assisting in the full implementation of the Act are adequately compensated.

Law enforcement officials, public prosecutors, judicial officers, NGOs, members of the press and others shall ensure that strict anonymity is maintained with respect to the identity of trafficked persons, keeping in mind the provisions of Section 228 I.P.C and Section 22 J.J Act.

In *State of Punjab vs. Gurmit Singh* (1996 2 SCC 384), the Supreme Court has held that trials for rape cases ought to be held in camera, as a rule, and open trials can only be the exception. In view of the fact that sex with a minor amounts to rape, trials relating to trafficking ought to be as a rule to be held in camera.

### **Special Prosecutors**

The State shall form a cadre of prosecutors specialising in prosecution under ITP Act and these prosecutors shall be given specialised training

and adequate facilities and infrastructure to conduct cases under ITP Act in a most professional manner.

### **Confiscation of Assets**

Law enforcement and judicial officers shall place particular emphasis on the confiscation and forfeiting of the assets of traffickers and other accused persons.

### **Police Misconduct**

Any policeman found mixing up with trafficked victims, brothel-keepers, pimps or traffickers in any way shall be deemed to have committed a major misconduct within the meaning of the service rules. The authorities shall view sexual activity between the police and the trafficked victim as a misconduct of the most serious nature warranting dismissal from service.

### **Misconduct by Others**

All SPOs and TPOs are hereby directed to bring to the notice of their superior officers and to the appropriate court in writing, any communication by any official or politician or any other person in opposition of authority having the effect of interfering with the investigation of the prosecution.

### **Civil Societies/ NGOs**

Direct the Central and State governments to provide adequate resources facilities and infrastructure to the credible NGOs working in the field of trafficking.

### **Sex Tourism**

The Central Government shall within eight weeks come out with an Action Plan on Combating Sex Tourism after taking into consideration the report of the NCW and NHRC, the provisions of the Goa Children's Act 2003 and all other relevant material.

### **International Trafficking**

Direct the Central Government to consult with other countries in the region from where trafficking takes place and also to consult NGOs and draw up a practical and detailed plan of action for combating international trafficking.

In the same line, *Prajwala vs. Union of India* clearly points out that there is a need for the victim protection protocol for pre-rescue, rescue

and post rescue stages of rehabilitation of the victims of trafficking. There has to be a systematic planning and preparation for any rescue. The protective homes must be prepared in advance as per the evaluation of the data collected through the interviews including catering to the individual needs of the rescued victim.

**PRE-RESCUE:** A victim friendly rehabilitation package must be prepared which totally protects the rights of the victim, including viable economic option, civic benefits and support such as education for their children, so that the victims would look ahead hopefully to being gainfully employed and to building an alternate life.

**RESCUE:** There should be no mass raids/rescues of trafficked women and children. Only specially trained and sensitised police officers should carry out the rescues. The rescues must be carried out in collaboration with some reputed local NGO working with trafficked women and children in the area. There should be least use of force during the rescue; they must be carried out in the most humane manner, with no violation of their human rights at any cost. The rescued women/children must be treated as victims, not as criminals.

**POST RESCUE:** The rescued victims must be transferred from the Police Station to the protective homes at the earliest. The recording of the statement of the victims should be deferred till she reaches a safe place and has got over the initial trauma. After their rescue, the victims and their families should be provided with total protection throughout the transit stay and the trail. The transit shelter protective home where the rescued women are shifted should be located in undisclosed location. There must be conscious efforts to create home like environment in the protective homes, with no jail like practices. The victim must be immediately provided with professional counselling especially towards trauma care, de-addiction and detoxification.

If the victims are not comfortable to go back to their native state, they should be provided all protection and support to start a life in the destination point. But if she is willing to go back to her state, she should be restored in a manner that is subtle and yet under protective car, throughout keeping victims identity and domicile confidential.

**COURTS:** Special courts must be set up at a central level and in every state to try trafficking cases as per section 22A and of ITP Act manned by judges who have received special training to deal with victims of sexual assault.

In conclusion, there is a need of a legislation which clearly sets out a criminal offence of 'trafficking' that covers trafficking for all purposes. Corollary to this is the acknowledgement of the trafficked person as a victim of crime. Their legal rights to confidentiality, right to representation, introducing measures to minimise additional trauma, protection of witness from intimidation, compensation from traffickers and adequate in-court evidentiary measures to protect victim witnesses at the earliest possible is essential to deliver justice to those who have suffered.





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**PART II**  
**SUMMARIES OF THE NATIONAL**  
**JUDGEMENTS**

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## SUMMARY JUDGEMENTS ON SEXUAL EXPLOITATION

### **IN THE SUPREME COURT OF INDIA**

**Gaurav Jain and Supreme Court Bar Association vs. Union of India & Others**

**AIR1998SC2848, [1998]2SCR493**

**Decided on 30.03.1998**

**Hon'ble Judges:**

**Sujata V. Manohar, S.P. Kurdukar and D.P. Wadhwa, JJ.**

In the High Court, two judges considered a petition, which asked for the establishment of separate educational institutions and for various other reliefs for the children of prostitutes. The judges agreed on certain directions which included the constitution of a committee to examine the plight of children of prostitutes. However, the judges disagreed on whether there should be ways and means put in place to prevent and eradicate prostitution and whether sustenance should be provided to them. It was originally decided that the full order could be passed under Article 142, because the PIL was not adversarial in nature, and reference to a 3 judge bench would cause even further delays. However, the SC disagreed that Article 142 could be used in this way, and that in view of Article 145(5) where a Bench consists of 2 judges that differ, the correct procedure is to refer the matter to the Chief Justice for constituting a larger bench. The directions given relating to prostitution and/or its amelioration were set aside, although this did not prevent the Union or State Governments from implementing their own policies in this area.

### **IN THE SUPREME COURT OF INDIA**

**Smt. Devki alias Kala vs. State of Harayana**

**AIR1979SC1948, [1980]1SCR91**

**Decided on 24.07.1979**

**Hon'ble Judges:**

**A.D. Koshal, D.A. Desai and V.R. Krishna Iyer, JJ.**

A 17 year old girl had been abducted and taken from her home in Bihar to Harayana where she was offered for sale. She was able to escape and her abductor was caught and sentenced. He appealed his sentence of 3 years, claiming that the Probation of Offenders Act should apply. The SC rejected this appeal whole heartedly and requested that the State Governments of Bihar and Harayana should put out a special squad to find other such anti-social and immoral offenders.

**IN THE SUPREME COURT OF INDIA**

**The State of Uttar Pradesh vs. Kaushaliaya and Others**

**AIR1964SC416, [1964]4SCR1002**

**Decided on 01.10.1963**

**Hon'ble Judges:**

**J.C. Shah, K. Subba Rao, K.N. Wanchoo, P.B. Gajendragadkar  
and Raghubar Dayal, JJ.**

Section 14 of the Constitution provides the right to equality before the law and sections 19(1)(d) and 19(1)(e) of the Constitution provide the right to move freely throughout the territories and to reside and settle in any part of India. Section 19(5) of the Constitution allows a State to make reasonable restrictions on the exercise of the rights listed in sub-clauses (d) and (e) in the interests of the general public or for the protection of the interests of any Scheduled Tribe. The SC considered whether s20 of the Suppression of Immoral Traffic in Women and Girls Act 1956 (the "Act") contravened these sections of the Constitution. Under s20, a Magistrate is given powers to give notice to a woman or girl that he has the requisite information on indicating that she is a prostitute and after hearing evidence, to make an order that she move from where she is residing to a place within or without the local limits of his jurisdiction and prohibit her from re-entering a place without his written permission.

The SC held that the Act was conceived to serve a public purpose, to suppress immoral traffic and to prevent deterioration of public morals. As the Act clearly defines "prostitute" and the circumstances in which a prostitute can be removed or when their movements should be restricted, there is no contravention of section 14 of the Constitution. The court also stated that differentiating prostitutes that live in busy localities within easy reach of public institutions from prostitutes who live in sparsely populated areas has a rational relation to the object sought by the Act and is therefore permissible. The SC thought that the restrictions that could be put in place on prostitutes are reasonable, particularly when they are subverting public morals and destructing public health.

**IN THE SUPREME COURT OF INDIA**

**Vishal Jeet vs. Union of India and others**

**AIR1990SC1412, [1990]2SCR861**

**Decided on 02.05.1990**

**Hon'ble Judges:**

**S.R. Pandian and K. Jayachandra Reddy, JJ.**

The SC was presented with details and 9 affidavits highlighting that despite the Suppression of Immoral Traffic in Women and Girls Act 1956, a number of children were living in brothels and/or being forced into becoming prostitutes. It therefore gave the following directions:

State and Union Territory Governments should direct law enforcers to take appropriate and speedy action to eradicate child prostitution.

Advisory Committees should be set up in each State and Territory to suggest measures that can be taken to eradicate child prostitution and to implement social welfare programs to care, protect, treat, develop and rehabilitate children rescued from brothel houses.

Adequate rehabilitation homes manned by trained social workers, psychiatrists and doctors.

The Union Government should set up a committee to evolve welfare programs to be implemented nationally to care for and protect children and to suggest amendments to existing laws to prevent sexual exploitation of children.

Central Government and States should ensure the proper implementation of suggestions made by these committees.

The advisory committee should suggest ways of how to tackle the davadasi system and Jogin tradition.

The affidavits should be sent to the Commissioner of Police for necessary action.

This list was not exhaustive.

**IN THE SUPREME COURT OF INDIA**

**Delhi Administration vs. Ram Singh**

**AIR1962SC63, [1962]2SCR694**

**Decided on 03.05.1961**

**Hon'ble Judges:**

**J.R. Mudholkar, K. Subba Rao and Raghubar Dayal, JJ.**

It was held by a majority (with Mudholkar dissenting) that only special police officers, and his assistant police officers are competent to investigate offences under the Suppression of Immoral Traffic in Women and Girls Act 1956 (the "Act"). A special police officer is of the rank Inspector and above, as the Act creates new offences and prescribes the procedure for dealing with them (specifically by a special police officer) it is a complete code in itself and should prevail over those of the Code of Criminal Procedure, 1898. There is nothing in the Act to co-ordinate the activities of the regular police with those of a special police officer which would lead to difficulties and duplication.

**IN THE HIGH COURT OF DELHI**

**Shalu Rawal and Others vs. State of N.C.T. of Delhi and Others**

**2003IIIAD(Delhi)552, 104(2003)DLT550**

**Decided on 09.04.2003**

**Hon'ble Judges:**

**Dalveer Bhandari and S.K. Agarwal, JJ.**

A raid was conducted on a suspected brothel, following evidence from a decoy customer. Two men were charged under the Immoral Traffic (Prevention) Act and seven girls were also arrested. The two men challenged their conviction, based on the fact that 3 girls still had their hymen in tact and the other 3 were menstruating, and therefore could not have been offered for sex. They referred to a number of cases which stated that an order should be quashed if the proceedings are so inherently absurd and improbable that no prudent person could reach such a conclusion. The court referred to a number of pieces of evidence which show that it is possible to have a hymen in tact despite being sexually active. It was also decided that it was possible to be selling oral sex from the girls. The SC therefore decided that there was adequate material to proceed with the matter and it the current order was not perverse or contrary to the law. Therefore the petition was dismissed.

**IN THE HIGH COURT OF DELHI****Mumtaj @ Behri vs. The State (Govt. of NCT of Delhi)****2003CriLJ533, 100(2002)DLT286****Decided on 09.08.2002****Hon'ble Judges:****O.P. Dwivedi, J.**

Two men were arrested for forcibly confining girls. One of the men appealed his conviction on a number of grounds. The first being that the entire raid, investigation and prosecution was not valid as it had not been carried out by a Special Police Officer or someone authorised by him, which is required by s15 of the Immoral Traffic (Prevention) Act (the "Act"). The accused also claimed that there was not enough evidence under s3 of the Act, which requires that the accused was managing/keeping the place with the knowledge that it was being used for the purposes of sexual exploitation or abuse of 2 or more prostitutes. There was no definite evidence to prove any specific instances of prostitution, which would usually be proved using a decoy customer. Therefore the appeal was accepted and the sentence set aside.

**IN THE HIGH COURT OF DELHI****Sangeeta and Anr. vs. State and Others****1995CriLJ3923, 58(1995)DLT589****Decided on 08.05.1995****Hon'ble Judges:****Mohd. Shamim, J.**

A raid was carried out at some premises where it was thought that minor girls were being used as prostitutes. Four of the nine girls recovered were ordered to a protective home for 3 years, they then appealed this order. Under s17(5) of the Immoral Traffic (Prevention) Act 1956 (the "Act") in discharging his functions, a Magistrate may be assisted by a panel of 5 respectable persons. The Court stated that the words "may" and "shall" are interchangeable and therefore could have a mandatory meaning. As the Act is a piece of social legislation and is meant to be for the benefit of those being exploited by others, the reading of the word "may" should be taken as "shall" and therefore mandatory. In addition, as an order under s17(4) can only be made subject to the provisions of s17(5), it can be safely inferred that the word may should be taken to be mandatory. The order was therefore set aside.



The appellants also claimed that the order was invalid because s13(3)(a) of the Act provides that women Police Officers should be included in the raiding party and under s15(6A) the Special Police Officer should be accompanied by at least 2 women police officers. However, this court felt that these provisions were at the discretion of the Special Police Officer and if there were not any female police officers available, he is not bound to include them.

**IN THE HIGH COURT OF DELHI**

**Meena and Others vs. State (Delhi Administration)**

**43(1991)DLT527, I(1991)DMC435**

**Decided on 04.02.1991**

**Hon'ble Judges:**

**V.B. Bansal, J.**

On the basis that some premises were being used as a brothel a decoy customer was used, and on the basis of this evidence the petitioner was arrested and charged under various sections of the Immoral Traffic (Prevention) Act and under s366-A of the IPC. Under this section of the IPC a person can be liable for a fine for inducing a girl below 18 years to go to a place with the intent of forcing her to have intercourse. There was nothing in the evidence to suggest that there was any inducement by the petitioner. The court stated that a person who merely accompanies a woman going out to be a prostitute or gives encouragement or renders assistance to a prostitute does not commit an offence under s366A IPC. Therefore this charge was to be removed.

**IN THE HIGH COURT OF PUNJAB AND HARYANA**

**Manjit Kaur vs. State of Punjab**

**2004CriLJ1845**

**Decided on 13.11.2003**

**Hon'ble Judges:**

**M.M. Kumar, J.**

A petitioner who had been charged under s3-7 of the Immoral Traffic (Prevention) Act 1956 (the "Act") argued that no offence had been made out because a Deputy Superintendent of Police conducted the raid, not a Special Police Officer as stated by the Act. The petitioner relied upon the case of Delhi Administration v Ram Singh, AIR1962 SC63. The court reviewed the relevant sections of the Act and found that it was evident that the petitioner had committed punishable acts and that the relevant ingredients of the various offences had been fulfilled. Therefore the petition was dismissed.

**IN THE HIGH COURT OF MADRAS**

**Mariakutty @ Thangam vs. State of Tamil Nadu,  
Udhagamandalam Town Police Station AND D. Ethiraj vs. State  
by the Deputy Superintendent of Police, C.B.C.I.D., Coimbatore  
Decided on 07.06.2002**

**Hon'ble Judges:**

**M. Karpagavinayagam, J.**

Two people were charged and tried for offences under the Immoral Traffic (Prevention) Act 1956 (the "Act") and under s366, 419 and 119 of the IPC. One of those accused was acquitted under s5(1)(b) of the Act, and the other claimed that the reasons for the acquittal should also apply to her. The appellant claimed that there was no evidence that she was conducting a brothel house, and therefore none of the other offences could be made out either. The evidence from two witnesses who were kidnapped by the appellant, as well as various other incidents and evidence adduce that the appellant was regularly indulging in the business of prostitution under the pretext of a beauty parlour. The reasoning for acquitting the appellant's accomplice do not apply as the brothel house was conducted by the appellant alone. As the testimony of the kidnapped girls shows, they believed there were going by bus with the appellant to get a job, and therefore the offences under the above listed sections of the IPC have also been made out.

**IN THE HIGH COURT OF ALLAHABAD**

**Pushpa vs. State of U.P. and Others**

**2004CriLJ4540**

**Decided on 16.07.2004**

**Hon'ble Judges:**

**Amar Saran, J.**

An application was brought by Pushpa who had been held at a Shelter Home in Agra for the last 9 months, that she be released into the care of her family as the Magistrates have failed to actively take on her case. Pushpa had been travelling around in a rickshaw when she was taken to the Shelter Home, however authorised detentions under the Act are only permitted in removing a person found in a brothel or in premises that have been searched (s16(1) and s15 of the Act). Therefore her initial detention was unauthorised. In addition she has been held for a much greater period than is authorised under the Act. Under s17 a person can be held for a maximum of 3 weeks, and under s7 or 8 the maximum detention is 3 or 6 months respectively. However, no charge has been made under s7 or 8 so her custody cannot be authorised

using these sections. The court decided that no purpose would be served by allowing the Magistrates to continue with their inquiry and Pushpa should be released.

The court then observed that Magistrates should in future see that the mandate of law is followed and enquiries should be made within the time-schedule as provided under the Act. The court also issued directions to the city Magistrate at Mathura and Agra to produce a status report on all inmates at the Protective Homes, including information on the length of their detainment, reasons for detainment and legal provisions under which they are being held. The Sessions Judges should ensure that the provisions of the Act are observed by the Magistrates and must proactively ensure inmates receive proper legal aid. The Sessions Judges were also tasked with conducting an enquiry into the living conditions of the care homes. These are important as while action is hardly ever taken against brothel owners and pimps, the exploited women are often left in care homes for long periods in oppressive conditions.

## **IN THE HIGH COURT OF ALLAHABAD**

**Radha and Others vs. State of U.P. and Others**

**2003(1)AWC455**

**Decided on 28.11.2002**

**Hon'ble Judges:**

**M. Katju and Rakesh Tiwari, JJ.**

The petitioners are a number of women who are harassed and evicted from their premises by police constables who believe that they are prostitutes. Although the petitioners claimed that they are only in the profession of singing and dancing the court assumed that they were also prostitutes. The court then considered whether the police's acts should be allowed. The court noted that:

- Prostitution is not an offence except under s 7 and 8 of the Immoral Traffic (Prevention) Act, 1956;
- women become prostitutes due to poverty, and they should therefore be shown sympathy and not harassed due to their choice of work;
- prostitutes are entitled to have a life of dignity, which is a constitutional right under article 21.

Therefore State Governments should formulate schemes for rehabilitation, by giving women technical skills so that they can earn a living by different means. The petition is allowed and the women should stop being harassed and threatened with eviction.

## **IN THE HIGH COURT OF ALLAHABAD**

**Smt. Kaushailiya vs. State**

**AIR1963All71, 1963CriLJ138**

**Decided on 17.11.1961**

**Hon'ble Judges:**

**W. Broome, J.**

A number of woman claimed that proceedings started against them under s20 of the Suppression of the Immoral Traffic in Women and Girls Act 1956 (the "Act") were unconstitutional as they violated their rights under Articles 14 and 19 of the Constitution. The first argument is that prostitution is a profession, occupation or trade, which the applicants have a right to carry on under Article 19(1)(g) of the Constitution. However the court disagreed, prostitution cannot be put on a par with normal respectable professions and it is therefore open to the State to ban such activity.

The second argument was that the women have a right to move freely about the territory of India under Articles 19(1)(d) and (e) of the Constitution. The Magistrates' powers under the Act allow them to expel the women from the entire district for an unlimited time period. This encroachment on their fundamental rights was considered by the court to far outweigh the benefit likely to accrue to the public at large and therefore is not reasonable. In addition there is no criteria or principles which must be followed by the Magistrate, which gives them an uncontrolled power which is itself unreasonable but also allows for the situation where one prostitute is expelled from an area where another is allowed to stay. This is not complicit with their right to equality under Article 14 of the Constitution. The procedure is also contrary to their fundamental right to a fair trial, while it allows for the woman accused to produce evidence it does not allow for any cross-examination or for the Magistrate to record the reasons for his decision. Therefore s20 of the Act should be struck down under article 13(2) of the Constitution for abridging or removing the fundamental rights under Articles 19(1)(d) and (e) and Article 14 of the Constitution.

**IN THE HIGH COURT OF ANDHRA PRADESH AT HYDERABAD**

**P.N. Swamy, Labour Liberation Front, Mahaboobnagar vs.**

**Station House Officer, Hyderabad and Others**

**1998(1)ALD755**

**Decided on 22.08.1997**

**Hon'ble Judges:**

**Y. Bhaskar Rao and V. Rajagopal Reddy, JJ.**

During a detailed enquiry into a known redlight area 65 females were rescued and 19 brothel owners were arrested. The petition made claims for providing proper facilities to the rescued women and to stop them from being removed from the area as this would violate their fundamental rights under Article 21 and Article 19(1)(d) and (e) of the Constitution. The court considered that reasons for the Act being implemented (i.e. in pursuance of the International Convention in New York in 1950) and decided that it was the duty of the State to rescue women, particularly those with HIV for their own interests and the interests of society. It also stated that in the interest of social economic good, the individual fundamental right has to yield to the larger interest of the society. Therefore the procedures under s17(4) and (5) of the Act to remove prostitutes into care homes, is not unconstitutional.

The court also stated that there is an obligation on the State to implement the provisions of the Act and to provide the minimum facilities at the care homes. The court directed the respondents and Government to prepare a scheme to renovate the care homes by providing a sufficient budget and to monitor the activities of the care homes. To ease the burden on the Government care homes it was suggested that recognised voluntary organisations should be given licenses to establish more care homes. In accordance with the procedures under the Act, the court also directed the Government to appoint a Special Police Officer and an advisory body to advise the Special Police Officer and to ensure that their work is supervised. As a number of the rescued women had AIDS the secretary of the health department in Hyderabad was directed to take measures to educate sex workers about the effect of this disease and to advertise its effects in hospitals and health centres.

Therefore the women and girls were lodged in the juvenile jail and it was directed that the juvenile girls should receive vocational training and released on the advisory body's recommendation. The brother owners who had evidence against them for selling women and girls were sold to the brothel houses should be prosecuted under Article 23 of the Constitution which prohibits traffic in human beings.

Finally the court stated that the reports clearly showed that the money earned by these woman had been misappropriated by financiers, brokers etc. It suggested that appropriate amendments should be made to the Act to allow for the recovery of such money which could be used to help destitute women start a new life.

**IN THE HIGH COURT OF ANDHRA PRADESH**

**Vasanthi vs. Jaya Prakasha Rao and Others**

**1996CriLJ4243, 1996(4)ALD150**

**Decided on 08.08.1996**

**Hon'ble Judges:**

**Prabha Shankar Mishra and Syed Saadatulla Hussaini, JJ.**

A female lawyer lodged a petition describing how 3 people had been taken by the police and beaten. The Public Prosecutor came to her house to ask the lawyer to withdraw the petition, and then threatened her when she refused. According to the lawyer the Public Prosecutor used his position to have her arrested and she was beaten and held without charge or crime number. It was later alleged that she had been arrested because she was involved in immoral traffic acts. After looking at the facts and the circumstances the court decided that it did not have sufficient evidence on the indecencies suffered by the lawyer at the hands of the police and Public Prosecutor. However there was sufficient material to prove that she was humiliated by being accused of running a brothel and engaging in immoral sex games. This infringed her right under Article 21 of the Constitution and therefore the Government was ordered to pay her compensation and an order of restraint was place on the Public Prosecutor from visiting the lawyer at home or anywhere else.

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**M. Rajeswari vs. State by P.S.I, (Land O), Kengeri Gate Police**

**Station, Bangalore**

**2001(5)KarLJ532**

**Decided on 24.07.2001**

**Hon'ble Judges:**

**G. Patribasavan Goud, J.**

A police inspector conducted a raid on a hotel which was thought to be being used as a brothel. Based on the findings, the hotel owner was charged for offences under s3, 4, 5 and 7 of the Immoral Traffic Prevention Act, 1956 (the "Act"). However, s13 of the Act requires that a Special Police Officer should deal with offences and investigate offences. This applies to all steps involved, from receipt of information to filing

the charge sheet. This has been upheld in Delhi Administration v Ram Singh. The offences in this case were dealt with by a Sub-Inspector who is not a Special Police Officer and therefore the proceedings are quashed.

**IN THE HIGH COURT OF MADHYA PRADESH (GWALIOR BENCH)**

**Priya vs. State of Madhya Pradesh and Others**

**2001(4)MPHT223**

**Decided on 11.09.2001**

**Hon'ble Judges:**

**Y. Bhaskar Rao and V. Rajagopal Reddy, JJ.**

The petitioner was found and recovered from a brothel and remanded to be kept at a care home in Gwalior. The present petition has been filed on her behalf on claims that she is being forced to stay at the care home against her will and is being subjected to bad behaviour. The court noted that it has a duty to make an enquiry as to whether she could be a victim of sexual exploitation and whether the application was made bona fide in her interest. However, an order for her transfer can only be made by the learned Sessions Judge of the Districts. Having heard the evidence, the court thought that appropriate action was taken in removing the petitioner but was concerned at the lack of action taken against the brother owners. Direct and immediate departmental action should therefore be taken against those responsible for not taking prompt action to get the criminal cases registered and for not taking any preventive and positive action.

As the petitioner was requesting to live with her father and given that she had now reached the age of majority she was released from the care home. The Superintendent of Police asked to keep a watch over her without interfering in her liberty in any way.

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**Nilofar and Nilam Usman Shaikh vs. The State of Gujarat**

**(2004)3GLR2630**

**Decided on 14.10.2004**

**Hon'ble Judges:**

**J.R. Vora, J.**

The applicants under this petition had been found to be procuring girls and keeping them in houses or hotels before convincing them to

become prostitutes. The two applicants filed to have the charges against them under s 6 and 9 of the Immoral Traffic Prevention Act 1956 (the "Act") dropped.

S9 of the act has two essential ingredients. The first that there is "seduction", the applicants referred to the case of Ramesh vs The State of Maharashtra for the meaning of this term. The SC stated that seduction amounts to surrender by a woman who is otherwise unwilling by persuasion, flattery, blandishment or opportunity but there is no requirement to show that she was compelled to surrender. In this case, the girl was in dire financial state, and it was on this basis and the offer of paid work by the applicants that it is likely that she "agreed" to offer her body for money. This being completely different to the circumstances of the SC case where only a facility to customers and victim girls had been provided, the claim that no seduction was involved was rejected. The second ingredient is that the accused must have had "custody, charge or care of, or a position of authority over any person". The court considered, that because the girls did not know Ahmedabad, it is likely that they had nowhere else to go except stay at the house or hotel provided by the applicants. Even if not all their movements were restricted, there is enough to suggest that this second ingredient was present.

The term detaining in s6 of the Act is also required to be interpreted widely and consent is not material. Therefore even if the person agrees to stay in the brothel or house, an offence under s6 can still be made out. As all that is required at this stage is enough evidence for a prosecution case to be made on face value and not whether the applicants are guilty or innocent, the court rejected the application that the necessary ingredients of s6 and 9 were not made out.

### **IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**Sahyog Mahila Mandal and Anr. vs. State of Gujarat and Others  
(2004)2GLR1764**

**Decided on 18.03.2004**

**Hon'ble Judges:**

**R.K. Abichandani and D.H. Waghela, JJ.**

Two petitions were raised challenging s7(1)(b), 14 and 15 of the Immoral Traffic (Prevention) Act 1956 (the "Act") on the ground that they violate the fundamental rights under Articles 14, 19 and 21 of the Constitution of India.



The conclusions and order of the court are given below together with a summary of the arguments presented:

1. S7(1)(b) of the Act does not violate Articles 14, 19 or 21 of the Constitution.

The petitioners argued that as there were no guidelines for Magistrates as to which areas they could prohibit prostitution all notifications under this section were arbitrary and discriminatory in nature and violative of a prostitute's fundamental rights. The respondents stated that s7(1)(b) contained intrinsic guidelines as to the nature of the area in which it would be an offence to carry on the activity of prostitution and although it extends to "other public places of any kind", the Magistrate must keep in mind the object and intention of this provision. In addition s7(3) guides the State government on which areas prostitution could held to be an offence. The respondents also felt that it was the duty of every citizen to renounce practices which were derogatory to women and to recognise prostitution as a legitimate means of livelihood would be an open invitation to trafficking and normalise the abuse that occurs to these women.

2. S14 of the Act empowering a special police officer to make an arrest without a warrant does not violate Article 14 or Article 21 of the Constitution.

The petitioners argued that prostitution in itself was no offence, except in the manner covered under s7 and 8 of the Act, therefore this section allows those who are prostitutes to be treated in the same way as those running the brothel, when it was never the intention of the Act to make the women or girls used for trafficking liable for punishment. The respondents argued that having regard to the object sought by the Act it was necessary for the police to have this power.

3. S15 of the Act empowering a special police officer to make a search without a warrant does not violate Article 14 or 21 of the Constitution.

The petitioners referred to case law which stated that even women of easy virtue are entitled to their privacy. This power, without proper guidelines was likely to be abused. The respondents said that the right to privacy cannot be pleaded where there are reasonable

grounds for suspecting that offences under the Act were being committed. It was also stated that the power was not arbitrary but subject to immediate scrutiny by a magistrate

4. A woman or girl who is removed from a brothel must be treated by Magistrates and police officers in a manner that would achieve the object of the Act, ensuring their rehabilitation which can be carried out in protective homes.

The petitioners relied on case law to show that any rehabilitation must be compatible with a prostitute's dignity and worth as a human being and it should be designed to uplift their morals, provide them with the means to find a different job and re-integrate into society. They should be viewed as victims of gender-orientated vulnerability and not punished. The respondent's stated that the restrictions that result from being sent to a protective home are imposed via the judicial process and through a clearly disclosed policy and were therefore reasonable. Such orders were also necessary to curb the evil and to improve public morals. They relied on case law to show that no citizen has the right to carry on trade or activities which are inherently vicious, pernicious, criminal, obnoxious and injurious to the safety, health or welfare of the general public.

5. The State must provide sufficient and adequate protective homes.
6. To ensure effective supervision and control of the rehabilitation of prostitutes a State Level Rehabilitation Committee should be set up. This should prepare and circulate a note for guidance (in accordance with national and international law) for rescue and rehabilitation of all women and girls rescued. It should continue to meet periodically and at least once every 2 months to review progress and compliance with the rules of rescued women and girls. It should submit a report and recommendations to the Cabinet yearly.
7. A Local Cell should also be set up consisting of the commissioner of police, medical staff and a representative from an N.G.O. The Cell should periodically check on the conditions in the protective homes and report any violations to the Committee. The local cell should also inform all women and girls working as prostitutes and those in protective homes as to their rights

**IN THE HIGH COURT OF BOMBAY**

**Prerana vs. The State of Maharashtra**

**Decided on 24.08.2000**

**Hon'ble Judges:**

**A.P. Shah and V.C. Daga, JJ.**

Prerana, an N.G.O. working for women and children who are the victims of sexual exploitation filed the petition in this case, they sought directions from the State Government to improve the conditions of a care home for trafficked women. A number of complaints were made, including the insufficient bathroom, medical and recreation facilities, the lack of constructive activity and counseling facilities or anything to assist the women that had been rescued.

The petition referred to a number of previous cases in which the State Government has been directed to ensure that adequate and rehabilitative houses planned by well-qualified social workers, psychiatrists and doctors. In addition measures should be taken to eradicate child prostitution and to implement social welfare programmes to protect, treat and rehabilitate girls rescued from brothels. The court noted that there were no adequate facilities available in Maharashtra but that it was the duty of the state to take preventative measures to eradicate child prostitution.

**IN THE HIGH COURT OF BOMBAY**

**Prerana vs. The State of Maharashtra and Others**

**Decided on 17.10.2002**

**Hon'ble Judges:**

**A.P. Shah and Ranjana Desai, JJ.**

Ten girls under the age of 18 had been rescued from a brothel and taken to a special rehabilitation centre. They were produced before the Juvenile Justice Board but were released as they had not committed any offence and had asked to be set free. Prerana filed a petition in the interest of protecting children from being returned to the brothels or pimps they had been rescued from. The court decided that under the Juvenile Justice Act 2000 ("JJA") any child found soliciting should be treated as a child in need of care and protection under s2(d)(vi) and not as a juvenile in conflict with the law under s2(1). They should therefore be brought before the Child Welfare Committee and not before the Juvenile Justice Board. The court went onto direct that children should

only be released after an inquiry has been completed by the Probation Officer and to the care of a parent or guardian (or if they are unfit the procedure under the JJA should be followed). The court also noted that it was disturbing that the lawyer who had acted for the brothel keepers was the one who had made the request for the girls to be released and made a direction that such practice should be barred.

## **IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**Prerana vs. The State of Maharashtra and Others**

**Decided on 18.04.2007**

**Hon'ble Judges:**

**Smt. Ranjana Desai, J.**

The court delivered extensive directions for the procedures that should be followed when raids are made and when women and girls are rescued from brothels. In summary, the court ordered that an Anti-Trafficking Cell should be created to supervise any investigation under the Act. The Special Police Officers were directed to contact a lawyer as soon as a rescue operation is begun, to ensure that each statement from a rescued victim is recorded in the presence of a Superintendent or responsible member of staff, to keep the rescued victims in a place of safety and not at the police station and to initiate action to close the brothel. The State Government was directed to ensure that the institutions housing rescued women and children are clean and have basic amenities, that there are at least 2 Counselors and 2 Probation Officers for each State, to provide rescued victims with the opportunity for formal education and to constitute the Special Courts described in the Act. The Superintendants were directed to ensure that no one had access to the rescued victims without permission from the Child Welfare Committee or Magistrate and only in the presence of another member of responsible staff. The Magistrates and Sessions Judges were instructed to ensure the presence of a Counselor in court during the testimony of a child victim, to provide them with a lawyer, to ensure age verification is carried out at a recognised hospital, to record testimony's within 1 month and to expedite cases relating to trafficking. The Magistrates were directed to look into the suitability of the home an adult victim may be returned to and how she might be influenced before releasing her, this enquiry should take a maximum of 3 weeks and in the meantime she should be kept in a place of safe custody.

**IN THE HIGH COURT OF BOMBAY AT GOA**

**Savera a Society registered under the Societies Registration Act 1860, through its President Smt. Tara Kerkar and Others vs. State of Goa, through the Chief Secretary and Others**  
**Decided on 21.07.2003**

**Hon'ble Judges:**

**F.I. Rebello and P.V. Hardas, JJ.**

This petition was filed to highlight the lack of compliance with the directions given by the court in Gaurav Jain vs. Union of India and the fact that rescued women are not being housed in homes with decent facilities and are being abused by the police. A committee appointed by the National Commission for Women had also made various recommendations including that State Governments should provide appropriate rehabilitation centres and should stop the migration of sex workers from one state to another. In light of this the court directed that the State Government should take steps to comply with the recommendations from the committee and the directions given in Gaurav Jain vs UoI. In addition, any rescued women or children should be returned from the State from which they came from but that the Goa State Commission for Women should work with the National Commission for Women to ensure that they are rehabilitated in their home states.

**IN THE HIGH COURT OF KERALA**

**Sinu Sainudheen vs. Sub Inspector of Police**  
**2003CriLJ3205**

**Decided on 12.02.2002**

**Hon'ble Judges:**

**G Sasidharan, J.**

A raid and an arrest without warrant had been conducted by a Sub Inspector of Police, on the permission of the Assistant Commissioner of Police. Under the Immoral Traffic (Prevention) Act 1956 (the "Act"), s15 requires there to be at least 2 women police officers present during a raid. The Supreme Court in Bai Radha vs. State of Gujarat had found that such safeguards had been put in place owing to the nature of the premises and to protect privacy, however the entire proceedings do not have to vitiated due to the non-compliance of these requirements. S15 also requires that a raid is carried out by a Special Police Officer and s14 requires that an arrest must also be carried out by a special police officer or someone authorised by him. As neither of the policeman involved

are special police officers, there was not sufficient authorisation to carry out the raid and arrest. Therefore under the provisions of s482 of the Criminal Procedure Code which justifies the quashing of proceedings to prevent an abuse of process of court or otherwise, these proceedings (conviction and sentence) were quashed.

### **IN THE HIGH COURT OF ORISSA**

**Sushanta Kumar Patra alias Hemanta Kumar Das and two Others vs. State of Orissa**

**2000CriLJ2689, 2000(1)OLR647**

**Decided on 21.04.2000**

**Hon'ble Judges:**

**L. Mohapatra, J.**

During a raid of a suspected brothel 3 women were rescued and 5 customers were arrested while trying to escape. Three of those customers have filed a petition stating that none of the offences under the Immoral Traffic (Prevention) Act 1956 (the "Act") have been proven. The offences are listed under s3-7 of the Act and include keeping, managing or assisting in the keeping of a brothel, living on the earnings of prostitution, procuring or attempting to procure a person for prostitution without their consent and detaining a person with the intent that that person will have sexual intercourse with someone other than their spouse.

As the men arrested were found trying to escape and there was no evidence of semen on the undergarments on any of the women rescued, none of the offences had been made out and the order against the 3 petitioners was quashed.

### **IN THE HIGH COURT OF BOMBAY**

**Geeta Kancha Tamang vs. State of Maharashtra**

**Decided on 23.11.2009**

**Hon'ble Judges:**

**Roshan Dalvi, J.**

A woman who had been convicted of being a brothel owner/keeper had served 14 months of her sentence requested bail on suspension of her sentence. The court considered that trafficking is prohibited under Article 23 of the Constitution of India and that the applicant was likely to re-offend as the brothel had not yet been closed. Therefore the application was rejected.

**IN THE SUPREME COURT OF INDIA**

**Guria, Swayam Sevi Sanstham vs. State of U.P. and Ors.**

**Decided on 31.07.2009**

**Hon'ble Judges:**

**S.B. Sinha and Cyriac Joseph, JJ.**

A raid was conducted on a suspected brothel and during the following investigation it was evident that some of the accused were making a living by forcing girls into prostitution. The High Court granted bail to these men, on the basis that there was no specific evidence that they were inducing or taking women for the sake of prostitution. This judgement was appealed by the appellant who is an NGO, claiming that the High Court erred in its judgement. The SC decided that the when considering bail, the gravity of the offence should be considered. As the offence of living off the earnings of prostitution carries a sentence of 7-10 years (higher than that of running a brothel) the SC decided that the High Court was not correct in dealing with the bail in such a cursory manner. The court went on to approve of the case of *Puran v Rambilas and Anr.* in which one of the grounds for cancellation of bail would be where material evidence on record had been ignored without reason. However, given that bail had been granted a long time ago it would not cancel bail in this case but advised the High Court to exercise caution in the future.

**IN THE HIGH COURT OF DELHI**

**Kamaljeet Singh (In Judicial Custody) vs. State**

**Decided on 29.01.2008**

**Hon'ble Judges:**

**Reva Khetrpal, J.**

Using a decoy customer, a man was arrested and charged for offering women for sex. He later disclosed that he was part of a wider prostitution racket which was then investigated. Based on the evidence that was found the appellant was charged under s 4-5 Immoral Traffic (Prevention) Act 1956 (the "Act") and under s3-4 Maharashtra Control of organised Crimes Act 1999 (the "MCOCA").

The appellant argued that s4-5 Act read with section 420/120B IPC were not intended to be covered by MCOCA. In addition s3 MCOCA has not been made out as the appellant had not been engaged in any "continuing unlawful activity" or been part of an "organised syndicate". In addition he argued that s4 should not apply because the definition

of “unlawful activity” includes the words “use of violence, threat of violence, intimidation or coercion” which the appellant had not been involved in. The court considered a number of cases which describe how words of statute should be interpreted. The court found that the Statement of Objects and Reasons clearly states why the Act was enacted and therefore it was safe to presume that “unlawful means” referred to any act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control. I.e. organised crime falls within this remit. The court also decided that the invocation of the MCOCA was justified as the words “other unlawful means” did not have to be read as *noscitur a sociis* with the words violence, threat of violence, intimidation or coercion.

The appellant also contended that the confession made, which named him as the organiser of the prosecution racket was invalid. It was argued that the statement was not voluntary as the confession records that he was asked to co-operate or he would be involved in the case. The court disagreed and held that it was clear he had not been beaten or tortured and therefore the confession was given of his own free will.

## **IN THE SUPREME COURT OF INDIA**

**State of Maharashtra and Anr. vs. Mohd. Sajid Husain Mohd. S. Husain etc.**

**Decided on 10.10.2007**

**Hon’ble Judges:**

**S.B. Sinha, Harjit Singh Bedi, JJ.**

A girl was lured into becoming a prostitute by her employer. She was only found and arrested when some of the accused persons starting acting indecently with her on a bus. She made several statements which implicated the accused who comprise of police officers, politicians and a businessman. The respondents filed an application for anticipatory bail before the Sessions Judge, which was dismissed. They therefore applied to the High Court which granted anticipatory bail on the basis that the girl was a major and could have consented to having sex and therefore a *prima facie* case had not been made out.

The State argued that the High Court had erred in its judgement as there were numerous public documents which indicated that girl was under 16 years old and therefore any purported consent was irrelevant. The state also pointed out that all of the accused had been absconding. The court considered the factors which are relevant in deciding whether



to grant bail, including the gravity of the offence, previous convictions of the applicant, the possibility of the object being to humiliate the applicant and the possibility of the applicant fleeing from justice.

It held that it was not necessary for the First Information Report to list all of the names of the people involved, particularly in this instance where there is no reason to suspect that the girl would falsely implicate any of the accused. The court also noted that immoral conduct on the part of police officers should not be encouraged and there were no reasons as to why they had been changing their residence frequently and not complying with the conditions imposed upon them.

Given that the High Court had refused regular bail and the fact that accused are relying upon the same materials for their application for anticipatory bail, the court failed to see why in such circumstances that anticipatory bail should be granted and therefore allowed the appeal. It noted that the factors that must be considered on an application for cancellation of bail are different when the conduct subsequent to release and supervening circumstances alone are relevant.

## **IN THE HIGH COURT OF BOMBAY**

**Sunny Kamalsingh Mathur vs. Office of Commissioner of Police and Ors.**

**Decided on 14.10.2008**

**Hon'ble Judges:**

**Bilal Nazki and A.A. Kumbhakoni, JJ.**

The petitioner had been arrested for being a pimp following a raid on a brothel. An order had then been passed by the Commissioner of Police under s18 Immoral Traffic Prevention Act, 1956 ("the Act") directing the petitioner to obtain approval before leasing or letting out any or his premises for the following year. The petitioner appealed this order on the grounds that action under s18 could not be taken until he had been prosecuted under either s3 or s7 of the Act.

The petitioner referred the court to the Supreme Court judgement of A.C. Aggarwal, *Sub-Divisional Magistrate, Delhi and Anr v. Mst Ram Kali* which held that only after a conviction under s3 or s7 of the Act could action be taken under s18. However, the court in this case noted that the law had since changed, in particular s22 of the Act had been amended and now the Magistrate referred to under s18 is not the same Magistrate referred to in s3 and s7. While a trial under s22 has to be conducted by a Magistrate or Judicial Magistrate, the power under s18

must be exercised by a District or Sub-Divisional Magistrate. Therefore an order under s18 can be made irrespective of whether an action under s3 or s7 has been taken or is pending. However before passing a s18 order, all of the requirements of this provision must be complied with, including the Magistrate must show a cause notice and hear the person concerned.

SUMMARY JUDGEMENTS ON ADOPTION

**IN THE SUPREME COURT OF INDIA**

**St. Theresa's Tender Loving Care Home and Others**

**vs. State of Andhra Pradesh**

**AIR2005SC4375, 2005(8)SCALE610**

**Decided on 24.10.2005**

**Hon'ble Judges:**

**Arijit Pasayat and Arun Kumar, JJ.**

This case considered whether Appellant 1, which claimed to be an organisation interested in the welfare of abandoned children, should be permitted to arrange the foreign adoption of a minor child. The mother of the child had executed a Relinquishment Deed which stated that as the mother was unmarried and working as a labourer she relinquished the child in favour of appellant 1. The Voluntary Coordination Agency had given permission for the adoption abroad, but the State of Andhra Pradesh resisted the claim. Their stand was that it had come to their notice that some organisations in Andhra Pradesh were indulging in child trafficking.

After an inquiry the Crime Branch of CID reported that the Relinquishment Deed was a fake document and the witnesses to the Relinquishment Deed were employees of appellant 1. Therefore the appeal was dismissed. The court went on to note that SC decision of Lakshmi Kant Pandey v UOI had stated that relinquishment by the biological parents on the grounds of poverty, number of children, unwanted girl was not permitted. The court went on to list the 7 directions given by the SC in adoption cases, which include making every effort to see if the child can be adopted within the country first and only if that is not possible, looking at foreign adoption possibilities, every application from a foreigner must be sponsored by social or child welfare agency recognised or licensed by their government etc. In addition it should be ensured that trafficking is not lurking behind the mask of social services.

**IN THE SUPREME COURT OF INDIA**  
**Indian Council Social Welfare and Ors.**  
**vs State Andhra Pradesh and Ors.**  
**2003(10)SCALE53, (1999)6SCC365**  
**Decided on 14.07.1999**  
**Hon'ble Judges:**  
**Sujata V. Manohar and R.P. Sethi, JJ.**

Two organisations in Andhra Pradesh were suspected of malpractices relating to trafficking in children. Therefore, although the four petitioners in this case are not connected with those organisations, they were prevented from proceeding with applications for guardianship of some children abroad.

The petitioners sought limited relief relating to those children whose applications for guardianship were pending and those already issued. The court noted that the State Government is required to separately maintain a list of all agencies handling adoption of children, and it is required to identify those institutions which have children who are free for adoption. It also stated that before a guardianship certificate is issued a letter of relinquishment, VCA clearance, no-objection certificate from Central Adoption Resource Agency and other relevant documents such as the home study of the proposed guardians, no-objection certificate from the agency that scrutinised the application and approval from the scrutinising agency in India are required. Thereafter the court decides whether the guardianship should be granted or not.

In this case the court allowed the applications for guardianship. However, the court made it clear that wherever there are allegations of malpractices the State Government is entitled to investigate.

**IN THE SUPREME COURT OF INDIA**  
**Lakshmi Kant Pandey vs. Union of India**  
**AIR1984SC469, [1984]2SCR795**  
**Decided on 06.02.1984**  
**Hon'ble Judges:**  
**Amarendra Nath Sen, P.N. Bhagwati and R.S. Pathak, JJ.**

Laxmi Kant Pandey's wrote to the court asking it to restrain Indian private agencies from routing children for adoption abroad. The court therefore set out the principles and norms which should be followed when a child is being considered for adoption or guardianship with foreign parents.

The Court reviewed the international level of concern for children, referring to the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations and the draft declaration and draft guidelines of procedure concerning inter-country adoption which the Economic and Social Council approved.

The court went on to list the requirements which should be insisted upon when a foreigner wishes to adopt a child. The foreigners must be sponsored by a social or child welfare agency recognised or licensed by their government, this is essential primarily for 3 reasons. Firstly to reduce or eliminate profiteering and trafficking, secondly to allow the court to satisfy itself that the foreigner is suitable as a parent and thirdly the social or child welfare agency can be made responsible for supervising the progress of the child. A home study report must be supplied by the social or child welfare agency which should assess whether the parents are fit, suitable and have the capacity to parent a child from a different racial and cultural background. The application of the foreigner should include a Power of Attorney in favour of an officer of the social or welfare agency in India, to process and handle the case.

If the biological parents are known they must be properly assisted in making a decision about relinquishing the child and not be subjected to any duress. They should also not be induced or permitted to make a decision about an adoption before the child is born or within 3 months from the date of birth. However, once a child is to be adopted, it is essential that the biological parents should not have any opportunity to find out who the adoptive parents are to prevent them trying to contact the child or asking for money. A general approval for adoption is not allowed, only one for a specific known child. Siblings who have been brought up together should not be separated unless there are special reasons to do so.

If the child is residing at an unrecognised social or child welfare agency, a recognised one will have to be approached. The government should, with the assistance of the Government of States prepare a list of recognised social or child welfare agencies which should be state to the High and District Courts. Each agency is entitled to receive money for maintenance, not exceeding Rs 60 per day from the date of selection to the date the child leaves the agency and for medical expenses incurred. The entire procedure should be carried out expeditiously.

This procedure should reduce if not eliminate abuses which can occur.

**IN THE HIGH COURT OF DELHI****Child Welfare Committee vs. Govt. of N.C.T. of Delhi and Ors.****Decided on 03.09.2008****Hon'ble Judges:****Ajit Prakash Shar, C.J. and S. Muralidhar, J.**

This petition was brought to the court concerning an illegal adoption of a male infant whose biological mother was a rape victim and a minor. The girl told the court that her baby had been sold by her employment agency. The court held that the child came within the ambit of a child in need of care and protection under the Juvenile Justice Act 2000 ("JJA"). Therefore the Magistrate which had ordered the custody of the child to remain with the couple who had bought the baby had failed to take into consideration the provisions of JJA which states that the primary care and responsibility of a child should be with its family.

Although the biological mother had made a statement to the effect that she wanted to give her child up for adoption, this was because the mother did not have milk for her baby and thought that her child would be fed once it was adopted. After being examined by a psychiatrist it was clear that the girl wanted to keep her baby. The court referred to the obligations on the state to provide for the infant and as her family had expressed their unwillingness to support the girl the court decided that the CWC should ascertain the mother's wishes. The GNCTD offered to give the girl (now a major) employment and housing for her and her child, which the girl agreed to.

The court reminded Magistrates of the powers under the JJA and to be more vigilant and cautious before making orders placing young children with unrelated adults without examining the ramifications of such orders. It also observed that each child is entitled to free legal aid but they are continually having to rely on the services of NGOs. Therefore the District Legal Services Committee should constitute a special panel of advocates, who can be available around the clock to ensure legal aid is provided.

**IN THE HIGH COURT OF ANDHRA PRADESH AT HYDERABAD****John Clements and Anr. vs. All Concerned and Ors.****Decided on 02.05.2003****Hon'ble Judges:****B.S.A. Swamy and G. Yethirajulu, J.J**

This was an appeal against an order of the Family Court, which dismissed the appointment of the appellants as guardians of a minor

girl and so prevented them from returning to the US with her. The appellants claimed that the child's mother had signed a relinquishment deed and that because the child had deformed feet, no Indian parents had wanted to adopt her.

Although guardianship had been granted by the Central Adoption Recourse Agency (CARA) and the Voluntary Adoption Coordinating Agency (VACA), many of the documents relied upon were forged. In addition the guidelines issued in *Lakshmi Kanth Pandey v UOI* had not been complied with. The Family Court had found that no efforts had been made to establish whether Indian parents wanted to adopt the child. From the evidence it was clear that the placement agencies were keeping fair, healthy children separate from those put up for adoption by Indian parents. Therefore despite there being a detailed procedure for inter-country adoption, the court stated that there were certain gaps and so issued additional guidelines. These include suggesting that the placement agencies have no role except informing the authorities about a child coming into their care and collecting their expenses on finalisation of adoption of the child; legally trained people from VACA and CARA should be responsible for scrutinising all documents; prospective Indian parents should be found if possible, from any State, before considering foreign adoption; the surrender of a child by its biological parents must be signed by 2 witnesses which are not employees of the agency; suggestions were also made as to how to make the process of children being adopted more transparent and which documents should be filed at the Family Court.

The court was also asked to consider making an exception in this case, given the amount of time that appellants had spent with the child. The court considered its equitable duty, but upheld that its paramount consideration is the furtherance of cause of justice. Therefore it did not interfere with the order of the Family Court but suggested that appellants could re-apply to adopt if no Indian parents were found.

## **IN THE HIGH COURT OF MADRAS**

**S. Banu vs. Raghupathy, Principal Thriuvalluvar Gurukulam School and Ors.**

**Decided on 19.06.2007**

**Hon'ble Judges:**

**P.K. Misra and R. Banumathi, JJ.**

The Petitioner was widowed and therefore unable to feed and maintain her 3 children so she handed custody over to the first

respondent, who runs a school. Some years later she was diagnosed with heart disease and has filed this petition to try to locate her two minor children, who she has been told have been adopted by foreigners.

The petitioner's case is that she did not sign a Surrender Deed and that the Madras Social Service Guild [MASOS], which were involved in the adoption did not have the licence as this had been suspended following some questionable activities. MASOS responded by claiming that the adoption was carried out in accordance with the procedure under law and through a responsible and qualified social welfare officer.

The court referred to a number of cases, in particular *St Theresa's Tender Loving Care Home and ors vs State of AP* which highlighted the essence of the directions given in *Lakshmi Kant Pandey's* case. The guidelines which have since been published by the Central Adoption Resources Agency (CARA) and govern inter country adoption. The court went on to offer its own directions including: that strict adherence should be paid to the guidelines offered by the Supreme Court; the credentials of the organisation involved are to be monitored/scrutinised; in cases of complaints, the District Social Welfare Officer shall hold public hearing into complaints and conduct an enquiry; in cases of questionable documents relating to adoption, the parties should be directed to approach the Police; when an Adoption O.P. is filed in a District other than the District where the child was surrendered by the biological parents, granting permission for adoption and allowing Guardian OP is not to be automatic, the District Judge shall enquire the background of the child given in adoption and the reason for filing Guardian O.P. in a different District.

In this case the court decided that given the background of allegations and counter allegations and the accusations relate to cheating / manipulations / fabrications of documents they would leave the decision to the judges in the criminal case which is under investigation and in progress.



**SUMMARY JUDGEMENTS ON EXPLOITATIVE LABOUR**

**IN THE SUPREME COURT OF INDIA**

**Public Union for Civil Liberties**

**vs. State of Tamil Nadu and Others**

**(2004)12SCC381, 2004(5)SCALE890**

**Decided on 05.05.2004**

**Hon'ble Judges:**

**S. Rajendra Babu, C.J. and G.P. Mathur, J.**

The original petition on bonded laborers in Tamil Nadu had been expanded to cover the problems in all States and Union Territories on this matter. The National Human Rights Commission had constituted a group of expert to review the current procedures in place and how best to implement the provisions of the Bonded Labour System (Abolition) Act 1976 (the "Act"). This group had recommended that the focus be on rehabilitation and that Central and State governments should share the expenditure 50:50. Where the State is not able to reach out to the needy, NGOs in this area should be utilised to fill thiOn the basis of the recommendations, the court made a number of directions to all State Governments and Union Territories including: proper arrangements for rehabilitation released bonded laborers, to be based on land or skills depending on the laborers choice and past experience; to use NGOs where the State is not able to compete these duties and to share the money available with such NGOS; to submit a status report every 6 months; ensure District Magistrates and other authorities are aware of their duties under the Act; and constitute Vigilance Committees in accordance with s16 Act within 6 months.

**IN THE SUPREME COURT OF INDIA**

**People's Union for Civil Liberties (PUCL)**

**vs. Union of India and Others**

**(1998)8SCC485**

**Decided on 26.03.1996**

**Hon'ble Judges:**

**Kuldip Singh and Faizan Uddin, JJ.**

The Campaign Against Child Labour organisation brought this PIL, as a man named Rajput was found to be purchasing children and

forcing them into bonded labour. It was also claimed that he had beaten one of the boys to death and the court noted that Rajput had already been convicted for murder.

The murdered boy's brother was awarded Rs. 2 lakhs in compensation from the state of Maharashtra, to be held by the Magistrate in a bank until he became an adult. The other children rescued were awarded Rs. 75,000 as compensation from the state of Tamil Nadu.

## **IN THE SUPREME COURT OF INDIA**

**Neeraja Chaudhary vs. State of M.P.**

**AIR1984SC1099, (1984)3SCC243**

**Decided on 08.05.1984**

**Hon'ble Judges:**

**A.N. Sen and P.N. Bhagwati, JJ.**

During this case the court stated that it was imperative that the Government should not be content with just identifying and releasing bonded labourers but they must be properly and suitably rehabilitated too. It is nothing to release a person from bondage if he only ends up in another life of bondage, namely hunger and starvation. The court also affirmed the case of *Bandhua Mukti Morcha*, which held that once it has been shown that the labourer is made to provide forced labour, the presumption is that he is required to do so in consideration of an advance or other economic consideration. Unless material is produced rebutting this presumption, the labourer is entitled to the benefit of the provisions of the Bonded Labour System Abolition Act 1976.

The petition concerned 135 bonded labourers who had been released back to their villages but had not been rehabilitated even though 6 months had passed. The Court reviewed the findings of the survey carried out by the State Government in 1981 and urged the government to implement the recommendations made. Including: vigilance committees should have more frequent meetings; these committees should have representatives from one or more relevant social action groups; they should be reorganised and activated; and the officers in charge of rehabilitation should be fully aware of his great responsibility. The State Government was also directed to provide rehabilitative assistance to the 135 bonded labourers described in the petition and to file an affidavit in one month describing the steps taken.

**IN THE HIGH COURT OF ANDHRA PRADESH AT HYDERABAD**

**Priyadarshini Jattu Workers Labour, Contract Co-operative Society rep. by its Secretary, G Satyanarayana vs. The Food Corporation of India rep. by its Chairman and Managing Director and Others**

**1995(2)ALT107**

**Decided on 21.03.1995**

**Hon'ble Judges:**

**K.M. Agarwal, Acting C.J.**

The purpose of the petition was to complain that the 4<sup>th</sup> respondent had been awarded a contract by The Food Corporation of India, when the petitioner had offered the lowest price. It was established that previous contracts had been awarded at a rates as low as 99.999 percent below the notified schedule of rates. The petition itself had no substance and was dismissed but the court was pained to note that the first respondent had taken advantage of the unfair cut throat competition between the petitioner and the 4<sup>th</sup> respondent. It was guilty of practicing and encouraging a system akin to bonded labour prohibited under the Bonded Labour System (Abolition) Act 1976 to the extent that only Rs.30/- was paid for work worth Rs.30 lakh. The court therefore ordered that the Collector from the district find out the names and addresses of the labourers and pay them or their heirs according to the amount of work they did at the SR rate.

**IN THE SUPREME COURT OF INDIA**

**Bandhua Mukti Morcha vs. Union of India and Others**

**(1984)3SCC161, [1984]2SCR67**

**Decided on 16.12.1983**

**Hon'ble Judges:**

**Amarendra Nath Sen, P.N. Bhagwati and R.S. Pathak, J.J**

The petitioner is an organisation dedicated to the release of bonded labourers. This case concerned a number of bonded labourers which the respondents claimed should not form a writ petition as no fundamental right has been infringed. However the court said that PILs are to ensure observance of social and economic rescue programs and to protect people from violations of their basic human rights. Everyone has the right to live with human dignity, free from exploitation and therefore living in inhumane conditions and being held in bondage was a violation of this right.

The court issued a number of directions to the Government of Haryana which included the following: constitute a Vigilance Committee; make identification of bonded labour a top priority task and assign task forces to locate any instances; obtain assistance from nonpolitical social action groups; take all steps to ensure minimum wages are paid; direct an appropriate officer to ensure those paid on a truck basis are not cheated out of their legitimate wage; ensure payment of wages is made directly to the workers; educate workers of stone quarries as to their rights; ensure clean drinking water is supplied; ensure that latrines, urinals and medical care are provided and provide legal assistance to any worker who is injured while working. A Commissioner was also appointed to visit the stone quarries periodically and establish whether any of the workers wish to return to their homes and to make the necessary arrangements if so. He will also check whether any advances are being made and that all of the directions issued to the Government of Haryana are being complied with.

## **IN THE SUPREME COURT OF INDIA**

**Bandhua Mukti Morcha vs. Union of India and Others**  
(1991)4SCC177

**Decided on 13.08.1991**

**Hon'ble Judges:**

**Ranganath Mishra, C.J. and M.M. Punchhi and S.C. Agarwal, J.J**

The petitioner brought the same case before the SC, as the State of Haryana had failed to exercise the appropriate control the Court had provided 8 years earlier. The SC stated that it was the obligation of the State in which there are stone quarries to regulate the labour and called upon the State of Haryana to attend to the needs of the workers in a considered and systematic way. In effect it should play the role of a welfare State and protect labourers from the vagaries of employment. The directions given 8 years ago should be complied with. The petition was therefore disposed of, and the State was directed to provide decent conditions of service for those workers who wish to stay and to release and rehabilitate those workers who wish to return home and to pay Rs. 20,000 to pay for the Committee appointed by the SC.

**IN THE HIGH COURT OF DELHI**

**Bachpan Bachao Andolan vs. Union of India and Others**

**Decided on 23.01.2009**

**Hon'ble Judges:**

**K.G. Balakrishnan, C.J. and Sanjiv Khanna, J.**

The report brought before the court showed that 27 children and 9 adults had been rescued but that no arrests have been made. The petitioner referred to the Standard Operating Procedures which were published by the Government of India and United Nations in respect of investigations for crimes of trafficking in forced labour. The petitioner also referred to a complaint made by a man who had said that his sister, sister-in-law and friends had been enticed to come to Delhi. However, he is now missing and no effective steps had been taken to locate him.

The court therefore found that the approach of the Delhi police had been completely lackadaisical, virtually no investigation has been carried out despite the seriousness of the allegations. The Standard Operating Procedures have also been completely ignored. The Court granted the Delhi Police 1 week in which to take effective and proper steps to cover all aspects and provisions of the Indian Penal Code and other enactments.

**IN THE HIGH COURT OF DELHI**

**Bachpan Bachao & Ors. vs. Union of India & others**

**And Shramjivee Mahila Samity vs. State & Others**

**And Kalpana Pandi vs. State**

**Decided on 24.12.2010**

**Hon'ble Judges:**

**A.K. Sikri and A. Bharihoke J.J.**

The cases listed together concern girls who were placed with an agency for the purpose of working as a domestic help. However, when the families have gone to locate the girls, they have been told that they are missing. This case was therefore about two issues, one being finding the women and girls and the other the functioning of these placement agencies which are not regulated and often move girls working in domestic help into more hazardous work or prostitution. This trend defeats the very spirit of the Juvenile Justice (Care and Protection of Children) Act 2000. The State Government amended the Delhi Shops and Establishment Act to make registration of placement agencies mandatory. While this was commended, a later petition was filed

requesting that the manner in which the agencies function must also be regulated.

The court directed that as there is no comprehensive legislation in place to take care of these problems i.e. to ensure that women and children receive proper wages; to ensure freedom of movement; access to shelter if they are abused, the feasibility of having legislation to regulate such employment should be studied. In the meantime guidelines should be issued to NGOs working in this area to coordinate the current system. It was also directed that all placement agencies should be registered and failure to do so would result in a penal action; all placement agencies in Delhi as well as those located elsewhere but are placing women and children in Delhi should be registered; registration should require a number of pieces of information including the number of people employed, the addresses of employers, the nature of the work and period of employment. These details should be available to the Child Welfare Committee and the Delhi Commission for Women. The court went on to direct the respondent authorities to consider various duties and powers of the Commission and Committee and how to manage complaints. The Delhi Police were also directed to reconsider whether they could regulate the function of the placement agencies (having previously claimed that they were too busy to take on this task) and that they should screen domestic workers and keep a full record of the details of the applicants and employers.

## **IN THE HIGH COURT OF DELHI**

**Court of its own motion vs. Govt of NCT of Delhi**

**And Save the Childhood Foundation vs. UOI and Others**

**And Q.I.C & A.C. vs. Ministry of Labour & Employment & Anr**

**And All India Bhrashtachar Virodhi Morcha (Regd.) vs. Karol Bagh Bangiya Swaran Shilpi Samiti (Regd.) & Others**

**Decided on 15.07.2009**

**Hon'ble Judges:**

**Manmohan, J.**

As the constitutional mandate and statutory provisions with regard to children were not being implemented, and to improve coordination between various agencies and the Government the National Commission for Protection of Child Rights formulated a Delhi Action Plan. This suggested two strategies, the first, to eliminate child labour for all children aged 6 to 14 and the second to identify, rescue, repatriate and rehabilitate any child migrant labourers. These strategies in essence implement the Child Labour (Prohibition & Regulation) Act,

1986 (CLPRA), Delhi Shops and Establishment Act, 1954, Juvenile Justice (Care and Protection of Children) Act, 2000 and the Bonded Labour System (Abolition ) Act, 1976.

The Court reviewed and accepted the Delhi Action Plan which details a procedure for interim care and protection of rescued children, with a few changes. Under the CLPRA only children in hazardous jobs can be rescued, however the Court found that the Juvenile Justice Act 2000 would apply to children under the age of 14 as well as those aged 14-18 in non-scheduled occupation and process. In addition the recovery of the fine of Rs. 20,000/- does not have to wait for a conviction and should be utilised for the educational needs of the rescued child. Finally the responsibility of lodging a police complaint against an employer employing child labour would lie with the Delhi Police and not the Labour Department.

**SUMMARY JUDGEMENTS ON MARRIAGE****IN THE HIGH COURT OF MADHYA PRADESH****Nihal Singh vs. Ram Bai****AIR1987MP126****Decided on 03.10.1986****Hon'ble Judges:****T.N. Singh, J.**

A man who was not able to marry due to his caste arranged for a woman to be kept as his mistress for the price of Rs. 4,000/-. However, less than a month after the woman had arrived, a warrant was issued for the woman and she returned to her village. The man asked for a refund and when this was refused, he filed this petition.

The court considered that it was paramount that the constitutional prohibition of traffic in human beings, enshrined in Article 23 should be upheld. In addition, Article 21 secures dignified existence to a human being and Article 51A obligates citizens to "renounce practices derogatory to the dignity of women". International law also prohibits slavery and servitude and ensures dignity to all human beings. Therefore even though such a contract may be sanctioned by caste-custom it is in violation of the constitutional injunction and therefore the contract is void ab initio. As such a contract is unenforceable, a suit based on such a contract cannot be entertained by any court of law. The suit was therefore dismissed and copies of the judgement should be sent to various authorities and measures were also directed to be taken to educate the rural masses in the constitutional imperatives.

**IN THE SUPREME COURT OF INDIA****Chandrika Prasad Yadav vs. State of Bihar and Others****(1991)4SCC177****Decided on 13.02.2009****Hon'ble Judges:****S.B. Sinha and Mukundakam Sharma, JJ.**

The appellant alleged that his 14 year old daughter had been kidnapped by her uncle who intended to marry her. During the investigation, the victim was recovered and placed in a Women's Protection Home. The appellant was aggrieved that he, being the natural guardian was not awarded custody and that the court was delaying the girls stay at the Home while they were waiting for a medical



report. It was then discovered that the victim girl was missing from the Home. The Court was distressed to learn that minor victim girl could go missing without the knowledge of the managing authority and that there was practically no security. It was also concerned that such an incident was a regular affair and that although the police were informed immediately thereafter, they did not take action immediately. The State Authority is duty bound to see that all of its welfare measures are being carried out effectively and meaningfully but it has failed to comply with its responsibility. It is for these reasons that care and protection homes are becoming places for trafficking of women and girls. Given the gravity of the situation, the court ordered that a proper and detailed inquiry should be held by the Hon'ble Chairman of Bihar Human Rights Commission on the functioning and management of the Home and on the whereabouts of the victim girl. The report should also indicate the reasons why the police have failed to trace the girl and the status of the investigation.

**IN THE HIGH COURT OF DELHI**

**Association for Social Justice & Research**

**vs. Union of India and Others**

**AIR1987MP126**

**Decided on 13.05.2010**

**Hon'ble Judges:**

**A.K. Sikri, A. Bharihoke, JJ.**

A father married his 11–12 year old daughter to an adult man, the petitioner, an NGO intervened. The father and husband were arrested and the girl was placed in a Child Home. The father and “husband” argued that no money had been exchanged and that the girl would have a better life in marriage as the father was a labourer with a low income. The Court held that the evil of child marriage continues often due to poverty, culture, tradition and values based on patriarchal norms but are also because of a low-level of education of girls, lower status given to the girls and considering them as financial burden and social customs. Under the Child Marriage Act 2006 the marriage of a minor girl (any girl less than 18 years old) is null and void (section 12(a)). Therefore the marriage is invalid, unless the girl decides otherwise when she reaches 18 years of age. The girl will therefore stay with her parents until she is 18, at which point she can decide whether to accept this marriage or not.

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**PART III**  
**JUDGEMENTS ON SEXUAL**  
**EXPLOITATION**

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**IN THE SUPREME COURT OF INDIA**

**Gaurav Jain and Supreme Court Bar Association vs.  
Union of India & Others**

AIR1998SC2848, [1998]2SCR493,

Decided On: 30.03.1998

**Hon'ble Judges:**

Sujata V. Manohar, S.P. Kurdukar and D.P. Wadhwa, JJ.

**JUDGEMENT**

- 1 This is a somewhat unusual review petition filed by the Supreme Court Bar Association and supported by Gaurav Jain, the original petitioner, in respect of a decision of a Bench of two judges of this court, Ramaswamy and Wadhwa, JJ. in writ petition (C) No. 824 of 1988, Gaurav Jain vs. Union of India & Ors. and reported in. By an order dated 5th of January, 1998 this review petition has been directed to be heard by a Bench of three judges of this Court. Hence the petition has been placed before us.
- 2 The original writ petition under Article 32 of the Constitution was filed as a public interest litigation by Gaurav Jain, an advocate of this Court. In the writ petition, the petitioner had asked for establishment of separate educational institutions for the children of prostitutes and for various other reliefs concerning children of prostitutes. The petition was heard and disposed of by a Bench of two judges - Ramaswamy and Wadhwa, JJ. In the judgement delivered by Ramaswamy, J., apart from a discussion of the plight of prostitutes and their children, various directions have been given, including directions for the Constitution of a committee as set out in the judgement, to examine the plight of children of the prostitutes as also the problems of the prostitutes themselves and to devise ways and means for amelioration of their condition and for prevention and eradication of prostitution. On the other hand, Wadhwa, J. in his judgement, while agreeing with the directions given by Ramaswamy, J. pertaining to the children of the prostitutes, has not agreed to the directions given in respect of eradication of prostitution or succour and sustenance to be provided to them. He has stated:

“The committee in its report which runs into over 100 pages has only referred in two paragraphs, while examining target

group, as to who are the prostitutes. Apart from this I do not find there is any discussion in the report of the Committee towards eradication of prostitution. As to what should be the scheme to be evolved to eradicate prostitution, i.e. the source itself; the basics; and what succour and sustenance can be provided to the fallen victims of flesh trade was not a question agitated in the proceedings. Certainly no one can dispute that evil of prostitution must be curbed. It is the mandate of the Constitution which prohibits traffic in human beings....

I am not entering into the scope and width of public interest litigation but when the issue has not been squarely raised, concerned parties not informed, pleadings being not there, it may not be correct to embark upon that task and to give interpretation of the law applicable thereto and that too without hearing the parties when the issue is so profound certainly involving the issue is so profound certainly involving hearing of the Union of India and State Governments with respect to their problems.

Thus considering the substratum of the judgement prepared by my learned brother relating to children of the prostitutes and establishment of the juvenile homes I would concur with the directions being issued by him in his order. *I would, however, record my respectful dissent on the question of prostitution and the directions proposed to be issued on that account and also, in the circumstances of the case, what my learned brother has to say on the directions proposed to be issued referring to the provisions of Articles 142 and 145(5) of the Constitution"*

[underlining ours]

- 3 Despite this clear dissent voiced by his brother judge, Ramaswamy, J. has given directions relating to prostitution and its eradication. He has held that under Article 32 of the Constitution, when a public interest litigation is launched, it cannot be considered as adversorial. It involves cooperation between the State and the Court. Had it been an adversorial dispute, in view of the dissent expressed by his brother judge, he would have referred the matter to a three judge Bench in respect of the directions on which he and his brother judge had differed. However, since the petition was public interest litigation and was not adversorial in nature, and since the

matter was pending for nearly a decade, if a reference were to be made to a three-judge Bench, it may be further delayed. Therefore, under Article 142 he could issue directions to enforce his order in its entirety even in respect of that portion of the order from which his brother judge had dissented, in order to do complete justice in the case. By availing of Article 142, a Single Judge sitting in a Division Bench of two judges has issued directions singly although there is a difference of opinion between him and his brother judge. It is this part of his order which is sought to be reviewed on the ground that it discloses an error apparent on the face of the record.

- 4 Article 145(1) of the Constitution provides that subject to the provisions of any law made by Parliament, the supreme Court may, from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the court. The Supreme Court Rules have been framed under this provision. Under clause (2) of Article 145, subject to the provisions of clause (3), rules made under this Article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts. Clause (5) of Article 145 provides as follows:

“145(5): No judgement and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a judge who does not concur from delivering a dissenting judgement or opinion.”

- 5 In view of Article 145(5) the concurrence of a majority of Judges present at the hearing of a case is necessary for any judgement or order. When a Bench consists of two judges and they differ, the correct procedure is to refer the matter to the Chief Justice for constituting a larger Bench. Under Order VII Rule 1 of the Supreme Court Rules, 1966, subject to the other provisions of these rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice subject to certain provisos. Rule 2 of Order VII provides that where, in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it. Order XXXV deals with applications for enforcement of fundamental rights

under Article 32 of the Constitution. Rule 1 of Order XXXV provides as follows:

“1.(1): Every petition under Article 32 of the Constitution shall be in writing and shall be heard by a Division Court of not less than five Judges provided that a petition which does not raise a substantial question of law as to the interpretation of the Constitution may be heard and decided by a Division court of less than five Judges, and, during vacation, by the Vacation Judge sitting singly.”

6 Rules 10(1) and (2) of Order XXXV are as follows:

“10(1) Unless the Court otherwise orders, the rule nisi together with a copy of the petition and of the affidavit in support thereof shall be served on the respondent not less than twenty-one days before the returnable date. The rule shall be served on all persons directly affected and on such other persons as the Court may direct.

(2) Affidavits in opposition shall be filed in the Registry not later than four days before the returnable date and affidavits in reply shall be filed within two days of the service of the affidavit in opposition.”

7 Therefore, counter affidavits can be filed by the respondents in a public interest litigation, and further affidavits in rejoinder etc. can also be filed.

8 There is no provision under Order XXXV for any special procedure in respect of a public interest petition under Article 32. The petition will have to be served on the respondents who have a right to file a counter affidavit. Although the proceedings in a public interest litigation may not be adversarial in a given case, there can clearly be different perceptions of the same problem or its solution and the respondents are entitled to put forth their own view before the Court which may or may not coincide with the view of the petitioner. The court may come to a view different from that of any of the parties. Therefore, even in a public interest litigation, if the members of the Bench hold different views, the provisions of Article 145(5) will apply and the matter will have to be decided by a majority. When a Bench consists of two judges and they differ, the matter must necessarily be referred to the Chief Justice for constituting a larger Bench. In fact this legal position is expressly noted by Ramaswamy,

J. However, he has taken the view that despite the provisions of Article 145(5), he can take the assistance of Article 142 for the purpose of issuing directions even though his brother judge has differed from these directions.

- 9 We do not find anything in Article 142 which enables the court to do so. Article 142 provides as follows:
- “142. Enforcement of decrees and orders of Supreme court and orders of Supreme Court and orders as to discovery, etc.
- (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the president may by order prescribe.
- (2) ...”
- 10 It does not and cannot override Article 145(5). The decrees or orders issued under Article 142 must be issued with the concurrence of the majority of judges hearing the matter. In the case of *Prem Chand Garg and Anr. vs. Excise Commissioner, U.P. and Ors.* a Bench of five judges of this Court considered a Rule made by this Court providing for imposition of terms as to costs and as to giving of security in a petition under Article 32. The Rule was sought to be justified, *inter alia*, on the ground that the powers conferred on this Court under Article 142 were very wide and could not be controlled by Article 32. Negating this contention, this Court said, “The powers of this Court under Article 142(1) are no doubt very wide and they are intended and would be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties must not only be consistent with the fundamental rights guaranteed by the Constitution but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. Therefore, we do not think it would be possible to hold that Article 142(1) confers upon this Court powers which can contravene the provisions of Article



32". Similarly, powers conferred by Article 142(1) also cannot contravene the provisions of Article 145(5). Article 142 would not entitle a Judge sitting on a Bench of two judges, who differs from his colleague to issue directions for the enforcement of his order although it may not be the agreed order of the Bench of two judges. If this were to be permitted, it would lead to conflicting directions being issued by each judge under Article 142, directions which may quite possibly nullify the directions given by another judge on the same Bench. This would put the court in an untenable position. Because if in a Bench of two judges, one judge can resort to Article 142 for enforcement of his directions, the second judge can do likewise for the enforcement of his directions. And even in a larger Bench, a judge holding a minority view can issue his order under Article 142 although it may conflict with the order issued by the majority. This would put this Court in an indefensible situation and lead to total confusion. Article 142 is not meant for such a purpose and cannot be resorted to in this fashion.

- 11 The learned Judge is in error in resorting to Article 142 for the purpose of enforcement of his directions although his brother judge has dissented from those directions. The justification which is put forward for resorting to Article 142 is that reference to a larger Bench would cause delay. This cannot be a ground for not following the provisions of the Constitution under Article 145. Whenever a matter has to be referred to a larger Bench, there is bound to be some delay. But such a reference is necessary in the interest of justice. It is necessary that the Court speaks with one voice and that voice is the voice of the majority as propounded in Article 145(5). Only then can its orders be enforced. When two judges differ, the matter will have to be decided by a larger Bench.
- 12 We, therefore, allow this review petition. The directions given by the learned judge relating to prostitution and/or its amelioration or eradication or set aside. This, however, should not be understood as preventing the Union or State Governments from formulating their own policies in this area or taking measures to implement them. His observations relating to the use of Article 142 in this connection are also set aside and the question of giving any directions in relation to prostitution, its eradication or amelioration will have to be placed before a larger bench if any directions are required to be given in that connection by this Court. The matter should be placed before

the Hon'ble the Chief Justice for considering whether a larger Bench should be constituted for this purpose.

- 13 In view of this order, the application filed by the Union of India - 1.A. No. 1 is not pressed. It is accordingly disposed of.

**IN THE SUPREME COURT OF INDIA**

**Smt. Devki alias Kala vs. State of Haryana**

AIR1979SC1948, [1980]1SCR91

Decided On: 24.07.1979

**Hon'ble Judges:**

A.D. Koshal, D.A. Desai and V.R. Krishna Iyer, JJ.

**JUDGEMENT**

- 1 Parvati, an unsophisticated girl of 17 was wending her way home at about sunset along a public street in the artless town of Sitalpur in Bihar when Smt. Devki, the petitioner before us, with diabolic design, swooped down and snatched her into a taxi-cab and blitzed away. The weeping victim was medicated into unconsciousness, removed to Dhanbad and further on, to destination Haryana. Tragically, where tourists abound, satellite industries in female flesh flourish, unless the State crusades with militant zeal to stamp out this terrible vice. Anyway, Parvati, by now enslaved in & village villa, was offered for marital sale to affluent lecherous youths. The damsel in distress desperately escaped through a half-ajar door and eventually landed in a police station. The police investigation unravelled the pathetic story and ended up in a case, conviction, appeal, confirmation and, finally, in this special leave petition to this Court which is the last refuge of every vanquished litigant.
- 2 Confronted by concurrent findings of guilt, counsel for the petitioner gave up his attack on the conviction and concentrated his fire on the sentence, which, in this case, was three years' rigorous imprisonment. For what? For abducting a teenage girl and forcing her into sexual submission with commercial object, a racket which has become an enormous lational menace, notwithstanding the constitutional concern for the weaker sex. Counsel dared to urge that the Probation of Offenders Act should be ex-tended to this abominable culprit who had shown sufficient expertise in the art of abduction, seduction and sale of girls to others who offer a tempting price. The features of this case show that the petitioner suddenly descended in a taxi-cab and kidnapped the young woman, and when she cried out, administered the potion which rendered her unconscious, Furthermore, a well laid-out plan is discernible when we see the geographical spread of the crime.

From a small town in Bihar, the girl is despatched to Dhan-bad and from there, via Delhi, to Haryana, lodged in a house where young men were asked to view her for obvious immoral purposes. It is an insulting stultification of the ameioratory legislation viz. Probation of Offenders Act to extend its considerate provisions to such anti-social, specialist criminals. All that we can do is to reject the plea with indignation and follow it up with an appeal to the State Governments of Bihar and of Haryana to put a special squad on the trail and hound out every such offender so that the streets of our towns and cities may be sanitised and safe after sunset for Indian womanhood Dismissed.

**IN THE SUPREME COURT OF INDIA**

**The State of Uttar Pradesh vs. Kaushaliya and Others**

AIR1964SC416, [1964]4SCR1002

Decided On: 01.10.1963

**Hon'ble Judges:**

J.C. Shah, K. Subba Rao, K.N. Wanchoo, P.B. Gajendragadkar and Raghubar Dayal, JJ.

**JUDGEMENT**

- 1 These six appeals filed by certificates granted by the High Court of Judicature at Allahabad raise the question of the vires of section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956), hereinafter called the Act.
- 2 The relevant facts may be briefly stated. The respondents are alleged to be prostitutes carrying on their trade in the City of Kanpur. On receiving information from the Sub-Inspector of Police, who is not a Special Police Officer, the City Magistrate, Kanpur, issued notices to the respondents under section 20(1) of the Act to show cause why they should not be required to remove themselves from the places where they were residing and be prohibited from re-entering them. The respondents received the notices and filed objections claiming that the proceedings were not legally maintainable. The learned City Magistrate repelled the said objections. Against the orders of the Magistrate the respondents went up in revision to the Additional Sessions Judge Kanpur, but the same were dismissed. Thereafter the respondents preferred revisions to the High Court of Judicature at Allahabad and the said High Court allowed the revision petitions and set aside the proceedings pending against the respondents in the Court of the City Magistrate, Kanpur. The High Court held that section 20 of the Act abridged the fundamental rights of the respondents under Art. 14 and sub-clause (d) and (e) of Art. 19(1) of the Constitution. After obtaining certificates for leave to appeal from the High Court, the present appeals have been preferred by the State.
- 4 The first question raised is whether the information received enabling a Magistrate under section 20 of the Act to make the enquiry provided thereunder should be only from a special police officer designated under section 13 of the Act. Section 13 of the Act

says that there shall be for each area to be specified by the State Government in this behalf a special police officer appointed by or on behalf of that Government for dealing with offences under this Act in that area. The post of special police officer is created under the Act for dealing with offences under the Act, whereas section 20 does not deal with offences. That apart, the expression used in section 20, namely, "on receiving information" is not expressly or by necessary implication limited to information received from a special police officer. If the Legislature intended to confine the expression "information" only to that given by a special Police officer, it would have specifically stated so in the section. The omission is a clear indication that a particular source of information is not material for the application of the section. There is an essential distinction between an investigation and arrest in the matter of offences and information to the Magistrate : the former, when dealing with women, has potentialities for grave mischief and, therefore, entrusted only to specific officers, while mere giving of information would not have such consequences, particularly when, as we would indicate later, the information received by the Magistrate would only start the machinery of a judicial enquiry. We therefore, hold, giving the natural meaning to the expression "on receiving information", that "information" may be from any source.

- 5 The next question is whether section 20 of the Act offends Art. 14 of the Constitution. It is stated that the power conferred on the Magistrate under section 20 of the Act is an uncanalised and uncontrolled one, that he acts thereunder in his executive capacity, that the said section enables him to discriminate between prostitute and prostitute in the matter of restricting their movements and deporting them to places outside his jurisdiction, and that it also enables him on flimsy and untested evidence to interfere with the lives of respectable women by holding them to be prostitutes and, therefore, it violates Art. 14 of the Constitution. So stated, the argument appears to be plausible, but a closer scrutiny of the section and the connected sections not only reveals a clearcut policy but also the existence of effective checks against arbitrariness. Let us at the outset scrutinise the provisions of the Act. The preamble of the Act shows that the Act was made to provide in pursuance of the International Convention signed at New York on May 9, 1950, for the suppression of immoral traffic in women and girls. The short title of the Act says that the Act may be called "The Suppression

of Immoral Traffic in Women and Girls Act, 1956". Though the preamble as well as the short title shows that the Act was intended to prevent immoral traffic in women and girls, the other sections of the Act indicate that it was not the only purpose of the Act. Section 2(b) defines "girl" to mean a female who has not completed the age of twenty-one section 2(j), "woman" to mean a female who has completed the age of 21 years, section 2(e), "prostitute" to mean a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind, and section 2(f), "prostitution" to mean the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind. There are provisions in the Act for punishing men who run brothels and who procure girls and women for prostitution, for punishing women and girls who seduce or solicit for the purpose of prostitution in public places, for placing the rescued women and girls in detention in protection homes, for closure of brothels and eviction of offenders from premises, for restricting the movements of prostitutes and even for deporting them to places outside the jurisdiction of the Magistrate, Section 7(1) provides for the punishment of a prostitute, if she carries on prostitution in any premises which are within a distance of two hundred yards of any place of public religious worship, educational institution, hostels, hospitals, nursing home or such other public place or any kind notified in that behalf by the Commissioner of Police or the District Magistrate, as the case may be. Section 8 prohibits seducing or soliciting for purpose of prostitution in any public place or within sight of, and in such manner as to be seen or heard from, any public place whether from within any building or house or not, and makes such soliciting or seducing an offence under the Act. Section 18 provides for the closure of brothels and eviction of offenders from the premises, if such premises are within a distance of two hundred yards from a public place mentioned in section 7(1) and are used or run as a brothel by any person or used by prostitutes for carrying on their trade. The Act was conceived to serve a public social purpose, viz, to suppress immoral traffic in women and girls, to rescue fallen women and girls and to prevent deterioration in public morals. The Act clearly defines a "prostitute", and gives definite indications from which places prostitutes should be removed or in respect whereof their movements should be restricted.

- 6 With this policy in mind, let us now give close look to the provisions of section 20(1) of the Act. The following procedural steps are laid down in section 20 of the Act : (1) the enquiry is initiated by a Magistrate on his receiving the requisite information that a woman a girl is a prostitute; (2) he records the substance of the information; (3) he gives notice to the woman or girl to show cause; (4) he sends, along with the notice, a copy of the record; (5) he shall give the woman or girl an opportunity to adduce evidence on two points, namely, (i) whether she is a prostitute, and (ii) whether in the interests of the general public should be required to remove herself from the place where she is residing or which she is frequenting; (6) the Magistrate shall give his findings on the said questions, and on the basis thereof, he makes the appropriate order; and (7) the disobedience of the order entails punishment of fine.
- 7 It is argued that the enquiry is not in respect of "offences", though disobedience of an order made thereunder may entail punishment of fine, and, therefore, the order is one made in an administrative capacity.... The fact that the enquiry does not relate to an "offence" is not decisive of the question whether the Magistrate is functioning as a court. There are many proceedings under the Code of Criminal Procedure, such as those under sections 133, 144, 145 and 488 which do not deal with offences but still it is never suggested that a Magistrate in making an enquiry in respect of matters there under is not functioning as a court. We therefore, hold that in the circumstances the Magistrate must be held to be acting as a court. If the Magistrate is acting as a court, as we have held he is, it is obvious that he is subject to the revisional jurisdiction conferred under sections 435 and 439 of the Code of Criminal Procedure....
- 8 The next question is whether the policy so disclosed offends Art. 14 of the Constitution. It has been well settled that Art. 14 does not prohibit reasonable classification for the purpose of legislation and that a law would not be held to infringe Art. 14 of the Constitution if the classification is founded on an intelligible differentia and the said differentia has a rational relation to the object sought to be achieved by the said law. The differences between a woman who is a prostitute and one who is not certainly justify their being placed in different classes. So too, there are obvious differences between a prostitute who is a public nuisance and one who is not. A prostitute who carries on her trade on the sly or in the unfrequented part of the



town or in a town with a sparse population may be so dangerous to public health or morals as a prostitute who lives in a busy locality or in an over crowded town or in a place within the easy reach of public institutions like religious and educational institutions. Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralise the public morals, but, what is worse, to spread diseases not only affecting the present generation, but also the future ones. Such trade in public may also lead to scandals and unseemly broils. There are, therefore, pronounced and real differences between a woman who is a prostitute and one who is not, and between a prostitute, who does not demand in public interests any restrictions on her movements and a prostitute, whose actions in public places call for the imposition of restrictions on her movements and even deportation. The object of the Act, as has already been noticed, is not only to suppress immoral traffic in women and girls, but also to improve public morals by removing prostitutes from busy public places in the vicinity of religious and educational institutions. The differences between these two classes of prostitutes have a rational relation to the object sought to be achieved by the Act. Section 20, in order to prevent moral decadence in a busy locality, seeks to restrict the movements of the second category of prostitutes and to deport such of them as the peculiar methods of their operation in area may demand.

- 10 A Division Bench of the Bombay High Court, in *Begum vs. State*, had to consider the same question now before us. It held that the provisions of section 20 of the Act would not be hit by Art. 14 of the Constitution, though it held that the provisions of section 20 of the Act which enable a Magistrate to direct a prostitute to remove herself from the place where she is residing to a place without the local limits of his jurisdiction was an unreasonable restriction upon the fundamental right guaranteed under Art. 19(1) (d) and (e) of the Constitution. We agree with the High Court in so far as it held that the section does not offend Art. 14 of the Constitution, but we can not accept the view expressed by it in respect of Art. 19(1) (d) and (e) thereof. We shall consider this aspect at a later stage.
- 11 In *Shama Bai vs. State of U. P.*, *Sahai J.*, though he dismissed the writ petition without giving notice to the other party, made some

observations indicating his view that the said provision prima facie offends Art. 14 of the Constitution. For the reasons already stated by us, we do not agree with this view. We, therefore, hold that section 20 of the Act does not infringe Art. 14 of the Constitution.

- 12 Now coming to Art. 19(1) (d) and (e) of the Constitution, the question that arises is whether section 20 of the Act imposes an unreasonable restriction on girls and women leading a life of prostitution. To state it differently, does section 20 of the Act impose reasonable restrictions on the exercise of the fundamental right of the prostitutes under Art. 19(1) (d) and (e) of the Constitution in the interests of the general public. Under Art. 19(1)(d) the prostitute has a fundamental right to move freely throughout the territory of India; and under sub-clause (e) thereof to reside and settle in any part of the territory of India. Under section 20 of the Act the Magistrate can compel her to remove herself from place where she is residing or which she is frequenting to places within or without the local limits of his jurisdiction by such route or routes and within such time as may be specified in the order and prohibit her from re-entering the place without his permission in writing. This is certainly a restriction on a citizen's fundamental right under Art. 19(1) (d) and (e) of the Constitution. Whether a restriction is reasonable in the interests or the general public cannot be answered on a priori reasoning; it depends upon the peculiar circumstances of each case. Mahajan J., as he then was, speaking for the Court in *Chintaman Rao vs. The State of Madhya Pradesh* ([1950] S.C.R. 759, 763) succinctly defined the expression "reasonable restrictions" thus :

"The phrase "reasonable restriction" connotes the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates."

- 13 A fairly exhaustive test to ascertain the reasonableness of a provision is given by Patanjali Sastri C.J. in *The State of Madras vs. V. G. Row* ([1952] S.C.R. 597, 607). Therein the learned Chief Justice observed thus :

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard,

or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.”

- 14 If we may say so, with respect, this passage summarised the law on the subject fully and precisely,. The reasonableness of a restriction depends upon the values of life in a society, the circumstances obtaining at a particular point of time when the restriction is imposed, the degree and the urgency of the evil sought to be controlled and similar others. If in a particular locality the vice of prostitution is endemic degrading those who live by prostitution and demoralising others who come into contract with them, the Legislature may have to impose severe restrictions on the right of the prostitute to move about and to live in a house of her choice. If the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. It cannot be gainsaid that the vice of prostitution is rampant in various parts of the country. There cannot be two views on the question of its control and regulation. One of the objects of the Act is to control the growing evil of prostitution in public places. Under section 20 of the Act the freedom of movement and residence are regulated, but, as we have stated earlier, an effective and safe judicial machinery is provided to carry out the objects of the Act. The said restrictions placed upon them are certainly in the interests of the general public and, as the imposition of the restrictions is done through a Judicial process on the basis of a clearly disclosed policy, the said restrictions are clearly reasonable.
- 15 It is said that the restrictions on prostitutes, though they may be necessary, are excessive and beyond the requirements the eradication of the evil demands. The movements of prostitutes, the argument proceeds, may be controlled, but that part of the section which enables the Magistrate to deport them outside his jurisdiction is far in excess of the requirements.... Once it is held that the activities of a prostitute in a particular area, having regard to the conditions obtaining therein, are so subversive of public morals

and so destructive of public health that it is necessary in public interest to deport her from that place, we do not see any reason why the restrictions should be held to be unreasonable. Whether deportation out of the jurisdiction of the Magistrate is necessary or not depends upon the facts of each case and the degree of the demoralising influence a particular prostitute is exercising in a particular locality. If in a particular case a Magistrate goes out of the way and makes an order which is clearly disproportionate to the evil influence exercised by a particular prostitute, she has a remedy by way of revision to an appropriate court.

- 16 The Division Bench of the Bombay High Court in *Begum vs. State* no doubt held that the portion of section 20 of the Act which enables the Magistrate to direct a prostitute to remove herself from the place where she is living to a place without the local limits of his jurisdiction unreasonably encroaches upon the fundamental right guaranteed under Art. 19(1)(d) and (e) of the Constitution and is, therefore, invalid. For the aforesaid reasons, we cannot agree with this view.
- 17 We, therefore, hold that the provisions of section 20 of the Act are reasonable restrictions imposed in public interest within the meaning of section 19(5) of the Constitution and, therefore, do not infringe the fundamental rights of the respondents under Art. 19(1) (d) and (e) thereof.

**IN THE SUPREME COURT OF INDIA**

**Vishal Jeet vs. Union of India and others**

AIR1990SC1412, [1990]2SCR861,

Decided On: 02.05.1990

**Hon'ble Judges:**

S.R. Pandian and K. Jayachandra Reddy, JJ.

**JUDGEMENT**

- 1 This writ petition under Article 32 of the Constitution of India at the instance of an Advocate is filed by way of a Public Interest Litigation seeking issuance of certain directions, directing the Central Bureau of Investigation (1) to institute an enquiry against those police officers under whose jurisdiction Red Light areas as well Devadasi and Jogin traditions are flourishing and to take necessary action against such erring police officers and law breakers; (2) to bring all the inmates of the red light areas and also those who are engaged in 'flesh trade' to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a more dignified way of life and (3) to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into 'flesh trade' to protective homes and then to rehabilitate them.
- 2 The averments made in the writ petition on the basis of which these directions are prayed for can be summarised thus:
- 3 Many unfortunate teen-aged female children (hereinafter refer red to as 'the children') and girls in full bloom are being sold in various parts of the country, for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping that their children would be engaged only in household duties or manual labour. But those who are acting as pimps or brokers in the 'flesh trade' and brothel keepers who hunt for these teenaged children and young girls to make money either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into 'flesh trade'. Once these unfortunate victims are taken to the dens of prostitutes and sold to brothel keepers, they are shockingly and brutally treated and confined in complete seclusion in a tiny claustrophobic

room for several days without food until they succumb to the vicious desires of the brothel keepers and enter into the unethical and squalid business of prostitution. These victims though unwilling to lead this obnoxious way of life have no other way except to surrender themselves retreating into silence and submitting their bodies to all the dirty customers including even sexagenarians with plastic smile.

- 4 The petitioner has cited certain lurid tales of sex with sickening details alleged to have been confessed by some children and girls either escaped or rescued from such abodes of ill-fame. After giving a brief note on Devadasi system and Jogin tradition, the petitioner states that this system and tradition which are still prevailing in some parts of the country should be put to an end. The ultimate plea of the petitioner is that the young children and girls forcibly pushed into 'flesh trade' should be rescued and rehabilitated. With this petition, the petitioner has filed 9 affidavits said to have been sworn by 9 girls who claim to be living in the brothel houses, pleading for rescue and a list of names of 9 girls who are mortally afraid to swear the affidavits. Be it noted that no counter has been filed by any one of the respondents.
- 5 The matter is one of great importance warranting a comprehensive and searching analysis and requiring a humanistic rather than a purely legalistic approach from different angles. The questions involved cause considerable anxiety to the Court in reaching a q satisfactory solution in eradicating such sexual exploitation of children. We shall now examine this problem and address ourselves to the merits of the prayers.
- 6 No denying the fact that prostitution always remains as a running sore in the body of civilisation and destroys all moral values. The causes and evil effects of prostitution manning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large.
- 7 It is highly deplorable and heart-rending to note that many poverty stricken children and girls in the prime of youth are taken to 'flesh market' and forcibly pushed into the 'flesh trade' which is being

carried on in utter violation of all canons of morality, decency and dignity of humankind. There cannot be two opinions—indeed there is none—that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps.

- 8 Article 23 which relates to Fundamental Rights in Part III of the Constitution and which has been put under the caption ‘Right against exploitation’ prohibits ‘traffic in human beings and begar and other D similar forms of labour’ and provides that any contravention of Article 23(1) shall be an offence punishable in accordance with law. The expression ‘traffic in human beings’ is evidently a very wide expression including the prohibition of traffic in women for immoral or other purposes. Article 35(a)(ii) of the Constitution reads that notwithstanding anything in this Constitution, Parliament shall have, and the legislature of a State shall not have, power to make laws for prescribing punishment for those acts which are declared to be offences under this part. The power of legislation, under this article, is given to the Parliament exclusively, for, otherwise the laws relating to fundamental rights would not have been uniform throughout the country. The power is specifically denied to the state legislatures. In implementation of the principles underlying Article 23(1) the Suppression of Immoral Traffic in Women & Girls Act, 1956 (SITA for short) has been enacted under Article 35 with the object of inhibiting or abolishing the immoral traffic in women and girls.
- 9 In this connection, it is significant to refer Article 39 which relates to Directive Principles of State Policy’ under Part IV of the Constitution. Article 39 particularises certain objectives. Clause (f) of Article 39 was substituted by Forty-Second Amendment Act, 1976. Among the objectives mentioned under Clauses (e) and (f) of Article 39, we will confine ourselves only to certain relevant objectives under those two clauses which are sufficient for the purpose of this case. One of the objectives under Clause (e) of Article 39 is that the State should, in particular, direct its policy towards securing that the tender age of children are not abused. One of the objectives under Clause (f) is that the State should, in particular, direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. These objectives reflect the great anxiety of the Constitution makers to protect and safeguard the interests and welfare of the children of

our country. The Government of India has also, in pursuance of these constitutional provisions of Clauses (e) and (f) of Article 39, evolved a national policy for the welfare of the children.

- 10 It will be apposite to make reference to one of the principles, namely, principle No. (9) formulated by the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1959. The said principle reads thus:

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

- 11 Before the adoption of SITA, there were enactments in some of the states for suppression of immoral traffic, but they were not uniform nor were they found to be adequately effective. Some states did not have any law on the subject.
- 12 With the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in a convention for suppression of traffic in persons for exploitation for immoral purposes. Pursuant to the signing of that convention on May 9, 1950, our Parliament has passed an Act called "Suppression of Immoral Traffic in Women and Girls Act, 1956" which is now changed as "The Immoral Traffic (Prevention) Act, 1956" to which certain drastic amendments are introduced by the Amendment Acts of 46 of 1978 and 44 of 1986. This Act aims at suppressing the evils of prostitution in women and girls and achieving a public purpose viz. to rescue the fallen women and girls and to stamp out the evils of prostitution and also to provide all opportunity to these fallen victims so that they could become decent members of the society. Besides the above Act, there are various provisions in the Indian Penal Code such as Sections 366-A (dealing with procuration of minor girl), 366-B (dealing with offence of importation of girl from foreign country), 372 (dealing with selling of minor for purposes of prostitution etc.) and 373 (dealing with the offence of buying minor for purposes of prostitution etc.). The Juvenile Justice Act, 1986 which provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles contains a specific provision namely Section 13 which empowers a police officer or any other person or organisation authorised by the State Government in this behalf to take charge of any neglected juveniles and bring them before the Board constituted under this Act which



Board under section 14 has to hold an enquiry and make such orders in relation to the neglected juveniles as it may deem fit.

- 13 In spite of the above stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures to weed out the vices of illicit trafficking. This malady is not only a social but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.
- 14 In our view, it is neither practicable and possible nor desirable to make a roving enquiry through the CBI throughout the length and breadth of this country and no useful purpose will be served by issuing any such direction, as requested by the petitioner. Further, this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout.
- 15 This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Courts in such cases have to always take a serious view of this matter and inflict condign punishment on proof of such offences. Apart from legal action, both the Central and the State Government who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction.
- 16 Bhagwati, J. (as he then was) in *Lakshmi Kant Pandey vs. Union of India* while emphasising the importance of children has expressed his view thus:

It is obvious that in a civilised society the importance of child welfare cannot be over-emphasised, because the welfare of the entire community, its growth and development, depend on the

health and well-being of its children. Children are a 'supremely important national asset' and the future well-being of the nation depends on how its children grow and develop.

- 17 We, after bestowing our deep and anxious consideration on this matter feel that it would be appropriate if certain directions are given in this regard. Accordingly, we make the following directions:
1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.
  2. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women's organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations and associations etc., the main objects of the Advisory Committee being to make suggestions of:
    - (a) the measures to be taken in eradicating the child prostitution, and
    - (b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.
  3. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.
  4. The Union Government should set up a committee of its own in the line, we have suggested under direction No. (2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. etc. of the young fallen victims namely the children and girls and to make suggestions of amendments

to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

5. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.
  6. The Advisory Committee can also go deep into devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.
  7. The copies of the affidavits and the list containing the names of 9 girls are directed to be forwarded to the Commissioner of Police Delhi for necessary action.
- 18 We may add that we are not giving an exhaustive list of the members for the Constitution of the committee. Therefore, it is open to the concerned Government to include any member or members in the committee as it deems necessary.
- 19 We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, Tevadasi system and Jogin tradition and will also at the same time protect and safeguard the interests of the children by preventing of the sexual abuse and exploitation.
- 20 So far as the remaining prayer regarding rehabilitation of the children of prostitutes is concerned, we understand that a similar issue is raised in a separate writ petition bearing W.P. No. 824/88 pending before this Court and this Court is seized of the matter and also has given an interim direction on 15.11.1989 for setting up a committee to go into the question from various angles of the problems taking into consideration the different laws relevant to the matter and to submit its report. (Vide *Gaurav Jain vs. Union of India and Ors.* Therefore, we are not expressing any opinion on this prayer regarding the rehabilitation of the children of prostitutes.
- 21 With the above directions, the Writ Petition is disposed of.

**IN THE SUPREME COURT OF INDIA**

**Delhi Administration vs. Ram Singh**

AIR1962SC63, [1962]2SCR694

Decided On: 03.05.1961

**Hon'ble Judges:**

J.R. Mudholkar, K. Subba Rao and Raghubar Dayal, JJ.

**JUDGEMENT**

- 1 The only point for consideration in this appeal, by certificate granted by the High Court of Judicature at Punjab, is whether a police officer, who is neither a special police officer under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act CIV of 1956), hereinafter called the Act, nor a police officer subordinate to a special police officer, can validly investigate the offences under the Act.
- 5 Before dealing with the merits of the question for determination, we may set out the object of the enactment and the relevant provisions thereof. The Act was enacted in pursuance of the International Convention signed at New York on the 9th day of May, 1950, for the suppression of immoral traffic in women and girls. Section 2 deals with definitions and, according to its clause (i), 'special police officer' means a police officer appointed by or on behalf of the State Government to be in charge of police duties within a specified area for the purposes of the Act. Sections 3 to 9 create new offences and provide punishment for them. It is not necessary to detail the nature of the offences.
- 13 It is clear from the various provisions that the Act is a complete Code with respect to what is to be done under it. It deals with the suppression of immoral traffic in women and girls, a matter which has to be tackled with consideration, intelligence and understanding of the problem. This is evident from the provisions of clause (b) of sub-section (3) of section 13 which provides for the association of a non-official advisory body consisting of not more than five leading social welfare workers of that area (including women social welfare workers wherever practicable) with the special police officer in order to advise him on questions of general importance regarding the working of the Act.

- 14 The Act creates new offences, provides for the forum before which they would be tried and the orders to be passed on conviction of the offenders. Necessary provisions of the Code of Criminal Procedure have been adopted fully or with modifications. The Act provides machinery to deal with the offences created and its necessary implication must be that that new machinery is to deal with those offences in accordance with the provisions of the special Act and, when there is no specific provision in such Act, in accordance with the general procedure and that no other machinery is to deal with those offences. It does not appear reasonable that the investigation of offences would have been left unprovided and was to be done by the regular police, in accordance with the regular procedure laid down under the Code.
- 15 On the other hand, there are certain provisions which are such that the regular police cannot comply with them and thus they point to the conclusion that it is the special police officer alone who is to take any action which the police has to take in connection with the offences under the Act. Section 14 makes offences under the Act cognisable, which, according to the Code means that persons accused of those offences can be arrested without a warrant, and section 157 of the Code specially mentions that the investigating officer, if necessary, is to take measures for the discovery and the arrest of the offender; and yet, the power to arrest without a warrant is not given to the regular police, but under the proviso to this section, is to be exercised by the special police officer or under his direction or guidance or subject to his prior approval. The provisions of proviso (iii) correspond to the provision of section 57 of the Code and others refer to special circumstances in which a police officer not below the rank of an inspector specially authorised by the special police officer can arrest without warrant.
- 16 Section 15 provides for searches without warrant, by the special police officer. This section does not specifically state that the special police officer alone will search without warrant, but it is clear from the provisions of this section that officers of the regular police force will not search without warrant and thus will not exercise the power given under section 165 of the Code. All the provisions of section 15 correspond to those of section 165 of the Code.
- 17 Further, in view of sub-section (2) of section 15, the special police officer is required to include at least one woman among the search witnesses. There is no such restriction in section 103 of the Code.

If a regular police officer is to conduct search in pursuance of the powers conferred under section 165 of the Code, he is not bound to include a woman among the search witnesses. Further, sub-sections (4) and (5) of section 15 authorise a special police officer to remove any girl found in the premises searched, if she be under twenty-one years of age and is carrying on prostitution. Such a girl is to be produced before the appropriate Magistrate. The ordinary regular police officer conducting search under section 165 of the Code, will not be able to do anything with respect to such a girl found in the premises searched by him. These provisions clearly indicate that the regular police officers are not to exercise any powers in connection with the offences and the other purposes of this Act.

- 18 The entire police duties in connection with the purposes of the Act within a certain area have been put in the charge of a special police officer. There must be a definite purpose behind the provision of appointing a police officer in charge of the police duties within a specified area for the purpose of this Act. If the ordinary police can also perform the police duties for the purposes of the Act, there can be no special reason for making the provision for the appointment of a special police officer. The expression 'police duties' will include all the functions of the police in connection with the purpose of the Act and in the special context of the Act they will include the detection, prevention and investigation of offences and the other duties which have been specially imposed on them under the Act.
- 21 The suggestion that the special police officer would be very heavily worked in case he had to perform all the ordinary duties of the police connected with the investigation of offences in addition to the duties conferred on him under the Act, does not go far in putting a different interpretation on the powers of the special police officer. He is to be assisted by his sub-ordinate police officers. They can investigate both under the implication of the provisions of section 13, as they are to assist the special police officer, and also on deputations by the special police officer, in view of section 157 of the Code.
- 23 If the power of the special police officer to deal with the offences under the Act, and therefore to investigate into the offences, be not held exclusive, there can be then two investigations carried on by two different agencies, one by the special police officer and the

other by the ordinary police. It is easy to imagine the difficulties which such duplication of proceedings can lead to. There is nothing in the Act to co-ordinate the activities of the regular police with respect to cognisable offences under the Act and those of the special police officer.

- 24 The special police officer is a police officer and is always of the rank higher than a Sub-Inspector and therefore, in view of section 551 of the Code, can exercise the same powers throughout the local area to which he is appointed as may be exercised by the officer in charge of a police station within the limits of his station.
- 25 We are therefore of opinion that the special police officer is competent to investigate and that he and his assistant police officers are the only persons competent to investigate offences under the Act and that police officers not specially appointed as special police officers cannot investigate the offences under the Act even though they are cognisable offences. The result is that this appeal by the Delhi Administration fails and is hereby dismissed.

**Mudholkar, J.**

- 26 The point which arises for consideration in this appeal is whether a charge-sheet presented by a station-house officer alleging against the respondent certain offences under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. CIV of 1956) (hereinafter called the Act) is bad because the investigation into those offences was carried out not by a special police officer appointed under the Act but by the station house officer.
- 28 The High Court, following the decision in *Kuppammal, In re* [I.L.R. [1959] Mad. 345.] held that an offence under the Act must be investigated only by one of the officers mentioned in section 13 and that a charge-sheet based upon the investigation made by any other police officer is bad and must be quashed.
- 29 In my opinion the view taken by the Madras High Court and accepted by the Punjab High Court is untenable. The Act creates certain new offences, prescribes the placing of certain restrictions upon persons found guilty of those offences, provides for the appointment of a special police officer and for the constitution of an Advisory Board, confers certain special powers upon the special police officer, empowers Magistrates to order the closure of brothels and eviction of the offenders from the premises occupied

by them as well as for the removal of prostitutes from any place and also makes a provision for the establishment of protective homes as well as empowers Magistrates to order detention of women and girls in such protective homes in certain circumstances. In addition it provides for the making of rules.

- 30 According to my brother Raghubar Dayal, J., since the Act creates new offences and prescribes the procedure for dealing with them it is a complete code in itself. Therefore, according to him, to that extent the provisions of the Act must prevail over those of the Code of Criminal Procedure, 1898. Further according to him, since the Act provides for the appointment of a special police officer for dealing with offences under this Act in the area within his jurisdiction, it is he and he alone who can investigate into an offence under the Act committed within that area.
- 35 Investigation, inquiry and trial of offences and definite stages in the process of bringing a delinquent to book. Each stage is distinct from the other and the legislature has made it quite clear in section 5 of the Code of Criminal Procedure itself that they are important enough to be mentioned specifically. To make the point clearer it would be useful to compare the provisions of sub-section (1) of section 13 of the Act with those of sub-sections (1) and (2) of section 5 of the Code of Criminal Procedure. While in the former, Parliament has merely used the words "dealing with offences under the Act" in the latter the words used are "investigating, inquiring into, trying or otherwise dealing with such offences." No doubt the expression "dealing with offences" would, according to its ordinary connotation, include the stages of investigation, inquiry and trial. But the legislature has specifically referred to the aforesaid three stages because of their importance and apparently for obviating any doubt as to its intention. When Parliament had before it the Code of Criminal Procedure and in particular the provisions of section 5 and section 156 thereof it would have used in sub-section (1) of section 13 of the Act language similar to that used by it in sub-section (2) of section 5, Criminal Procedure Code if it were its intention to include in sub-section (1) of section 13 matters like investigation, inquiry and trial or any of them. It would, therefore, be legitimate to infer that when Parliament spoke in section 13(1) of a special police officer being empowered to deal with offences under the Act it did not intend to confer upon him the power to investigate into an offence under the Act.



- 37 I would like to make it clear that it is not my view that a special police officer appointed under the Act cannot have the power to investigate into an offence under the Act but what I hold is that he does not derive such power from sub-section (1) of section 13 of the Act. It is only under section 551 of the Code of Criminal Procedure that he may be able to exercise the power to investigate into an offence under the Act.
- 40 The High Court of Punjab as well as the High Court of Madras have held not only that section 13(1) of the Act confers power upon special police officer to investigate into an offence under the Act but that the power conferred is exclusive. I am unable to appreciate how even assuming that the words "deal with offences" confer upon a special police officer the power to investigate into an offence under the Act and present a charge-sheet, the powers of an officer-in-charge of a station-house within whose jurisdiction an offence under the Act has been committed are excluded. There is not a whisper in section 13(1) of the Act of the exclusion of the powers of an officer-in-charge of a police station. It is suggested that unless it is so held a confusion will result because the special police officer as well as the officer-in-charge of a police station will each exercise his power to investigate into an offence under the Act.
- 41 I do not think that there would be a danger of such simultaneous exercise of the power to investigate by two officers. The offence will have to be registered at the police station within the limits of the jurisdiction of which the offence has taken place. Thereafter it would be investigated into by the officer at whose instance it was registered. If that officer happens to be a station-house officer the special police officer may take out the investigation from his hands or allow him to continue it. If the offence is registered at the instance of the special police officer, the station-house officer would be bound to know of it from the station-house records and would stay his hands.
- 42 Upon this view, therefore, I would allow the appeal, set aside the judgement of the High Court and of the Magistrate and remit the case to the latter for being dealt with according to law.
- 43 BY COURT : In accordance with the opinion of the majority, this appeal is dismissed.
- 44 Appeal dismissed.

**IN THE HIGH COURT OF DELHI**

**Shalu Rawal and Others vs. State of N.C.T. of Delhi and Others**

2003IIIAD(Delhi)552, 104(2003)DLT550,

Decided On: 09.04.2003

**Hon'ble Judges:**

Dalveer Bhandari and S.K. Agarwal, JJ.

**JUDGEMENT**

- 1 This petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 14.10.2000 passed by the learned Additional Chief Metropolitan Magistrate (for short ACMM), Delhi taking cognisance of offences emanating from FIR No. 445/2000 under Sections 3, 4, 5 & 8 of the Immoral Traffic (Prevention) Act, P.S. Rajouri Garden, New Delhi.
- 2 The facts as found by the learned ACMM are as under:-

At 3.45 p.m on 29.4.2000 Additional Station House Officer (for short 'Addl. SHO') police station Rajouri Garden, received an information from an informer that in "Bunny Thunny D Guys Den Beauty Parlour", A-1, Rajouri Garden, II floor, New Delhi flesh trade was being run by one Sandeep Suri, who has employed 6/7 girls for the purpose of sexual pleasure of the customers and if a raid was conducted the same could be detected. Addl. SHO P.S. Rajouri Garden brought this information to the notice of Additional Commissioner of Police (in short 'ACP') Rajouri Garden who in turn ordered to organise a raiding party. Accordingly the Addl SHO P.S. organised a raiding party consisting of Sub Inspector Satish Kumar, Sub Inspector Ritu Raj, Devender Purang, Sub Inspector Jagdish Kumar and Woman Head Constable Lata Kumari.
- 5 Thereafter, Addl SHO conducted the search of Shalu and recovered the two same currency notes of Rs. 500/- which had been earlier handed over to the decoy customer and seized the same through him. Thus Sandeep Suri in the garb of beauty parlour was in fact running a flesh trade. The manager of the parlour, Shalu who produced six girls for prostitution had committed offences under Sections 3,4, 5 & 7 Immoral Traffic (Prevention) Act. Inspector

Parvati Kujur sent the ruqqa through Sub Inspector Jagdish and got the case registered vide FIR No. 445 dated 29.4.2000 under Sections 3, 4, 5 & 7 Immoral Traffic (Prevention) Act, P.S. Rajouri Garden. The case was registered at 7.40 p.m. Sandeep Suri and seven girls were also arrested in this case. Sub Inspector Ajay Kumar took the accused persons vide DD No. 45-D dated 29.4.2000 for medical examination. The case file remained with the Addl. SHO P.S. Rajouri Garden till 11.5.2000 and later on the case was transferred to the crime branch.

- 6 Inspector Narinder Chawla made the request for cancellation of FIR and discharge of accused on the following material...
- 8 The case of the prosecution is that "D Guys Den" is used for prostitution. This is mentioned on the basis of the raid conducted by the police officials.
- 12 The learned ACMM in his order observed that from the material placed on record commission of offences under Sections 3,4,5 of Immoral Traffic (Prevention) Act 1956 against accused Sandeep Suri and accused Shalu and under section 8 of the Immoral Traffic (Prevention) Act 1956 are prima facie made out against other accused persons, namely, Rajni Madan, Ritu Tomer, Sapna, Rajani Sandhu, Vimal and Sheetal. He observed that in the interest of justice, cognisance of the said offences is taken. Accused persons were summoned with notice to their sureties to face trial for offences under the aforesaid provisions of the Act.
- 13 The learned counsel appearing for the petitioners challenged the order of the learned ACMM on various grounds. He submitted that issuing of the process in the said case on the allegations mentioned is manifestly erroneous and unsustainable. He also submitted that the learned ACMM has wrongly taken cognisance inspite of the fact that there was a cancellation report. He further submitted that the medical examination revealed that hymen of petitioners 1,2,3 were intact. Petitioner No. 1, 4 and 7 were menstruating on the date of the alleged incident and this fact itself was sufficient for the learned ACMM to be convinced that at that stage of their body they could not have been offered for sex.
- 14 Mr. K.T.S. Tulsi, learned Senior Counsel, appearing for the petitioners, placed reliance on the judgement of the Apex Court in Pepsi Foods vs. Special Judicial Magistrate in which it is mentioned

that summoning an accused is a serious matter and order must reflect application of mind to the nature of allegations and the evidence on record.

- 15 He also placed reliance on *State of Karnataka vs. Munnuswamy* 1977 SCC (Cri) 404. In this case, their Lordships of the Supreme Court observed that the High Court should exercise the powers to quash proceedings in cases where proceedings before court are being degenerated into a weapon of harassment or persecution.
- 16 Reliance has also been placed on *MCD vs. Ram Kishan Rohtagi and Others*, 1983 SCC (Cri) 115. In this case their Lordships observed that the court would be justified in quashing the order, if the court reaches the conclusion that the proceedings are inherently absurd and improbable, so that no prudent person can reach such a conclusion. The court also observed that if discretion in issuing process is capricious and arbitrary and based on no evidence, in that event proceedings should be quashed.
- 17 Learned counsel for the petitioners has also drawn our attention to the another case of Supreme Court *Ashok Chaturvedi and Others vs. Shitul H. Chanchani and Another*, (1998) SCC 698. It is observed in this case that when the complaint is vague and based on a bald allegation without an iota of material in support thereof, offence cannot be said to be made out, order of cognisance be quashed.
- 23 Mr. Subramaniam addressed the argument on the main concern of the Court belonging to Medical Report in which hymen of three girls have been shown as intact. He submitted that it is uncommon feature to conduct hymen test under ITP Act. In the written submissions filed by him, it is mentioned that hymen test has been conducted because of the influence, connection and pressure used by the family members of the accused persons. He questioned the veracity of the test. He referred to page 571 of *Forensic Medicine and Toxicology, Volume-II*, by J.B. Mukherjee. He submitted that it is a specialised job of the Specialist to conduct the hymen test. He again referred to page 75 of *Taylor's Principles and Practice of Medical Jurisprudence, 13th Edition*. It is mentioned that the hymen has got vast and various variances as even after several intercourses the hymen can still remain intact.
- 24 It is mentioned that cases are on record to show that, women may have intact hymen even after regular marital relationship;

with pregnancy the hymen gets ruptured, during full term delivery through vagina only. In case of Paris prostitutes as reported by K. Simpson in Taylor's (1965) 12th Edition, Vol-II, hymen were found to be intact. Hymen may not get ruptured even after abortion in early months. In case of sexual assault on very young children, hymen usually does not get ruptured owing to the depth of its situation, thick texture and narrowness of the vaginal canal.

- 25 He also referred to another leading book on the subject, Forensic Medicine and Toxicology, Volume-II, by J.B. Mukherjee. It is mentioned that even in the cases of those involved in prostitution the hymen had been found to be intact and the same is confirmed in various researches in Western Countries where the intact hymen is not a taboo at all.
- 26 In the written submissions, it is also mentioned that these days due to high risk of the contaminating diseases like, AIDS and other sexual diseases majority of the persons going to the prostitutes prefer oral sex. It may be pertinent to mention that the services offered to the decoy customer was of oral pleasure, therefore, this possibility cannot be ruled out that the accused petitioners whose hymen as allegedly shown as intact might be indulging only in oral sex.
- 30 Mr. Subramaniam submitted that it is the settled law that the Metropolitan Magistrate can reject the closure report on the basis of material on record and on the basis of material on record itself can take cognisance of the offence and proceed in accordance with law. He submitted that the entire defence set up by the accused/petitioners that Sub-inspector Ritu Raj has asked for sexual favour is entirely baseless and does not inspire any credibility.
- 31 Mr. Subramaniam, learned senior counsel submitted that under Section 190(1)(b), learned ACMM was empowered to take cognisance of any offence under Section 204. Reliance has been placed on the following judgements:  
H.M. Rishbud vs. State of Delhi,  
Abhinandan Jha & Ors. vs. Dinesh Mishra, AIR 1968 117;  
H.S. Bains vs. State,  
M/s. Indian Carat Pvt. Ltd. & 16 Ors. vs. State of Karnataka,

State of Haryana vs. Bhajan Lal,

K.L.Chawla vs. S.M. Agarwal & Ors., 1987 (2000) DLT 202.

- 32 He submitted that the law is well-settled that the ACMM can ignore the cancellation report or the conclusion arrived at by the Investigating Officer and independently apply his mind to take cognisance in exercise of his power under Section 190(1)(b) Cr.P.C. and direct the issue of processes to the accused. It is submitted that the powers under Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure should be exercised sparingly in exceptional cases and reference has been made in the following judgements:

State of U.P. vs. O.P. Sharma,

Smt. Rashmi Kumar vs. Mahesh Kumar Bhada, JT 1996 (II) 175;

State of Kerala and Ors. vs. O.C. Kuttan & Ors.,

Satvinder Kaur vs. State of NCT of Delhi, JT 1999(3) 25;

K.M. Mathew vs. K.A. Abraham & Ors.,

- 35 We have considered rival contentions and perused all the relevant documents on record. This Writ Petition is directed against the order dated 29.4.2000 by which the learned ACMM has taken the cognisance. There can be no dispute that the learned ACMM is not bound to accept the cancellation report. At the stage of issuing process the learned ACMM must apply his mind, on the basis of material available before him.
- 36 It is settled law that at the stage of taking cognisance it is enough if there is adequate material to proceed with the matter. The defence of the accused cannot be considered at this stage. We have noted various contentions but deliberately refrained to give our findings lest it may prejudice the case of either party during the trial.
- 37 In our considered opinion, impugned order of the learned ACMM cannot be called perverse or contrary to law calling for interference by this Court.
- 38 This petition being devoid of any merit is accordingly dismissed.

**IN THE HIGH COURT OF DELHI**

**Mumtaj @ Behri vs. The State (Govt. of NCT of Delhi)**

2003CriLJ533, 100(2002)DLT286

Decided On: 09.08.2002

**Hon'ble Judges:**

O.P. Dwivedi, J.

**JUDGEMENT**

- 1 This appeal is directed against the impugned order of conviction dated 10th January, 2002 and order on sentence dated 1st February, 2002 passed by learned ASJ whereby the appellant was convicted under Section 3 and 4 of Immoral Traffic (Prevention) Act (for short 'the Act') and was sentenced to undergo RI for two years and a fine of Rs. 1,000/-, in default thereof, imprisonment for five months for the offence under Section 3 of the Act and to undergo RI for a period of 7 years for the offence under Section 4 of the Act in case SC. No. 298/01 FIR No. 94/2001 PS Kamla Market, Delhi.
- 2 Briefly narrated the facts leading to the appeal are that on 25th February, 2001 at about 9.30 P.M. SI V.P. Jha, Police Station Kamla Market was on patrolling duty in the area and when they reached at Chowk Nihariyan along with H.C. Makhan Singh, Lady Constable Pulkira, he received a secret information that some girls were illegally confined in Kotha No. 50, G.B. Road. On receipt of this information, SI V.P. Jha along with the Constables reached Kotha No. 50, G.B. Road. On enquiry, he came to know that one girl was forcibly confined on the First Floor. Girl namely Allivellu met the police officials and told them that she had been forcibly confined there. Girl was speaking Telgu. SI V.P. Jha called constable K. Anand who knew the said language. With the held of Constable K.Anand, SI V.P. Jha recorded the statement of Allivellu. SI V.P. Jha got the case registered and thereafter on the pointing out of Allivellu SI apprehended both the accused persons namely Nagina and Mumtaj and they were arrested. Statement of Alivelu was got recorded under Section 164 Cr.PC before the Magistrate. After completing investigations, challan was filed against Nagina and Mumtaj under Section 342/323/363/368/ 373/109/506/34 IPC and under Section 3, 4, 5 and 6 of the Act. Learned ASJ framed charges under Sections 368/373/363/342/323/506 IPC against

both the accused persons. They were also charged separately under Sections 3, 4, 5 and 6 of Act. Both the accused persons pleaded not guilty to the charges and claimed trial. In order to prove its version, prosecution examined as many as 11 witnesses. After consideration, learned ASJ convicted Nagina for the offences under Section 368/373/363/342/322/506 IPC and also 3, 4, 5 and 6 of the Act. Appellant Mumtaj was convicted only under Sections 3 and 4 of the Act and sentenced as stated earlier. Present appeal has been filed by Mumtaj only.

- 3 The first and foremost challenge of learned counsel for the appellant was as to legality and validity of entire process of raid, arrest, investigation and prosecution of the appellant. Submission of learned counsel for the appellant was that Section 13 of the Act mandates State Government to appoint Special Police Officer for dealing with the offences under the Act. Such Special Police Officer shall not be below the rank of an Inspector of Police. Further Section 15 of the Act requires that search and arrest can be carried out only by, the Special Police Officer or some officer subordinate to him and authorised by him in writing. In the present case, SI V.P. Jha who conducted search, investigations and arrested the accused persons, did not have the power of Special Police Officer and therefore all proceedings conducted by him are illegal and unauthorised. Learned counsel for the appellant referred to a decision of Three Judges Bench of Supreme Court in the case of Delhi Administration vs. Ram Singh AIR 1963 SC 63 wherein the facts were that the respondent who was suspected of having committed an offence under Section 8 of the Act was prosecuted vide challan filed by Sub Inspector who had not been appointed as Special Police Officer by the State Government. The Magistrate quashed the charge sheets holding that the SI was not competent to investigate the case. On revision by the State, High Court agreed with the view of the Magistrate and dismissed the revision. Delhi Administration preferred appeal before the Supreme Court. After a detailed analysis of various provisions of Act, Hon'ble Supreme Court observed that the Act is a complete Code with respect to what is to be done under it. The entire police duties in connection with the purposes of Act within a certain area have been put in the charge of a special police officer. The expression "police duties" under Section 2(i) includes all the functions of the police in connection with the purpose of the Act and in the special context of the Act



they will include the detection, prevention and investigation of offences and the other duties which have been specially imposed on them under the Act. Hon'ble Supreme Court further observed that if powers of the Special Police Officer to deal with the offences under the Act and therefore to investigate into the offences, be not held exclusive, there can be two investigations carried on by two different agencies, one by Special Police Officer and the other by the ordinary police. It is easy to imagine the difficulties which such duplication of proceedings can lead to. There is nothing in the Act to coordinate the activities of the regular police with respect to the cognisable offences under the Act and those of the special police. It was further held that only the special police officer appointed under the Act is competent to investigate offences under the Act and the police officers not specially appointed as special police officers cannot investigate offences under the Act even though they are cognisable offences. Accordingly, the appeal filed by the Delhi Administration was dismissed.

- 4 The same view was taken by this Court in the case of Raghbir Singh vs. State 2001 AD (Cr.) DHC 386 wherein prosecution under Section 3, 4 and 5 of the Act was quashed by invoking Section 482 Cr.PC as the investigation was not conducted by Special Police Officer.
- 5 Mr. V.K. Malik, Advocate appearing for the State countered this argument on the strength of a subsequent decision of Hon'ble Supreme Court in the case of Bai Radha vs. State of Gujarat. In that case investigation was carried out by a Special Police Officer. But while conducting the search by provision of Section 15 of the Act viz. recording of grounds of belief for conducting search and joining two or more public witness was not complied with. Hon'ble Supreme Court held that this irregularity does not vitiate the trial. The judgement in the case of Delhi Admn. (supra) was also referred in para No.5 but was distinguished on the ground that the police officer who visited the premises where the offences were alleged to have been committed was not a special police officer who alone is authorised to do the various things under the provisions of the Act. So the law laid down in the said judgement would not apply to the case of Bai Radha (supra). In that case investigation was conducted by special police officer. The only point involved in the case of Bai Radha (supra) was whether the trial is vitiated if the search has not

been made in strict compliance with the provisions of Section 15 of the Act.

- 6 In this case, the entire proceedings were conducted by SI V.P. Jha who was not appointed as Special Police Officer under the Act. It is not a question of mere irregularity in the procedure. It goes to the very root, competence and jurisdiction. Therefore, on the strength of law laid down by the Supreme Court in the case of Delhi Admn. (supra), the entire proceedings namely search, investigations, arrest and prosecution by S.I. V.P. Jha has to be held to be illegal.
- 7 Besides, on merits also I find that prosecution has failed to prove the case under Sections 3 and 4 of the Act against the appellant. Section 3 of the Act provides the punishment for keeping/managing or assisting in keeping or managing of a brothel. Section 2(a) of the Act defines that "brothel" includes any house, room or place or any portion of any house, room or place, which is used for the purposes of sexual exploitation of abuse for the again of another person or for the mutual gain of two or more prostitutes. It is obvious that for proving an offence under Section 3 of the Act some specific instances of prosecution must be proved and then it must further be proved that the accused was managing/keeping the place with the knowledge that same is being used for the purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes.
- 8 In the present case, the police did not send any decoy customer to the kotha to strike a deal with the appellant for providing girl for prostitution. Even the girl Alivelu PW-3 does not say that appellant ever provided girls for prostitution or allowed anybody else to use Kotha for prostitution.... So the mere fact that the appellant is the owner of the building/kotha, in absence of any definite evidence to prove any specific instances of prostitution or that the said kotha was used for prostitution with the connivance of the appellant, would not be sufficient to make out offence under Section 3 of the Act. For the same reason, offence under Section 4 of the Act also is not made out because PW-3 never stated that she ever paid any amount to the appellant nor any other girl has been examined to prove it.
- 9 In all such cases, it will be almost impossible for prosecution to succeed unless some specific instance of prostitution are proved

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and that is why while organising raids, decoy customer is generally used for the purpose of providing sexual exploitation of girls for monetary gain of another person or for the mutual gain of two or more persons.

- 10 In the result, appeal is accepted. The impugned order where by the appellant was convicted and sentenced under Section 3 and 4 of the Act is hereby set aside.

Appeal stands disposed of.

**IN THE HIGH COURT OF DELHI**

**Sangeeta and Anr. vs. State and Others**

1995CriLJ3923, 58(1995)DLT589

Decided On: 08.05.1995

**Hon'ble Judges:**

Mohd. Shamim, J.

**JUDGEMENT**

- 2 Brief facts which led to the presentation of the present petitions are asunder: that Inspector P.L.Suri, S.H.O. Ps Kamla Market was present at G.B.Road along with a lady constable and staff in connection with his usual patrolling duty during the night of 12/06/1994. He received a secret information that certain minor girls were indulging in prostitution in premises No. 5216, G.B.Road, Delhi. On receipt of the said information, he organised a raiding party and included therein two members of the public known as Rajesh Chawla r/o 2860/3, and Mrs.Sneh Srivastava r/o 107/1, Railway Colony, Thomson Road, Special Police Officer of Ps Kamla Market. The above said premises were searched which resulted in the recovery of nine girls from the said premises including the present petitioners. A loof them were produced before the learned Metropolitan Magistrate who after conducting an enquiry under/ Section 17 of the Immoral Traffic (Prevention) Act, 1956 hereinafter referred to as the Act for the sake of convenience) ordered the detention of the petitioners i.e. Usha Singh, Sangita, Pooja and Rekha for a period of three years in a Protective Home through his judgement and order dated 16/08/1994.
- 3 The petitioners on being dis-satisfied with the above said order approached the Court of Session. The appeals were dismissed vide order dated 17/10/1994.
- 4 It is in the above circumstances that the petitioners are before this Court.
- 5 Learned Counsel for the petitioners have assailed the legality and validity of the judgement and order passed by the Courts below, inter alia, on the following grounds: that the raiding party was not constituted in accordance with the provisions of Section 13 and Section 15(6-A) of the Act in as much as it did not include two lady

Police Officers. The interrogation was not done in the presence of a lady member of a recognised welfare institution. The constitution of the Tribunal was also not valid and legal in as much as it was in flagrant disregard of the mandatory provisions of Section 17(5) of the Act. There is absolutely no evidence on record to show and prove that there was sexual exploitation or abuse of the petitioners for commercial purposes. The case of the petitioners does not fall within the domain of Section 2(g) of the Act. Hence no action could have been taken against the petitioners.

- 7 It has been urged for and on behalf of the petitioners that the learned Magistrate who was working as a tribunal for the purposes of limited jurisdiction was not assisted at the relevant time by a panel of five respectable persons as envisaged by Section 17(5) of the Act. It thus as a corollary whereof rendered nugatory the entire proceedings before the learned Magistrate since a duty has been cast on the shoulders of the Magistrate to have the assistance of the panel of five respectable persons while discharging his functions under Sub-section (2) of Section 17. Thus, the learned Magistrate was left with no option but to seek the assistance of the said panel comprised of five persons as provided under Section 17(5) while discharging his functions under the said Section. The learned PPs, on the other hand, have contended that it was not incumbent on the Magistrate to seek the assistance of a panel of five persons as spoken of under Section 17(5) of the Act inasmuch as the word used therein is 'may' which gave an ample option and latitude to the Magistrate and left to his judicious discretion to have the services of those five persons or to ignore the same.
- 12 Thus the pertinent question whereon hinges the fate of the present cases which comes to the tip of the tongue is as to whether the legislators have used the word 'may' in the sense of 'shall' and as such a duty was cast on the shoulders of the learned Magistrate to summon a panel of five respectable persons to assist him and to advise him in the due discharge of his functions under Section 17 of the Act.
- 13 It is a well established principle of law that the word 'may' and the word 'shall' are interchangeable terms. It cannot be deduced ipsofacto from use of word 'may' in a particular statute that it has been used in the sense of directory conferring an ample discretion on the part of the authority to take recourse to particular course

of action or not. Much would depend upon the context in which the word 'may' has been used and the intention of the legislature which they want to convey through a particular enactment. It is true that ordinarily whenever the words 'shall' and 'must' are used they issue a mandate and a duty is cast thereby on the shoulders of an authority to carry out the said obligations. On the other hand, if it appears from the context that the legislators have used the word 'may' in the sense of 'shall' keeping in view the statute as a whole and with regard to its nature and object in that eventuality it would be appropriate for the Courts to construe the word 'may' as 'shall'. It has also been held time and again that in case the word 'may' occurs in a statute concerning the rights and interests of the public and if some benefit is proposed to be conferred on the persons affected by the said statute in that eventuality the word 'may' would be construed as 'shall' and would have a mandatory meaning.

- 14 Admittedly the present Act is meant to prevent immoral traffic in the human beings. The said Act was enacted by the Parliament in pursuance of the International Convention signed at New York on the 9th day of May 1950. Furthermore, Art. 23 of our Constitution deals with right against exploitation. It lays down traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. Art. 35 casts a duty on the shoulders of the Parliament to make laws as soon as possible after the commencement of the Constitution. Thus, the present Act is a piece of social legislation. It is meant to ameliorate the lot of the persons of this contrary who are being exploited by others. Hence the present Act is meant for the benefit of those persons who are suffering and being exploited at the hands of others. Consequently according to well established principles of interpretation the word 'may' which occurs in Section 17(5) of the Act is to be read as 'shall' and as such, whatever, is contemplated therein cannot be ignored....
- 20 ...A close scrutiny of Section 17(4) reveals that when the Magistrate has satisfied himself that the information with regard to a particular person is correct and that such person is in need of care and protection then he will pass an order subject to the provisions of Sub-section (5) that such person be detained for such period being not less than one year and not more than three years as may

be specified in the order in a Protective Home. It implies thereby that an order under the said Section can be made only subject to the provisions of Sub-section (5) of Section 17 of the Act. Sub-section (5) of Section 17 which has already been adverted to above provides that the Magistrate while discharging the functions under Section 17 would be assisted by five respectable persons out of whom whenever it is practicable three would be women to assist him.

- 21 In view of the above it can be safely inferred therefrom that the legislature while using the word 'may' wanted to use it in the mandatory sense otherwise they would not have subjected the exercise of powers under Sections 17(2) to 17(5). It is axiomatic that nothing can be made subject to which is discretionary.
- 25 A perusal of the relevant provisions of the Act goes a long way to show that the purpose and the object of the Act is not to abolish the prostitute or the prostitution. There is no provision under the Act which makes the prostitution parse a criminal offence or punishes a person(r) because he is indulging in prostitution. What is punishable under the Act is sexual exploitation or abuse of persons for commercial purposes and to earn the bread thereby except where a person is carrying on prostitution in the vicinity of a public place (vide Section 7) or when a person is found soliciting or seducing another person (vide Section 8).
- 26 It is thus crystal clear from above that the prostitution by itself is not an offence except when it is committed in the vicinity of a public place or some body seduces or solits a person for the purpose of prostitution....
- 29 ...There is thus nothing in the Act which punishes or makes liable for action a woman, who carries on prostitution for her own gain, unaided by others or who carries it on for the mere pleasure or fun of it."
- 31 Section 15(6A) envisages "The Special Police Officer or the trafficking Police Officer, as the case may be, making a search under this section shall be accompanied by at least two women Police Officers, and where any women or girl removed under Sub-section (4) is required to be interrogated, it shall be done by a woman Police Officer and if no woman Police Officer is available, the interrogation shall be done only in the presence of a lady member of a recognised welfare institution or organisation."

- 32 Learned Counsel for the petitioners on the basis of the above provisions of law have found fault with the constitution of the raiding party and have argued that a duty has been cast on the shoulders of the Special Police Officer to include in the raiding party at least two women Police Officers....
- 33 ...A close scrutiny of Section 13(3)(a) reveals that it provides that women Police Officers be included in the raiding party as and when it is practicable. Thus, it has been, I feel, left to the discretion of the Special Police Officer which leads the raiding party to include women Police Officers as and when they are available. The Police Officer, I feel, in view of the above was not bound to include women Police Officers if the same were not available.
- 34 A careful perusal of Sub-section (6A) of Section 15 of the Act reveals that the Special Police Officer would be accompanied by at least two women Police Officers. However, again it has been left to the discretion of the Special Police Officer to include two woman Police Officers at the time of the search and at the time of the interrogation. This intention of the legislature is crystal from the subsequent last lines of Sub-section (6A) inasmuch as it provides that if no woman Police Officer is available in that eventuality interrogation shall be done only in the presence of a lady member of a recognised welfare institution or organisation.
- 36 The next limb of the argument in support of the above contention is that the constitution of the raiding party was not in accordance with law inasmuch as all the members of the raiding party were not above the rank of the Head Constable i.e. not below the rank of Assistant Sub Inspector of Police as required vide Notification No. F.5/67/88-Home (P)/Estt. dated 14/12/1988. The learned Counsel in this connection has led me through the above said Notification. It is in the following words:

“In exercise of the powers conferred by Sub-section (1) of Section 13 of the Immoral Traffic (Prevention) Act, 1956, read with Government of India, Ministry of Home Affairs, Notification No. 37/1/57-P-11 dated 26/04/1958, the Administrator of the Union Territory of Delhi is pleased to appoint all Assistant Commissioners of Police, working as Sub-Divisional Police Officers, all Station House Officers, and all the Assistant Commissioners of Police of the Crime Branch, Palam Airport and Railways, as Special Police Officers within the said territory



for purposes of the said Act. He is further pleased to direct under Sub-section (3)(a) of the said Section 13 that the Subordinate Police Officers (not below the rank of Assistant Sub-Inspector of Police) shall assist their respective officers so appointed as Special Police Officers.”

- 37 The learned Counsel on the basis of the above Notification has contended that it is mandatory in view of the above Notification that all the members of the raiding party should not be less than the Assistant Sub-Inspectors of Police in rank. Admittedly, according to the learned Counsel there was one lady police constable in the raiding party. Thus all the members of the raiding party were not above the rank of Head Constables. Thus the said raiding party can by no stretch of imagination be called to be legal and validly constituted raiding party.
- 38 The contention of the learned Counsel I feel is without any substance. A careful perusal of the said Notification shows that there is no mandate that all the members of the raiding party should not be below the rank of Assistant Sub inspectors of Police. What is required by the said Notification is that a Special Police Officer would be assisted by an officer not below the rank of Assistant Sub inspector of Police. The raiding party consisted of an Inspector of Police known as Inspector P.L.Suri and a Sub Inspector of Police known as Si Uday Singh and a lady constable. Thus the Inspector of Police who was a Special Police Officer was being assisted by a Sub Inspector of Police. Thus the constitution of the raiding party cannot be found fault with on the said score.
- 39 In the circumstances stated above the petitioners are entitled to succeed. The petitions are allowed. The impugned order dated 16/08/1994 passed by the learned Magistrate and the order dated 17/10/1994 passed by the learned Additional Sessions Judge are hereby set aside. The petitioners be set at liberty incase they are not required to be detained in connection with any other case.

**IN THE HIGH COURT OF DELHI**

**Meena and Others vs. State (Delhi Administration)**

43(1991)DLT527, 1(1991)DMC435

Decided On: 04.02.1991

**Hon'ble Judges:**

V.B. Bansal, J.

**JUDGEMENT**

- 1 By way of this petition the petitioners have challenged the framing of the charge under Section 366-A of the Indian Penal Code against them by Additional Sessions Judge, Delhi vide order dated 17th October 1989.
- 3 Briefly stated the prosecution story has been that there was a secret information with Acp Moti Nagar that premises No. El 45, 185 and 186, Raghbir Nagar, New Delhi were being used as brothel by one Lajjo, her daughter, Smt. Meena and another person named, Rajiv.... The case was registered and after investigation the petitioner were challenged (challaned). Learned trial court after hearing arguments found a prima facie case under sections 3, 4, 5, 6, and 7 of the Immoral Traffic (Prevention) Act, 1956 and under section 366-A of the Indian Penal Code vide impugned order dated 17th October 1989.
- 4 ...The only grievance of learned counsel for the petitioner has been qua the order for framing of the charge against the petitioners under section 366-A of the Indian Penal Code. It would, in my view, be appropriate to quote this section, which reads as under:

“366-A. Procuration of minor girl-Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be liable to fine.”

A bare reading of the aforesaid provision makes it abundantly clear that there has to be inducement to a girl below 18 years of age so that she may go from one place to another or do some other acts with intent that she was likely to be forced or seduced to intercourse with another person. The basic ingredient for this offence has to be the giving of inducement....

- 5 In the instant case the main reliance of the prosecution is upon the FIR recorded on the statement of ACP Moti Nagar and also the statement of Prem Prakash, the decoy witness. As already referred to, it has clearly been mentioned in the nikka by ACP and also by Prem Prakash in his statement under Section 161 of the Criminal Procedure Code that the girls made available to Prem Prakash in house No. 185, Raghbir Nagar, offered themselves of their own free will. There is nothing in the statement of the witness to show that there was any inducement by the petitioners to them or that they were forced or seduced to illicit intercourse by the petitioners. In these circumstances I have no hesitation in coming to the conclusion that there was no sufficient material before the learned trial court for holding that a prima facie case under Section 366-A of the Indian Penal Code was made out against the petitioners. I find support for this view from the case Ramesh appellant, vs. State of Maharashtra, 1963 (1) Cr.L.J. 16. It has been observed in the said judgement that seduction to intercourse contemplated by Section 366-A does not mean merely straying from the path of virtue by a female for the first time. It is further observed that the word 'seduce' is used in its ordinary and narrow sense as inducing a woman to stray from the path of virtue for the first time and also in the wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. A person who merely accompanies a woman going out to ply her profession of a prostitute, even if she has not attained the age of eighteen years, does not thereby commit an offence under Section 366-A of the Indian Penal Code. Similarly persons giving encouragement or rendering assistance to a woman/prostitute offering herself promiscuously for money to customers cannot be said to have committed an offence under Section 366, IPC. I am clearly of the view that the impugned order cannot be sustained qua the direction for framing of the charge under Section 366A of the Indian Penal Code against the petitioners.
- 6 In view of my aforesaid discussion, the Revision Petition is allowed. The impugned order dated 17th October 1989 of Additional Sessions Judge, 530 Delhi directing the framing of the charge is modified to the extent that there will be no charge against the petitioners under Section 366-A of the Indian Penal Code. The trial court would now proceed further in accordance with law. The petitioners are directed to appear before the trial court on 18th February 1991 Petition allowed.

**IN THE HIGH COURT OF PUNJAB AND HARYANA**

**Manjit Kaur vs. State of Punjab**

2004CriLJ1845

Decided On: 13.11.2003

**Hon'ble Judges:**

M.M. Kumar, J.

**JUDGEMENT**

- 1 This petition filed under Section 482 of the Code of Criminal Procedure, 1973 prays for quashing FIR No. 157 dated 13-9-2000 registered under Sections 3, 4, 5, 6 and 7 of the Immoral Traffic (Prevention) Act, 1956 (for brevity, the Act) registered at Police Station 'B' Division, Amritsar.
- 3 Mr. D. S. Pheruman, learned counsel for the petitioner has argued that if the allegations levelled in the First Information Report are taken to be gospel truth, no offence under Sections 3, 4, 5, 6 and 7 of the Act is made out. According to the learned Counsel, only a Special Police Officer could conduct the raid and it is nowhere mentioned that the Deputy Superintendent of Police was authorised to do so and, therefore, no cognisance of the offence under the Act could be taken. In support of his submissions, the learned counsel has placed reliance on a judgement of the Supreme Court in the case of Delhi Administration vs. Ram Singh, AIR 1962 SC 63: (1962 (1) Cri LJ 106) and also a judgement of Orissa High Court in the case of Sushanta Kumar Patra alias Hemanta Kumar Das vs. State of Orissa, (2000) 4 Rec Cri R 592: (2000 Cri LJ 2689).
- 4 After hearing the learned counsel and perusing the averments made in the First Information Report, I am of the considered view that no case is made out for quashing the First Information Report. xxxxxxxx xxxxxxxxxxxx Section 2(a) defines the expression 'brothel' which includes any house, room, conveyance or place or a portion thereof which is used for the purposes of prostitution for the gain of another person or for the mutual gain of two or other persons. Similarly, Section 2(f) of the Act defines the expression 'prostitution' to mean the sexual exploitation or abuse of persons for commercial purposes. Section 3 of the Act prescribes punishment for those who keep, manage, act or assist in keeping or managing a brothel. They are liable to be sentenced on first conviction with a term not

less than one year and not more than 3 years along with fine. Similarly, Section 8 of the Act talks of seducing or soliciting for the purpose of prostitution by making it an offence punishable in law for a period which may extend to six months on first conviction or with a fine....

- 5 From the perusal of aforementioned provisions, it is evident that the petitioner has committed acts which are punishable under the Act. It cannot be concluded that ingredients of various offences have not been fulfilled. She is equal partner in the commission of offences. Her presence, on the scene as well as acceptance of currency notes through the waiter clearly indicates the offences committed by her. Applying the principles laid down in the cases of *State of Haryana vs. Bhajan Lal*, 1992 Supp (1) SCC 335 : (1992 Cri LJ 527), *State of W. B. vs. Swapan Kumar Guha*, (1982) 1 SCC. 561 : (1982 Cri LJ 819) and *Pepsi Foods Ltd. vs. Special Judicial Magistrate*, (1998) 5 SCC 749 : (1998 Cri LJ 1) it cannot be said that the allegations in the First Information Report do not disclose the commission of an offence and the First Information Report is frivolous. The petition is wholly without merit and is, thus, liable to be dismissed.
- 6 For the reasons recorded above, this petition fails and the same is dismissed. No observation made in this order shall be construed as expression of opinion on the merit of the case.

**IN THE HIGH COURT OF MADRAS**

**Mariakutty @ Thangam vs. State of Tamil Nadu,  
Udhagamandalam Town Police Station**

**AND**

**D. Ethiraj vs. State by the Deputy Superintendent of Police,  
C.B.C.I.D., Coimbatore**

Decided On: 07.06.2002

**Hon'ble Judges:**

M. Karpagavinayagam, J.

**JUDGEMENT**

- 1 Mary Kutty alias Thangam (A1) kidnapped Sasikala (P.W.2) and Vijaya (P.W.3), the young girls from Ooty and took them in a bus to take them to Madras with an intention to engage them in prostitution. Santa Cruz (P.W.1), the father of P.Ws.2 and 3 gave a complaint to the police that his daughters were missing. On the information given by Ooty Police, the Salem Police intercepted the bus in which A1, P.W.2 and P.W.3 were travelling and rescued P.Ws.2 and 3 and arrested A1. During the course of investigation, it was revealed that Ethiraj (A2) being the Deputy Superintendent of Police at Ooty claiming to be the husband of A1 abetted the act of A1 Mary Kutty in kidnapping the said two girls from Ooty to Madras.
- 2 Both were charge sheeted and tried for the offences under Section 5(1)(b) of the Immoral Traffic (Prevention) Act 1956 (hereinafter referred to as "the Act") and under Sections 366, 419 and 119 I.P.C.
- 3 After trial, Mary Kutty (A1) was convicted for the offence under Section 5(1)(b) of the Act and under Sections 366 and 419 I.P.C. and sentenced to undergo R.I. for one year and to pay a fine of Rs.500/- for the offence under Section 5(1)(b); R.I. for three years and to pay a fine of Rs.2,000/- for the offence under Section 366 I.P.C. and R.I. for two years for the offence under Section 419 I.P.C. Ethiraj, D.S.P. (A2) though was acquitted in respect of 5(1)(b) of the Act, was convicted for the offences under Sections 366 read with 109, 419 read with 109 and 119 I.P.C. and sentenced to undergo R.I. for three years for the offence under Section 366 read with

109 I.P.C., R.I. for one year for the offence under Section 419 read with 109 I.P.C. and R.I. For 1 “years for the offence under Section 119 I.P.C. Challenging the same, both the accused have filed these separate appeals in C.A.Nos.62 and 64 of 1992 respectively.

- 4 ... (k) On analysing the materials, the trial Court convicted A1 for the offences under Section 5(1)(b) of the Act and under Sections 366 and 419 I.P.C. and A2 for the offences under Sections 366 read with 109, 419 read with 109 and 119 I.P.C. However, A2 was acquitted in respect of the charge for the offence under Section 5(1)(b) of the Act.”
- 6 The counsel appearing for A1 and A2, while assailing the judgement impugned would make the following contentions:
  - (i) Though both A1 and A2 were tried for the offence under Section 5(1)(b) of the Act, A1 alone was convicted and A2 was acquitted. The reasonings for acquittal given for A2 would apply to A1 as well. Moreover, the main ingredient of Section 5(1)(b) of the Act, which relates to conducting of brothel house, is absent. When there is no positive evidence to show that A1 is running a brothel house at the time of the alleged occurrence, the offence under Section 5(1)(b) of the Act is not attracted. Consequently, the offence under Section 366 I.P.C. also would not stand, as it cannot be stated that kidnapping of girls was for the purpose of engaging them in prostitution in a brothel house. Similarly, Sections 419 and 119 I.P.C., which are the offences for the purpose of aiding the commission of the offence under Section 366 I.P.C., would not be made out....
- 7 The main plank of the arguments advanced by both the counsel for the appellants is that the evidence relating to the ingredient of Section 5(1)(b) of Act is lacking and consequently, the other allied offences, namely, the offences under Sections 366, 419 and 119 I.P.C. cannot be said to be made out.
- 11 According to the prosecution, P.W.2 Sasikala and P.W.3 Vijaya were kidnapped by A1 Mary Kutty with the active assistance of Ethiraj (A2), who was working as D.S.P, Crime Records Bureau in Ooty for engaging them in prosecution by making false representation to them that A2 is her husband and she would get respectable job in the plastic industry at Madras.

- 12 There are three sets of evidence let in by the prosecution to prove the offences for which the appellants (A1 and A2) were tried:
- (1) The close association of A1 and A2;
  - (2) The incidents relating to kidnapping of the witnesses P.Ws.2 and 3 from Ooty in a bus to Madras by A1 with intention to use them for prostitution with the assistance of A2 and securing of girls and arrest of A1.
  - (3) The various other instances relating to the antecedents and character of A1, who is regularly indulging in procuring girls from various areas for prostitution.
- 38 The above materials through oral and documentary evidence would reveal that two young girls P.Ws.2 and 3 were induced by A1 and A2 by false representation to accompany A1 in the bus to go to Madras and thereby, they were kidnapped for using them for illegal purpose and on the way to Madras, the police rescued the victims and arrested A1.
- 50 The oral and documentary evidence adduced by the witnesses mentioned above would show that A1 was regularly indulging in the business of prostitution by engaging girls under the pretext of running Beauty Parlour both at Coimbatore and at Madras.
- 54 The reading of the provision of Section 5(1)(b) of the Act would show that there must be an act of the accused inducing a person to go from any place with the intent to use the person concerned for the purpose of prostitution either to make the person, the inmate of a brothel or frequent visitor of a brothel.
- 59 If this evidence adduced by P.Ws.2 and 3 is accepted, then it is clear that the intention of A1 was to use them for the purpose of prostitution in her house where brothel was conducted secretly.
- 70 ...These materials would reveal A1's intention to take these girls to her house at Madras for engaging them in prostitution.
- 72 It is not necessary for the prosecution to prove that she has been convicted in any case. If we place reliance on the evidence of the Police Officers, who conducted raid in her house at Coimbatore in 1983-84 and in the present address at Madras in 1985-87, then it could be very well concluded that she used her house, the address of which has been mentioned in Ex.P-1 letter addressed by P.Ws.2



and 3 to their parents, as the place for conducting prostitution and as such, it would attract the definition of brothel house. Therefore, there is no difficulty in concluding that the ingredient of Section 5(1) (b) of the Act is clearly made out as against A1. The reasoning for acquitting A2 in respect of this offence will not apply to A1, since brothel house was conducted by A1 alone and not by A2.

- 73 With reference to the other offences under Sections 366, 419 and 119 I.P.C., it would be appropriate to make a common discussion as they relate to both the accused.
- 79 Therefore, the false representation made by both A1 and A2, which was also supported by P.W.4 Krishnan, to make P.Ws.2 and 3 to believe that they were being taken to Madras for providing job has been clearly established through the evidence of these witnesses and as such, the offence under Section 366 I.P.C. and other allied offences under Sections 416, 419 and 119 I.P.C. are clearly made out.
- 87 From the evidence available on record, it is clear that A2 actively assisted and facilitated A1 in taking P.Ws.2 and 3 from Ooty to Madras through a false representation. Since the said act would attract the offences under Sections 366, 419 and 119 I.P.C., the trial Court correctly convicted him for the said offences while acquitting him in respect of the offence under Section 5(1)(b) of the Act.
- 90 Before parting with this case, it shall be mentioned that A2, who attained several merit certificates while he was working as Inspector of Police as deposed by D.W.1, has unfortunately become an abettor of the prostitution offender after he was promoted as Deputy Superintendent of Police. It is really pained to note that the high ranking official like the Deputy Superintendent of Police, instead of booking the law breakers, had indulged in the activities of a brothel broker. The shocking facts in this case would reveal that A2, the D.S.P. at Ooty, not only dishonestly induced the young girls to accompany to Madras with A1, who wanted to use them for prostitution, but also injured the very institution, which awarded certificates and promotion to him. If higher police officers themselves indulge in these sorts of offences, it is certain that the people will lose faith in the entire institution which would result in the calamitous consequences.

7-6-2002

**IN THE HIGH COURT OF ALLAHABAD**

**Pushpa vs. State of U.P. and Others**

2004CriLJ4540

Decided On: 16.07.2004

**Hon'ble Judges:**

Amar Saran, J.

**JUDGEMENT**

- 2 This application has been filed under Section 482, Cr. P.C. praying that Km. Pushpa, daughter of late Sri Ram Lal Sahu, original resident of Kasari Deeh, Fokatpara, District Durg (Chattisgarh), M.P., who is detained in a Protective Home in Case No. 1156 of 2003 under Sections 15, 16 and 17(A) of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as ITP Act), of Police Station Shahganj, district Agra, may be released in the charge of her mother or brother.
- 4 The present application has been filed for quashing proceedings under Sections 15, 16 and 17 of the ITP Act and for release of Pushpa in the charge of her mother or brothers, because the Magistrates have completely slept over the matter and have failed to pass any further orders in her case.
- 6 It has first to be considered whether the action of detention of Pushpa in the Shelter Home at Agra after her apprehension when she was going on the road on a rickshaw was authorised under Section 16(1) of ITP Act. The said section provides for the removal of a person found in a brothel. It does not appear to give any power to detain a person, at the time when she is moving around on a rickshaw, even if there are some suspicions that such a person may be involved in some immoral activity. Likewise Section 15 of the ITP Act also only applies to apprehension of person living in any premises after search of those premises without warrant. It also does not permit apprehending a person whilst she is travelling on a rickshaw. It also requires a special Police Officer or a trafficking Police Officer who are appointed by the State or Central Governments respectively under Section 13 of the ITP Act, to take a person into custody. The requirements of these provisions were also not met in Pushpa's case.

- 7 Be that as it may, Pushpa was produced before the City Magistrate presumably under Section 17(1) of ITP Act, who passed the initial order for keeping her in the Protective Home at Mathura and from where she had been transferred to the Protective Home at Agra as in the circumstances mentioned hereinabove. There appears to be some non-compliance with the requirements of this provision also, as the proviso to Section 17(3) provides that a person can be kept in custody for a maximum period of three weeks from the date of the order for an inquiry under Section 17(2) of the ITP Act. But Pushpa appears to have been kept in custody for almost 9 1/2 months and no final orders were passed for keeping her in the Protective Home or handing her over to any other appropriate custody.
- 8 It is also noteworthy that no prosecution has been launched against Pushpa under Section 7 or 8 of the ITP Act, on the charge of carrying on prostitution at a public place where prostitution is prohibited under Section 7(1) (a) or (b), or for seducing or soliciting in a public place, or public conveyance as interdicted under Section 8, hence her custody could also not be authorised under these provisions. Also the maximum period of detention for these offences extends to 3 months under Section 7(1)(a) and (b), and up to 6 months under Section 8 of the ITP Act. That would be considerably less than the period that Pushpa has already remained confined in the Protective Home.
- 9 Pushpa's medical examination report shows that Pushpa is about 23 years old, i.e. she is of the age of majority and capable of making her own decisions, and she is also not suffering from any sexually transmitted disease.
- 10 The Rescue Officer has also stated that no useful purpose would be served in keeping Pushpa any longer in the Protective Home, and it was desirable that she be handed over to the charge of her mother and brothers, who have expressed an interest in looking after her, and taking charge of her. This was the wish expressed by Pushpa too.
- 11 In view of all these circumstances I do not think that any purpose would be served by permitting the Magistrate to continue with the inquiry any further for deciding whether Pushpa should be kept in a Protective Home any longer.

- 12 ... Before parting with this case, it is being observed that when such a girl is produced in the Court of appropriate Magistrates, they will see in future that the mandate of law is followed and conduct the enquiry, if the pre-conditions exist for giving them jurisdiction to detain a person, and to make the concerned enquiries under Sections 15, 16, 17 and 17-A of the ITP Act in a time bound manner according to the time schedule prescribed under the ITP Act, and not allow the enquiry to linger on unnecessarily for an inordinately long period of time, as has been done in this case.
- 13 The application, so far as it relates to the matter for release of Pushpa is being allowed and the proceedings in the case of Pushpa under Sections 15, 16 and 17 of the ITP Act pending before the City Magistrate, Agra are being quashed. The authorities, who have produced Pushpa before me today are directed to hand over Pushpa to the charge of her mother forthwith. It is hoped that she will look after her in an appropriate manner and she will also try to prevent from her being exploited or being made to participate in any immoral activities. The authorities are being directed to take back the record of her case to the concerned Court.
- 14 Having disposed of the matter of Pushpa, I think a direction needs to be issued to the City Magistrate at Mathura and Agra to produce a status report on all the inmates detained in the Women Protective Homes at Mathura and Agra. This status report should mention the name of the inmate, her age, whether the medical examination under Section 15(5A) of the ITP Act reveals any injuries due to sexual abuse, or the presence of any sexually transmitted disease. The date since when the inmate was detained in the home, the circumstances and reasons for her being detained, the legal provision under which she has been detained, and the status of the enquiry before the competent Magistrate. The Superintendents of the Protective Homes of Mathura and Agra or other senior officers authorised by them are directed to produce these status reports together with other relevant material concerning the inmates who are housed in the protective homes before me on 16-9-2004.
- 15 The Sessions Judges of Agra and Mathura who are the appellate authorities under the ITP Act, and who as Chairpersons of the District Legal Services Authorities are also enjoined to provide legal services to women in custody in a Protective Home under Section

12(g) of the Legal Services Authorities Act, 1987, are directed to ensure that there is no laxity on part of the concerned Magistrates in sending the required information to this Court. They should also see that the provisions of the ITP Act are observed by the Magistrates, and that they take action according to the provisions of law and observe the time schedule provided for different purposes under the ITP Act or other legal provisions. The Sessions Judges as Chairmen of the District Legal Services Authorities must proactively ensure that the inmates of the Protective Homes receive proper legal aid. The Sessions Judges must also get an enquiry conducted into the living conditions in the homes, as stories have appeared in the press of living conditions in the homes being extremely poor and unhygienic, and there have been occasional reports of physical and sexual exploitation of inmates of some Protective Homes with the connivance of the staff of those homes. The enquiry must also throw light on the efficiency of the programme for education, training, rehabilitation and health care of the inmates, and whether there is any programme for arranging the marriages of the inmates, who are bereft of any outside support. Whether there are any provisions for entertainment of the girls in the homes, and is there any scope for outside visits, or are the inmates kept permanently confined in the homes. After getting the aforementioned enquiry conducted and outlining their proposed plan of action for ensuring compliance with the provisions of the ITP Act, and for providing legal services to the inmates of the Protective Homes, the reports of the Sessions Judges of Agra and Mathura, must reach this Court on or before 16-9-2004.

- 16 These specific directions for enquiring into the welfare of the women in the Protective Homes are being made because this Court finds that as in the present case, while action is hardly ever taken against the keepers of brothels and the pimps and other exploiters of the women, the women languish in Protective Homes for long periods of time in oppressive conditions thirsting for freedom. It is hardly unlikely that a trafficked woman may end up in a Protective Home by the collusion of the keepers of brothels, and pimps with some corrupt authorities, as that would throw her at their mercy and she would willingly succumb to their dictates, in a bid to secure her freedom, as there are no provisions for legal aid, and occasionally she has been abandoned by her family or they are too

weak economically to give her any worthwhile support. The fact that the Mathura home was so over-full that Pushpa had to be sent back to the Agra home, and the inordinate over 9 1/2 months delay, even in which period the case of Pushpa was not dealt with by the Magistrate only underscores the suffering that such an exploited and trafficked woman, who is usually at the bottom of the economic ladder, must undergo. The office is directed to send a copy of the order forthwith to the Courts of City Magistrates, Mathura and Agra, and to the learned Sessions Judges of Agra and Mathura for compliance. List this case before me for further orders on 16-9-2004.

**IN THE HIGH COURT OF ALLAHABAD**

**Radha and Others vs. State of U.P. and Others**

2003(1)AWC455

Decided On: 28.11.2002

**Hon'ble Judges:**

M. Katju and Rakesh Tiwari, JJ.

**JUDGEMENT**

- 1 This writ petition has been filed for a mandamus directing the respondents and their subordinates and other officers not to evict the petitioners from their residences and not to harass them.
- 4 It is alleged in paragraph 8 of the writ petition that the petitioners have been doing the profession of singing and dancing for the last several years and have nothing to do with prostitution nor have they violated the Immoral Traffic (Prevention) Act, 1956....
- 5 It has been alleged in paragraph 13 of the writ petition that like the other places in the country, in Meerut also prostitutes, singers and dancers and other women were being harassed by the police in all possible ways and numerous writ petitions had to be filed in this connection....
- 6 It is alleged in paragraph 22 of the writ petition that although the petitioners are not prostitutes even then the respondent No. 4, the Station Officer, police station Brahmपुरi, district Meerut and police constables have come to the residences of the petitioners and asked them to vacate their residences as early as possible failing which they shall be evicted with the use of police force and they have started stopping ingress and egress of the petitioners and their children and other relations and servants from their houses so as to create such a situation that the petitioners are compelled to leave their residences on their own. The petitioners have prayed that the respondents be restrained from evicting the petitioners from their respective houses and from harassing the petitioners.
- 8 We are assuming that the petitioners are doing the work of prostitution and not merely singing and dancing. However, the question arises whether they can be evicted from their residences and can be harassed merely because they are prostitutes.

- 9 It may be mentioned that prostitution itself is no offence except in the manner mentioned in Sections 7 and 8 of the Immoral Traffic (Prevention) Act, 1956, vide *T. Jacob vs. State of Kerala*, AIR 1971 Ker 166. Women become prostitutes not because they enjoy prostitution but due to poverty. The level of poverty in this country is appalling. Almost 50% of our people are living below the poverty line in horrible conditions, e.g., without employment, proper food, housing, medical care, education, etc.... Hence, the approach of society towards the prostitutes must change, and sympathy must be shown towards them as it must be realised that they are not necessarily women of bad character but have been driven to the profession due to acute poverty in their family....
- 10 In our opinion, prostitutes are also entitled to live a life of dignity which is part of Article 21 of the Constitution as interpreted by the Supreme Court. People including the police must have a sympathetic approach towards them and should not harass them, rather they should have sympathy towards them, and attempt should be made to rehabilitate them in society.
- 11 In our opinion, the State Government must formulate a scheme for rehabilitation of prostitutes in society and this is only possible if these women are given technical skills so that they can earn their bread by these skills instead of doing so by selling their bodies for filling their stomachs.
- 12 In 1982 Cr App R 264, *Chinnamma Sivadas vs. State (Delhi Administration)*, the Supreme Court held that the State Government should evolve a scheme in which women rescued from brothels and deserted women lodged in protective homes must be able to live with human dignity and find gainful employment after discharge. In view of the aforesaid decision of the Supreme Court and in view of the fact that the prostitutes are also entitled to live a life of dignity, we direct the State Government that a scheme should be framed whereby in every city in the State of U. P., the prostitutes are given some technical training so that they can earn their bread through such technical skills.
- 13 The writ petition is therefore allowed and the respondents are directed not to evict the petitioners from their residences and not to harass them except in accordance with law.



- 14 Although this writ petition is allowed, we direct that in order to monitor the aforesaid scheme as suggested by us, this petition should be again listed before us after two months on 7.2.2003, and by that date the State Government should prepare a scheme after consulting experts and submit the same before us so that we can examine the same and give appropriate directions to enforce the scheme. Let a copy of this judgement be sent by the Registrar General of this Court to the Chief Secretary, U. P., and also to the Secretaries of the Departments of Technical Education, Law, Women's Welfare and Finance, U. P.

## IN THE HIGH COURT OF ALLAHABAD

Smt. Kaushailiya vs. State

AIR1963All71, 1963CriLJ138

Decided On: 17.11.1961

**Hon'ble Judges:**

W. Broome, J.

**JUDGEMENT**

- 1 These six criminal revision applications from Kanpur involve identical questions of law and may conveniently be dealt with together. Proceedings have been launched against all the six applicants under Section 20 of the Suppression of Immoral Traffic in Women and Girls Act 1956, on the ground that they are prostitutes and that in the interests of the general public they should be asked to remove themselves from the places where they are at present residing. Objections have been filed at the initial stage of the proceedings in the Court of the City Magistrate of Kanpur, before whom the cases are pending, claiming that the proceedings are not legally maintainable and should be dropped; but the learned Magistrate has repelled this argument and the applicants have accordingly been obliged to approach this Court.
- 2 The contention of the applicants is twofold : firstly that the Magistrate is not entitled to take action against them under Section 20 Suppression of Immoral Traffic in Women and Girls Act on the basis of reports submitted by a Sub-Inspector of Police who has not been appointed under Section 13 of the Act as a 'special police officer', with power to deal with offences under the Act; and secondly that Section 20 of the Act is unconstitutional since it infringes Article 14 and Clauses (d), (e) and (g) of Article 19 of the Constitution.
- 4 The next point that arises for consideration is whether Section 20 of the Act violates the fundamental right guaranteed by Article 19 (1) (g) of the Constitution. The argument advanced in this connection is that prostitution is a profession, occupation or trade which the applicants have the right to practice or carry on and that Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, under which Magistrates have been given the power to require a prostitute to remove herself from the place where she is residing

and not to re-enter that place without permission, is calculated to impose a restriction amounting to total prohibition and cannot in any case be regarded as a reasonable restriction such as would be valid under Clause (6) of Article 19.

This view receives support from the remarks made by a learned single Judge of this Court in *Shama Bai vs. State of U. P.*, AIR 1959 All 57; but those remarks are admittedly obiter and cannot be treated as authoritative. The crucial point that must not be lost sight of when considering this problem is that prostitution (like gambling, touting and other inherently immoral occupations) cannot be put on a par with normal, respectable professions and trades which have no taint of immorality about them. As pointed out by a Division Bench of this Court in the case of *In the matter of Phool Din*, AIR 1952 All 491 :

“It has been argued also that restrictions contemplated by Clause (6) of Article 19 cannot mean total prohibition. As already stated, the restrictions contemplated by this clause do not mean the restrictions upon the practice of any particular profession, but the restriction upon the very right to engage oneself in “any profession”. It is therefore permissible under Clause (6) to prohibit a profession altogether if it is necessary to do so in public interest. The profession must not be opposed to public interest. We cannot interpret the words “any profession” in Article 19 (1) (g), as any profession which a citizen may choose to adopt regardless of its effect upon public interest.”

In a similar strain, the Supreme Court has held in *Cooverjee B. Bharucha vs. Excise Commr. and Chief Commr. Ajmer*, 1954 SCR 873 : (AIR 1954 SC 220) :

“in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors most differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades innocuous or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the

reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community.”

It is clear therefore that in the case of an inherently immoral activity like prostitution, it is open to the State to impose a total ban; and no one can claim any fundamental right to carry on such an activity as though it were an ordinary profession or trade. That being so, I cannot accept the contention that Section 20 of the Suppression of Immoral Traffic in Women and Girls Act is invalid for violation of Article 19 (1) (g).

- 5 The ‘applicants are on surer ground, however, when they rely on Clauses (d) and (e) of Article 19 (1). It is important to note that Section 20 of the Act is not aimed directly at the carrying on of prostitution, but instead seeks to control the movements and residence of prostitutes. Under this section a Magistrate is not required to order a prostitute to give up her trade, but can direct her to remove herself from some place within the local limits of his jurisdiction that she is residing in or frequenting “to such place whether within or without the local limits of his jurisdiction, by such route or routes and within such time as may be specified in the order” and may further prohibit her from re-entering the place from which she has been removed. This is a clear infringement of the fundamental rights guaranteed to citizens of this country by Article 19 of the Constitution, to move freely throughout the territory of India and to reside in any part of that territory.
- 6 Learned counsel for the State argues that the restrictions imposed by the impugned section are reasonable restrictions on the movements and residence of prostitutes that have been introduced in the interests of the general public and are therefore constitutionally valid by virtue of Clause (5) of Article 19. I do not think however that the pro-visions of Section 20 can be said to pass the usual tests of reasonableness. In the first place the action envisaged against prostitutes by this section is so harsh and drastic that it is out of all proportion to the benefit likely to accrue to the general public. As laid down by the Supreme Court in *Chintamanrao vs. The State of Madhya Pradesh*, (AIR 1951 SC 118)...

Viewed from this angle, Section 20 of the Suppression of Immoral Traffic in Women and Girls Act is clearly unreasonable. A woman proceeded against under this section is not given the option of ceasing to carry on prostitution, if she wishes to be allowed to continue to reside within the Magistrate's jurisdiction. If he finds that she has been working as a prostitute in the past, he can expel her from the area controlled by him without further ado. Moreover she cannot only be removed from one mohalla to another or from one town to another in the same district, but may be expelled from the whole district. And no time limit is prescribed for the period of exile — she can be kept out as long as the Magistrate chooses. Presumably the object of Section 20 is merely to prevent prostitution being carried on in certain localities where for one reason or another it is desirable in the interests of the general public that it should be banned; but the remedy provided by the section is unnecessarily drastic and wide in its scope. The encroachment made by Section 20 on the fundamental rights of residence and free movement of the individual far outweighs the benefit likely to accrue to the public at large and cannot therefore be deemed to be reasonable.

- 7 ...To begin with, the threat to public peace and safety by goondas who are likely to resort to violence obviously calls for stronger and more drastic measures than the mere contamination of public morals by prostitutes. Moreover, under Section 57 of the Bombay Police Act, only those persons can be externed who have certain convictions to their credit and are likely to commit further offences of a similar nature; whereas under Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, even prostitutes who have committed no offence whatsoever and who are scrupulously observing the letter of the law can be asked to remove themselves from the places resided in or frequented by them. And furthermore, under the Bombay Police Act the person proceeded against has a right of appeal to the State Government and can even in certain circumstances challenge the order of externment in a court of law.
- 8 Another ground for holding the restrictions imposed by Section 20 of the Suppression of Immoral Traffic in Women and Girls Act to be unreasonable is that no principles have been prescribed for the guidance of the Magistrate concerned, the circumstances in which

action should be taken under this section being left entirely to his subjective determination....

In the present case the Act gives no inkling of what criteria or principles are to be followed by a Magistrate under Section 20, while making up his mind whether action should be taken against a particular prostitute "in the interests of the general public".

Uncontrolled power has thus been delegated to the Executive; and the restrictions imposed in this manner on the fundamental rights of residence and free movement must be held to be unreasonable.

- 9 This delegation of unguided and unfettered power to a subordinate Magistrate also amounts to an infringement of the right to equality before the law guaranteed by Article 14; As already pointed out, there is nothing in the Act to guide the Magistrate in the exercise of his discretion when deciding the cases of individual prostitutes. At his own sweet will he can extern one prostitute from a certain locality "in the interests of the general public", while at the same time allowing another prostitute to carry on her trade in that same area. And his decision, based on pure subjective satisfaction, is not subject to any control or scrutiny by any higher authority, whether executive or judicial.

- 10 ...It seems to me however that the procedure prescribed by Section 20 cannot by any stretch of imagination be equated with a true judicial trial by a court of law : at best it provides for a quasi-judicial inquiry. The Magistrate is no doubt enjoined to issue notice to the person proceeded against and to allow her an opportunity to produce evidence; but she has not been given the right to cross-examine the prosecution witnesses on whose testimony the proceedings have been initiated, nor is any obligation cast on the Magistrate to record the reasons for his decision.

The section appears to envisage mere subjective satisfaction on the part of the Magistrate, without laying down any principles or providing any safeguards to ensure that he acts fairly and reasonably in arriving at his conclusions. Nor does it appear to be correct that his decision would be revisable by the High Court. Section 5 (2) Cri. P. C. cannot be invoked, in this connection, as it applies only to offences, while Section 20 of the Suppression of Immoral Traffic in Women and Girls Act does not deal with offences at all (apart from the last clause, which provides a punishment for

disobedience of an order passed under the preceding clauses). And a Magistrate acting under Section 20 is a special kind of tribunal, employing a special procedure, and cannot be treated as an 'inferior Criminal Court' for the purposes of Section 435 Cri. P. C. Learned counsel for the State relies on a recent decision of this Court *Shakila vs. State*, 1961 All LJ 470 : (AIR 1961 All 633) —as authority for the proposition that the Criminal Procedure Code will apply to all proceedings under the Suppression of Immoral Traffic in Women and Girls Act, unless specifically excluded; but a perusal of the ruling in question shows that the learned Judges were discussing the procedure relating to offences only, and their remarks can have no relevance for proceedings under Section 20, which are not in respect of any offence. Similar is the position in the other case cited by learned counsel for the State — *Smt. Prem vs. District Magistrate, Meerut*, AIR 1959 All 206.

- 11 My conclusion therefore is that Section 20 of the Suppression of Immoral Traffic in Women and Girls Act must be struck down under Article 13 (2) of the Constitution for taking away or abridging the fundamental rights conferred by Clauses (d) and (e) of Article 19 (1), as well as for infringement of Article 14. These six revision applications are accordingly allowed and the proceedings pending against the applicants in the court of the City Magistrate of Kanpur are quashed.

**IN THE HIGH COURT OF ANDHRA PRADESH AT HYDERABAD**

**P.N. Swamy, Labour Liberation Front, Mahaboobnagar vs.  
Station House Officer, Hyderabad and Others**

1998(1)ALD755

Decided On: 22.08.1997

**Hon'ble Judges:**

Y. Bhaskar Rao and V. Rajagopalal Reddy, JJ.

**JUDGEMENT**

- 1 'Mehaboob-ki-Mehindi' is an infamous redlight area lying in the thickly populated and business locality near Charminar where the dehumanising carnal trade has been flourishing for several decades. Though flesh trade was, prohibited by the law enacted as early as in 1956, prostitution is being carried on under the very nose of the police. However, the misery of the unfortunate sex-girls in the area was brought to the notice of the Court by a write up in the Telugu Daily 'Eenadu' followed by the letter dated 06-03-1997 of a public spirited person by name P.M. Swamy of "Liberation Front".
- 2 This Court treated the said letter as writ petition and the Commissioner of Police, Hyderabad city (second respondent) was directed to cause enquiry through the Superintendent of Police for women Protection Cell as to how many women have been kept forcibly in the place called Mehaboob ki Mehndi at Hyderabad and submit a report.
- 3 Accordingly, the Superintendent of Police, Women Protection Cell, CID, Hyderabad, went to the area and conducted a detailed enquiry on 12-4-1997 and 16-4-1997 and submitted an elaborate report. During the course of enquiry, the Superintendent of Police rescued 65 (sixty five) females from the Mehaboob-ki-Mehindi area She also arrested 19 (nineteen) Sethanis (brothel-keepers), who are conducting the brothel houses; she also arrested four house owners; two financiers; two brokers and one policeman....
- 4 Considering the ailments of various rescued women and minors, this Court also directed the Superintendent, Osmania General Hospital, Hyderabad, to make necessary arrangements for medical examination and also hospitalise them, if necessary. The Secretary,



Social Welfare Department was also directed to make necessary arrangements for medical examination and providing food for them.

- 7 In this writ petition Mehendi Manila Sangheebhava Committee filed a petition to implead them as party in the writ petition and the Sangheebhava Committee also made a claim for providing facilities to the rescued women at the cost of Government. One hundred seventy one (171) residents of surrounding locality of Mehaboob-ki-Mehindi filed a petition to implead them as the respondents in the writ petition and the same was ordered. It is alleged in the petition that the residents of entire area where they are now residing being proximate to Mehaboob-ki-Mehindi, are not in a position to leave the, same and go to any other part of the city and even if they are willing to do so, no person is willing to occupy the residences as tenants. In view of their residences near the areas even the matrimonial alliances to the young girls have become difficult and they were doomed and cursed for no fault of theirs and the entire locality has earned the dubious distinction for itself though prostitution was carried on in a few houses in the area. It was therefore, urged that the Government should take proper steps to ensure implementation of the provisions of the Immoral Traffic (Prevention) Act, 1956 (for short 'Act 104 of 1956) to erase the flesh trade in Mehaboob-ki-Mehindi area to retrieve the dignity of women.
- 8 This Court appointed Mr. V.V.S. Rao, senior Advocate as amicus curias to assist the Court, by enquiring with the rescued women.... He contended that the rescued women must be released immediately as they have not committed any crime and there is no law to confine them in the jails. Incarcerating them in jail and continue their confinement will be violative of Article 21 of the Constitution of India.... Even if they are infected with HIV, they cannot be put in incarceration or isolation in rescue homes or protective homes or welfare homes which would deprive not only their liberty under Article 21 of the Constitution of India, but also deprive the right to move freely and to reside and settle as they like as guaranteed under Article 19(1)(d) & (e) of the Constitution of India He further contended that by not liberating them they will not be in a position to look after their children and their children will be deprived of their livelihood. Thus there is requirement of their release immediately.

- 9 Learned Government Pleader contended that most of the rescued women are suffering from V.D.R.L. and H.I.V. infection. If the women are released there is every possibility of going to the same profession as Sethanis and brokers will drag them into the same profession.... It, is contended that the Government has prepared a scheme to rehabilitate such women....
- 10 The above scheme will be implemented with the co-operation of nongovernmental women organisations called "Pratyamnaya" who readily came forward to assist and co-operate to take up the rehabilitation programme of the commercial sex workers. Accordingly the Government sanctioned Rs. 15,00,000-00 for the present for implementation of the above scheme.
- 11 Therefore the rescued women, that, is the women who are infected with HIV and VDRL should be sent to the welfare homes so that they can be rehabilitated and they can be stopped from indulging in the prostitution. After they are trained in the vocational courses and counselling of education of infected diseases like HIV and AIDS they will be sent to their homes so that they can lead normal life by doing other works as co-citizens.
- 12 It is further contended that keeping the rescued women in welfare home or protective home thereby preventing spreading of the HIV and AIDS will not be violative of Article 21 or Article 19 (1) (d) and (e) of the Constitution of India.
- 13 Smt. Malladi Subbamma, one of the renowned women social worker appeared before this Court and submitted a representation suggesting the reformative measures to be taken and to set at liberty the rescued women, who are living as prostitutes due to their social economic conditions.... She also suggested two methods of rehabilitation, one being communal rehabilitation and the other one individual rehabilitation-Under the caption of individual rehabilitation, she suggested that some of the rescued women intended to start the normal life by installing pan shop, agricultural work and dairy. She also suggested that the rescued women should be provided financial assistance, agricultural land and house sites. If medical aid is provided, all the venereal diseases are curable. Though the law was amended in the year 1986, no male person has been booked.
- 14 Therefore, we have to examine the scope and the scheme of the Act No. 104 of 1956 and the relevant constitutional provisions. Further

we have to examine the scope of the judicial review under Article 226 of the Constitution of India so as to give suitable directions and the duty of the State i.e., Executive for implementation of the welfare legislations made by the Parliament and the State Legislatures to ameliorate the social and economic conditions of the poor women particularly innocent, illiterate women who are dragged into the prostitution by the brokers, Sethanis, Financiers and also by their own kith and kin, who sell them to the brothels for a pittance.

- 15 It is also relevant at this stage to refer to the elaborate painstaking report submitted by Mrs. Tej Deep, IPS, Superintendent of Police, Women Protection Cell, CID, Hyderabad, after conducting detailed enquiry, examining and interacting with the rescued women.... The report further reveals that the women are joining in the trade due to poverty, lack of economic support from male members of the family, unfavourable marital relations, cheating by husband/fiancee etc., that 80% of these women are having one or more children whom they have to maintain through their income from prostitution, that about 30% of the women are sending money to their parents and other relatives, that when the women were pressurised at one Urban-Centre they move to another centre and 20% of the women have interstate operations, that some of the women expected to become Sethanis at the appropriate time, that though they were well aware of the menace of AIDS they were not taking any precaution as a result of which three women were pregnant through their trade. The report further reveals that all steps are being taken for the rehabilitation of the rescued women and the S.P. suggested certain measures for rehabilitation of the rescued women and to erase the flesh trade in the area.
- 16 This writ petition is taken up as a public interest litigation on the basis of a letter sent by one public spirited person pointing out the social evil viz., Prostitution, rescuing the women from that area and the requirement of removal of the same from the Mehaboob-ki-Mehandi.
- 17 Let us now examine the relevant constitutional provisions:

Article 19 (1) (d) and (e) of the Constitution of India guarantees the right to reside anywhere and move freely throughout the territory of India. Article 21 of the Constitution of India guarantees Protection of life and personal liberty to the citizens. Article 23 of the Constitution of India prohibits traffic in human

beings and forced labour. Article 39 (e) contemplates that the State shall, in particular, direct its police towards securing the health and strength of workers, men and women, and that the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 39 (f) provides that the State shall, in particular direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 47 of the Constitution of India obligates the State to raise the level of nutrition and the standard of living and to improve public health.

- 18 By a combined reading of the above provisions of the Constitution of India it is manifest that there is a constitutional mandate to the State to maintain public health by providing adequate measures. This, in turn provides a corresponding constitutional right to the citizens including the poor, weak and fallen women. Though the Directive Principles are non-enforceable in a Court of law yet they are fundamental in the governance of the State. Therefore, the State has to provide all facilities including medical treatment for upliftment and rehabilitation of fallen women.
- 19 It is to be noticed that Article 23 of the Constitution of India prohibits the traffic in human beings. In the present case it brought to light that some of the women and young girls were sold to the brothel houses. The same amounts to the trafficking in women and the same is in contravention of the Article 23 of the Constitution of India. Therefore, there is duty cast on the law enforcing agency to prosecute the persons responsible and take further action to prevent such acts.
- 20 Now the point to be considered is whether the infected women with HIV and VDRL can be sent to the protective homes until they are rehabilitated or they shall be released forthwith.
- 25 Section 17(4) of the Act 104 of 1956 empowers the Magistrate to send the rescued women to the protective or welfare home to keep them for a prescribed period. It is contended that Section 17 (4) of Act 104 of 1956 is unconstitutional as it infringes the fundamental right guaranteed under Articles 14, 19 (1) (d) and (e) and 21 of the Constitution of India.

- 26 Therefore, the important question of law that arises for consideration is whether Section 17(4) of Act 104 of 1956 is in violation of Articles 14, 19 (1) (d) and (e) and 21 of the Constitution of India.
- 27 To appreciate the above contention, let us examine the relevant provisions of Act 104 of 1956. Section 15 of Act 104 of 1956 empowers the Special Police Officer, where he has got a reason to believe that an offence under Act 104 of 1956 has been or is being committed, to search the premises without warrant; and the police officer entering any premises shall be entitled to remove therefrom all the persons found therein; that the Special officer after removing the person shall forthwith produce him before the appropriate Magistrate; that any person produced before the Magistrate shall be examined by a registered medical practitioner for the purpose of determination of the age of such person or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases. Section 16 of the Act, 1956 postulates where a Magistrate receives any information from the Police or any other person authorised by the Government that any person is living or is carrying on or is being made to carry on prostitution in a brothel, he may direct a Police Officer not below the rank of a Sub-Inspector to enter such brothel and to remove therefrom such person and produce him before him; and that the Police officer after removing the person shall forthwith produce him before the Magistrate issuing the order. Section 17 of the Act, 1956 contemplates intermediate custody of persons removed under Section 15 of the Act, 1956 or rescued under Section 16 of the Act, 1956. Section 17 (4) of the Act, 1956 empowers where the Magistrate is satisfied after making an inquiry, he may make an order that such person be detained for such period being not less than one year and not more than three years as may be specified in the order in a protective home or in such other custody as he shall for reasons to be recorded in writing. The Magistrate is further empowered to call for a report from the Probation Officer after conducting enquiry into the age, character and antecedents of the persons for the purpose of handing over the rescued women to the husband or the relatives etc. Clause (5) of Section 17 of the Act, 1956 obligates the Magistrate to summon a panel of five respectable persons, three of whom shall, wherever practicable, be women, to assist him; and may, for this purpose, keep a list of experienced social welfare workers, particularly women social

welfare workers, in the field of suppression of immoral traffic in persons. Section 20 of the Act, 1956 says that the Magistrate on receiving information can remove any person from the place after giving notice to such person as to why he should not be required to remove from that place and be prohibited from re-entering into it.

- 28 By reading the Sections 15,16, 17 and 20 of Act, 1956 it is manifest that the Magistrate has got ample power to pass orders in respect of the rescued women either releasing them or for handing over them to their kith and kin or send them to rehabilitation centres or protective homes. The Section 17(4) of the Act, 1956 empowers sending such women to protective homes for not less than one year and not more than three years to rehabilitate them without trial and conviction if it reaches to conclusion that they need care and protection subject to the opinion of panel of social workers as provided under clause (5) of Section 17 of the Act, 1956. This is a salutary provision for reformation of the women who are forced into prostitution. This requires strict enforcement as one of the welfare measure in the Act. It should be noticed here that the Act, 1956 is enacted in pursuance of the International Convention signed at NewYork on the 9th day of May, 1950. Therefore, it is the duty of the State to reform the rescued women particularly those who are infected with HIV and AIDS in their own interest and in the interest of the society.
- 29 The Act, 1956 is a Social Welfare legislation to abolish the commercial sex activity carried on by the brothel keepers by using innocent and illiterate women and also to remove the social evil for the good of the society. Therefore the provisions of the Act, 1956 has to be read as reasonable restrictions on the fundamental rights as per the Article 19(5) of the Constitution of India It is always permissible for the State to enact laws and impose reasonable restrictions on the fundamental rights in the larger interest of the society. Where there is a conflict between the individual fundamental right and the larger interest of the society, in the interest of social economic good of the society to achieve constitutional goal the individual fundamental right has to yield to the larger interest of the society. The provisions of the Act which are imposing reasonable restrictions are procedures laid down by law and the said procedure cannot be said to be unfair. Therefore, Section 17(4) of the Act is not unconstitutional and the same is not violative of Article 21 of the Constitution of India.

- 30 Before the Supreme Court in *State of Uttar Pradesh vs. Kaushailiya*, Section 20 of the Act, 1956 which empowers the Magistrate to direct the prostitute to remove herself from a place, was challenged as unconstitutional as it is violative of Articles 14, 21, and 19(1) (d) and (e) of the Constitution of India, Mr. Justice Subba Rao speaking for the Court held that the provisions of Section 20 of the Act, 1956 are reasonable restrictions imposed in public interest within the meaning of Article 19(5) of the Constitution of India and therefore do not infringe the fundamental rights of the persons under Article 19 (1) (d) and (e) of the Constitution of India.
- 31 A Division Bench of Bombay High Court in *Lucy S. D'Souza vs. State of Goa*, AIR 1990 Bom 355, the constitutional validity of Sections 2 (15), 53 (1) (vii) of the Goa, Daman and Diu Public Health Act, 1985 which provides isolation of AIDS (Acquired Immuno Deficiency Syndrome) patient, were challenged as unconstitutional and violative of Articles 14, 19(1)(d) and 21 of the Constitution of India. The Court, after elaborately considering the AIDS disease and its effects on the patients and the preventive care to be taken to stop the spreading of the disease held that isolation of patients is not unconstitutional and not in violation of Articles 14, 19 (1) (d) and 21 of the Constitution of India, It is further held where there is a conflict between the right of an individual and public interest, the former must yield to the latter.
- 34 In view of the above stated principles laid down in the judgements Section 17(4) of Act 104 of 1956 empowering the Magistrate to send the rescued women to the protective homes or welfare homes for their rehabilitation and for social good cannot be said to be violative of Article 14 and Articles 19 (1)(d) and (e) and 21 of the Constitution of India.
- 35 It is further contended that the rescued women are not booked for any offence under Act 104 of 1956 and therefore the provisions of Act 104 of 1956 are not applicable and no action can be taken by this Court to enforce those provisions....
- 36 The High Court and the Supreme Court have got wide powers to give proper directions in the public interest litigation and to direct to implement the provisions of the laws which are for the social economic good of the society. Therefore this Court under Article 226 of the Constitution of India can issue suitable directions....

- 37 ...The principle laid down in the above judgement of the Supreme Court, is that the Courts have to look in the public interest than the private interest in the litigation between the parties and larger interest of the society and downtrodden has to be taken into consideration for giving concession. The failure of the State to perform its statutory obligations have also to be taken into consideration and relief has to be moulded in the larger interest of Society and particular in the interest of the downtrodden fallen women to take steps to wipe out the immoral activity of the Society to rehabilitate the victims.
- 38 Hence the contention that the rescued women who are infected with HIV infection cannot be sent to welfare home or protective home is not tenable....
- 41 Next question comes about the children of the HIV infected women. If any woman has got children who are dependent on them, they have to be looked after by providing all facilities because these women are now directed to be kept in welfare homes for a period of two years. Article 45 makes provisions for free and compulsory education for children, which is now well settled as a fundamental right to the children upto the age of 14 years; it also mandates that facilities and opportunities for higher education, be provided to them. Article 39(f) provides that the children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 46 directs the State to promote the educational and economic interest of the women) and weaker sections of the people and that it shall protect them from social injustice and all forms of exploitation. Thus the children have got a right to -be protected and educated particularly those children of the fallen women who are directed to be kept in protective home. Therefore we think it just and proper to direct the respondents to verify whether there any children of these 21 women and if the children are there, and they are of the age of sending them to educational institutions, the respondents are directed to send them to the welfare hostels established and maintained by Government and provide them food and clothing and other facilities to educate them.



- 42 Before parting with the case, it is necessary to examine whether the provisions of the Act 104 of 1956 are implemented in its true spirit or not. Section 21 of said of the Act obligates the State Government for establishing protective homes and corrective institutions and they should be properly maintained for rehabilitating the rescued women in the said protective homes. The provision further contemplates that no other person can establish such protective homes, except with the permission of the Government. The Government is entitled to issue licences to the organisations which want to establish the said protective homes. Such organisations after obtaining licence to maintain such protective homes as provided under the Act, 1956 have to establish the protective homes by following the due procedure prescribed therein. The intendment of establishing protective homes and corrective institutions is for the purpose of rehabilitation. The report of the amicus curiae shows that there are no minimum facilities available in the welfare home though a vast area is available to accommodate number of persons.
- 43 ... The Act, 1956 is enacted to curb the commercial activity in sex and for rescuing the innocent and illiterate prostitutes. There is an obligation on the State to implement the provisions of the Act, 1956 and to maintain the protective homes in such a way that atleast minimum facilities are provided to the inhabitants of the said homes. We, therefore, direct the respondents/Government to prepare a scheme to renovate the welfare homes/protective homes maintained by the State by providing sufficient budget and keep a strict vigil on the activities of the said homes and see whether they are properly carried on or not.
- 44 Section 21 of the Act, 1956 empowers the Government to permit the nongovernmental organisations to establish protective/welfare homes after obtaining licences and maintain them as per the norms prescribed by the Government. It is a fact that the protective homes established by the Government are not sufficient to accommodate the inmates. If voluntary organisations are given licences, it will facilitate to send the rescued women to such homes. Further, it is the fundamental duty of every citizen to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women, to value and preserve the rich heritage of our composite culture and to strive towards excellence in all spheres of individual

and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. Selling women and girls and forcing them to prostitution is an act which is derogatory to the dignity of womanhood. Every citizen is duty bound to eradicate such evil from the society. There is also any amount of responsibility on voluntary organisations to take up and serve the cause. One of the voluntary organisations, which is a party to this writ petition, expressed its desire to serve for the said cause. Therefore, we direct the State Government to consider the matter of issuing licences to the recognised voluntary organisations to establish protective homes after verifying the facts whether such bodies are having genuine, service-motto and sponsored by any other organisation, like Andhra Mahila Mandali, so that the burden on the Government will ease. The said voluntary organisations have to maintain protective homes in accordance with the norms and rules prescribed by the Government. We hope that the Government will bestow attention to this aspect also.

- 45 Section 13 of the Act, 1956 contemplates for appointment of a Special Police Officer and an Advisory Body. It is evident that the trade of prostitution is increasing day by day and the innocent women and minor girls are forced into the profession and the instances of sale of women to tie brothels are also brought to our notice in the report submitted by the Superintendent of Police, Women Protection Cell. Therefore, there is requirement of appointment of Special Police Officer to deal with the crimes in the area where the prostitution is prevailing and strictly implement the provisions of the Act. Section 13(3)(b) of the Act, 1956 provides that the State Government may associate with the Special Police Officer of a non-official advisory body consisting of not more than five leading social workers of that area (including women social welfare workers wherever practicable) to advise him on questions of general importance regarding the working of this Act. Till now such Special Officer or advisory body is not appointed.
- 46 Therefore, we direct the Government to appoint a Special Police Officer to deal with the cases of this nature identifying the areas in the city of Hyderabad and Secunderabad and also in districts. Merely appointing Special Police Officer or officers is not sufficient unless there is a supervision on Special Police Officer or Officers for implementation of provisions of the Act, 1956 in its true spirit- There is requirement to supervise and guide special police officer

and other police officers dealing with the crimes under the Act. Hence, a Superior officer has to be nominated by the Government. Therefore, we direct the Government and the Director General of Police to nominate Superintendent of Police, Women Protection Cell as a Superior officer to supervise and guide special police officer and police officers dealing with the crimes under the Act in the twin cities of Hyderabad and Secunderabad and also nominate such superior police officer in each district- We further direct that the Government may also appoint an advisory body as provided under Section 13(3)(b) of the Act, 1956 consisting of renowned social workers so as to help the Special Police Officer who is supervising the offences of this nature.

- 47 The Act, 1956 further provides for closure of brothel houses. Sections 18 and 20 of the Act, 1956 contemplates closure of brothel and eviction of offenders from the premises and removal of prostitute. It is not brought to our notice till now that any action has been taken. In the present case, the residents of the surrounding locality of Mehaboob-ki-Mehandi have filed a detailed affidavit selling out the difficulties facing by them due to the existence of the flesh trade in the area. Therefore, there is any amount of necessity to implement the provisions of Sections 18 and 20 of the Act, 1956 in the true spirit by the law enforcing agency i.e., Police and the Magistrate.
- 48 We have directed release of the women excluding minors, who are infected with VDRL disease and also directed to send (21) women infected with HIV to protective home....
- 49 We further direct that the four minor girls be lodged in the juvenile jail and further direct that the pregnant girls must be given treatment and counselling; and also give proper treatment to the minor girl Kowuri Saroja who is infected with VDRL. The four minor girls will be given vocational training. They will be kept in the juvenile jail for a period of two years. After expiry of two years or after attaining majority, whichever is later, the advisory body will examine them and in case they want to go and settle to lead normal life or if their parents or, kith and kin come forward to take them to settle them in society as normal women the advisory body after satisfying themselves may recommend for release of those girls and the said recommendation will be acted upon and the concerned Magistrate will pass appropriate orders.

- 51 Till now there is no advisory body appointed by the Government. Therefore, we think it just and proper it direct the Government to appoint an advisory body as expeditiously as possible, preferably within a period of six months. Until regular body, is appointed there is a necessity to have the advisory body to advise the Special Police Officer or other police officers who are dealing with the crimes under the Act.
- 52 Therefore, we hereby direct the Government to appoint Mrs. Tejdeep, IPS Superintendent of Police, Hyderabad and Smt Malladi Subbamma and any other women social workers opted by Smt. Malladi Subbamma and the Superintendent of Police, be appointed as members of the advisory body on temporary basis. The said advisory body will play an active role in assisting such special officers and other police officers who are dealing with the crimes under Act 104 of 1956 and the said advisory body will be in force until a regular body is appointed by the Government
- 53 We direct that the Government shall appoint a permanent Special Police Officer as contemplated under Section 13 of the Act, 1956 identifying the areas and also appoint an advisory body on permanent basis in terms of Section 13 of the Act, 1956 for the twin cities Hyderabad and Secunderabad and also for each district. This exercise shall be completed within a period of six months from the date of receipt of a copy of this order.

There is an AIDS department and Sexually Transmitted Diseases Department in the Director of Medical Services, Government of A.P, Hyderabad. It is brought to our notice that the authorities are not taking any measures to educate the sex workers about the effect of AIDS and VDRL diseases. Therefore we think it just and proper to direct the Secretary, Health Department, Government of A.P, Hyderabad to take appropriate steps and see that the above stated-two departments will propagate the evil effects of the diseases in every hospital in twin cities of Hyderabad and Secunderabad and in the district headquarters and also in every primary health centres in the State and also in the Government hospitals by affixing the posters and educating the patients who visit the hospitals. We further direct that the above two departments must also tour the areas where the prostitution is carried on and educate the sex workers about the dreaded diseases. We hope and trust that this exercise will clothe the sex workers with the knowledge

and they themselves will try to take preventive care by coming out of profession or by taking other preventive measures.

- 54 ...Therefore, we direct the Director General of Police to take stringent action against those police personnel involving in this nature of offence not only by taking departmental actions but also by laying prosecution and report compliance to the Registry of this Court immediately after taking such action. In the report the Superintendent of Police has made important suggestions and we feel that if such suggestions are implemented, the same will be useful for arresting the flourishing commercial activity of flesh trade. Therefore, we direct the Home Secretary and the Director General of Police to take those suggestions alongwith the relevant provisions of Act No.104 of 1956 and issue suitable directions to all the Police officers who will be dealing with the crimes under the said Act.
- 55 ...The reports clearly show that the money earned by these fallen women was misappropriated by the Sethanis, financiers, brokers etc. There are no adequate provisions in Act 104 of 1956 for recovery of such amounts. If the adequate provisions are provided in Act 104 of 1956 for recovery of the said amounts from the above said persons, the same can be recovered by process of law and restore to the destituted women and with that amount they can start a new life.... There, is every necessity to incorporate suitable provisions for recovery of such amounts by amending Act 104 of 1956. Therefore, we suggest that the Central Government should bring appropriate amendments in Act 104 of 1956.
- 57 The writ petition is accordingly disposed of.

## IN THE HIGH COURT OF ANDHRA PRADESH

**Vasanthi vs. Jaya Prakasha Rao and Others**

1996CriLJ4243, 1996(4)ALD150

Decided On: 08.08.1996

**Hon'ble Judges:**

Prabha Shankar Mishra and Syed Saadatulla Hussaini, JJ.

**JUDGEMENT**

- 1 A letter addressed to the Chief Justice of India by the petitioner has been taken up as a petition under Article 226 of the Constitution of India on being marked to this Court by the Supreme Court. In her letter to the Chief Justice of India, the petitioner has stated that she is a practising advocate of this Court and a divorcee with two children, who are studying in Puttaparthi. On 27-2-1995, three persons were taken illegally by Rajendra-Nagar Police and allegedly beaten black and blue. Their mother got a petition filed before this Court of a writ in the nature of Habeas Corpus on 2-3-1995. Sri. E. V. Bhagiratha Rao, who was then the Public Prosecutor, the petitioner has alleged, came to her residence on 6-3-1995, at about 6.30 p.m. and asked her to withdraw the writ petition as the then Home Minister was interested. When she refused to do so, Sri Bhagiratha Rao threatened her with dire consequences and left her place. She has alleged, "Before this incidence, for one and half year Mr. E. V. B. Rao continuously harassing me by regular visits and letters requesting me to marry him and stay as second wife as he was holding PP's post and having respect to his age I could not complain to anybody." Taking advantage of his office, according to the petitioner, Shri Bhagiratha Rao activated the Inspector and office in-charge of Nallakunta Police Station to arrest her and she was taken to the police station by the latter around 7.45 p.m. on the same date i.e., 6-3-1995. She was beaten very badly and was asked to sign on blank papers and when she refused, she was threatened by the Inspector of Police that he could make her stand naked in the police station the whole night. When, however, she strongly protested, she was shifted to Central Crime Station by the Inspector at about 3.00 a.m. in the morning of 7-3-1995. She was kept at one or the other police station for more than 26 hours and on 7-3-1995, at about 9.40 pm., she was taken to the VIth Metropolitan Magistrate's residence and, "without First Information Report,

without Crime Number, without charges” the Magistrate granted bail and she was released by 11.30 p.m. After returning home, she found her scooter-AP-9G-6682 missing, which, according to her version, had been taken away by the police. On the following day, she shifted her residence to Barakathpura. She met some of the Judges of the Court and narrated the incidents to them and filed a petition C.C. No. 168 of 1995, on 13-3-1995, against Shri Jayaprakash Rao, Inspector of Police, Nallakunta, contending that since she had filed the above Habeas Corpus petition, he had falsely filed a criminal case against her and had been saying that unless she withdrew the Habeas Corpus Petition, she would be implicated in false cases. Petitioner has alleged, “pamphlets were distributed by P.P. (Shri Bhagiratha Rao) and Shri Jayaprakash Rao that ‘she was arrested because she was involved in immoral traffic act case and that the Inspector of Police (Shri Jayaprakash Rao) had personally seen her involving in sexual acts with one of his best friends”. The letter addressed to the Chief Justice of India has posed, if he (the Inspector of Police) had really done his duty - (1) why he had not sent her/for medical examination; (2) why did he not produce her before the Court immediately; (3) why had he not taken a lady constable and panchas when he entered her residence and why had he not taken her to Court and asserted....

...She has, in the letter, requested as follows :

“I am requesting you to conduct CB CID enquiry and let all the facts came out. You are not only saving a lady’s life but also profession where lady advocate should practice fearlessly and fairly.”

The petitioner has also filed Criminal Petition No. 864 of 1995, to quash the proceedings in Crime No. 52 of 1995, dated 6-3-1995, on the file of Nallakunta Police Station, which is allegedly registered under Sections 3 and 4 of Immoral Traffic (Prevention) Act, 1956, against her.... In his report in respect of Crime No. 52 of 1995, the Officer (Shri Raju) has appended the following remark;

“Although facts and circumstances of the case as well as oral and documentary evidence collected show the needle of suspicion towards alleged activities of the accused, no legally admissible evidence to substantiate the charge under Sections 3 and 4 of Immoral Traffic (Prevention) Act could be collected. When information was received regarding alleged offence on

6-3-1995, the Inspector of Police, Nallakunta Police Station did not cause discreet enquiry into the matter. Not did he deploy any decoy either to verify the information or to assist in the raid. He hurriedly swung into action and raided the suspected premises without observing formalities contemplated under law resulting in loss of evidence essential to establish the alleged offence....”

- 3 To complete the narration of facts and events, we have to record that the Officer, who was asked to investigate the case, has found that allegations in Crime No. 35 of 1995 of Chikkadapally Police Station as respects involvement of the petitioner along with others in the offences punishable under Sections 468, 471 and 420 of the Indian Penal Code are supported by the evidence and accordingly in respect of the said offences, he has submitted the report for action against the petitioner and other named accused....
- 6 We do not have sufficient material for any clear finding as to the indecencies hurled upon the petitioner at the police station and humiliations caused to her by the third respondent or any other person, yet there are sufficient materials for inference without any need to conjecture that the third respondent caused to the petitioner sufficient embarrassment by putting her to shame as one who was running a brothel as defined under Immoral Traffic (Prevention) Act, 1956, and who herself indulged in immoral sexual games.... Shri Bhagiratha Rao, the then Public Prosecutor, has not conducted himself with the dignity as a member of the legal profession. He is responsible for a case which has put the petitioner to great humiliation and has not stopped in spite of clear reprimands, which, of course, have not come as orders from any authority but as disapproval of the society and the legal fraternity....
- 8 The petitioner has been a victim of the complaint by Shri Bhagiratha Rao, who had the status of the Public Prosecutor at the relevant time, and the actions of the third respondent - Shri Jayaprakash Rao, who was the Inspector of Police and Officer-in-charge of Nallakunta Police Station. It is a fit case, in our opinion, in which the State Government must, for the acts of its servants and agents, compensate the petitioner. In Nilabati Behera vs. State of Orissa, (1993) 2 SCC 476 : (1993 Cri LJ 2899), the Supreme Court had pointed out that in case of violation of fundamental right by State’s instrumentalities or servants, Court can direct the State to pay compensation to the victim or his heir by way of ‘monetary amends’



and redressal and this remedy is apart from the private law remedy which the petitioner can seek, if so advised....

The above, being candid statement of law, is reiterated by the Supreme Court in yet another judgement in Arvinder Singh Bagga vs. State of Uttar Pradesh, 1994 (4) SCALE 466 : (1994 AIR SCW 4148).

- 9 In the instant case, there is no manner of doubt the petitioner's right under Article 21 of the Constitution of India has been infringed by the third respondent and other officials, who arrested her and kept her under detention without complying with the requirements of law and who otherwise caused to her serious damage in reputation and prestige, both as a woman and a lawyer. Her rights under Article 21 of the Constitution of India are affected both in respect of right to live as well as liberty. Her privacy has been invaded and her liberty curtailed. The petitioner, however, will receive what the law must give as a consequence of her wrongdoings in lodging false cases as well as for the alleged offence committed by her in due course and by the due process of law. We have given a serious consideration to the quantum of exemplary compensation since the petitioner combines the privilege of a woman in a non-permissive society of ours with that of an advocate, who lives by his or her reputation and reputation alone as a lawyer. The State, for the wrongdoings of its servants, should pay a substantial monetary compensation, but when the petitioner herself is not free from any wrongdoings in the matter and the consequences, which the course of law shall finally deliver to her aside, the Court's conscience will not permit any heavy award in her favour. Since the compensation, at this stage, is besides the compensation the petitioner can claim under the private law, we fix the amount of compensation at Rs. 50,000/- only.
- 10 In the result, the writ petition is ordered as follows :
- (1) The Government of the State of Andhra Pradesh shall pay to the petitioner compensation in a sum of Rs. 50,000/- only within one month of the receipt of the copy of the judgement;
  - (2) all the reports under Section 173(2) of the Code of Criminal Procedure in all the above seven (7) crimes registered with the police shall be submitted to the Court of the Judicial Magistrate concerned forthwith for appropriate action in accordance with law;

- (3) there shall be an order of restrain upon Shri E. V. Bhagiratha Rao in visiting the petitioner at her place of abode or at any other place and the petitioner shall be at liberty to seek help of the police administration of the State in case the former is found doing anything to disturb her privacy. The Administration of the police of the State shall be obliged to provide protection to the petitioner as and when asked for by her to restrain any activity of Shri E. V. Bhagiratha Rao.

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**M. Rajeswari vs. State by P.S.I. (L and O),  
Kengeri Gate Police Station, Bangalore**

2001(5)KarLJ532

Decided On: 24.07.2001

**Hon'ble Judge:**

G. Patribasavan Goud, J.

**JUDGEMENT**

- 1 The petitioner is the owner of Hotel India International, a place for lodging, at Bangalore. She is prosecuted along with others for offences under Sections 3, 4, 5 and 7 of the Immoral Traffic (Prevention) Act, 1956 ('Act' for short). This was after the Police Inspector of Special Squad, C.C.B., Bangalore, raided the hotel concerned and found therein certain girls having been brought from Bombay for the purpose of prostitution. The case of the prosecution is that, the Manager of the hotel said that, at the instance of the petitioner-owner, in order to have more business in the hotel, these kinds of things were being permitted.
- 2 The objection of Sri S.G. Bhagwan, learned Counsel for the petitioner is a technical one, viz., that there is no compliance with Section 13 of the Act as regards the status of the officer who has dealt with the offences concerned herein. What has happened in the present case is that, after the said Police Inspector of Special Squad, C.C.B., Bangalore, found the above said circumstances in the hotel and set the law in motion by lodging a complaint to the S.H.O. of Kengeri Gate Police Station, it is the Sub-Inspector of Police of Kengeri Gate Police Station who has investigated into the same and has submitted the charge-sheet.

Section 13(1) of the Act inter alia provides that, for each area, there shall be a Special Police Officer for dealing with offences under the Act in that area. Sub-section (2) of Section 13 provides that, the Special Police Officer shall not be below the rank of an Inspector of Police. In *Delhi Administration v Ram Singh*, the Supreme Court held that the expression 'dealing with the offences' occurring in sub-section (1) of Section 13 of the Act includes power of investigation, and that the offences under the Act can be investigated only by Special Police Officer and not by other Police Officer. The Supreme

Court said that the Special Police Officer being competent to investigate, it is only he and his Assistant Police Officers who are the only persons competent to investigate the offences under the Act, and that the Police Officer not specially appointed as Special Police Officer cannot investigate the offences under the Act even though they are cognisable offences.

In *State of Madhya Pradesh vs. Mubarak Ali*, while dealing with the provisions of the Prevention of Corruption Act, 1947, the Supreme Court listed several steps involved in the investigation of an offence starting from the receipt of information and ending with the filing of the charge-sheet, thereby making it clear that, even the act of filing of the charge-sheet is a step in course of investigation.

- 3 Looked at in the background of the provisions concerned and the two decisions of the Supreme Court, it is apparent that the offences have been dealt with by the Sub-Inspector of Police of Kengeri Gate Police Station who is not a Special Police Officer competent to deal with the offences under the Act within the meaning of sub-section (1) of Section 13 of the Act, more so, when he is not of the rank of an Inspector of Police, which would be the minimum condition in view of sub-section (2) of Section 13 of the Act.
- 4 Petition is, therefore, allowed and the impugned proceeding is quashed.

**IN THE HIGH COURT OF MADHYA PRADESH (GWALIOR BENCH)**

**Priya vs. State of Madhya Pradesh and Others**

2001(4)MPHT223

Decided On: 11.09.2001

**Hon'ble Judges:**

S.P. Srivastava and R.B. Dixit, JJ.

**JUDGEMENT**

- 2 The present is an unfortunate story of plight of an unfortunate girl belonging to Mobia community of an area inhabited by aboriginal tribes of Chhattisgarh. Petitioner Priya (whose real name is Vaishakhi alias Pushpa), who had changed her name as Priya to escape herself from ignominy after her sexual exploitation in dacoity infested area of Bhind. Out of three, she is the eldest daughter in the family and had dropped out of the Govt. Middle School, Mirgaon after she failed in Class VIIIth in the year 1998. As per school records, her date of birth is 30-6-1982. In the year 1999, she came in contact with one Lalit Rawat and developed intimacy with him. Since Lalit Rawat was already married and was arrested on the complaint of his wife, the petitioner was compelled to lead an immoral life through Smt. Beena, respondent No. 8, her close relation. Daver Chand was younger brother of Beena who was married to Urmila, younger sister of the petitioner. In the month of March, 2000, Daver Chand took the petitioner to Smt. Beena at Bhind, who was an active participant of a Brothel House, run by Smt. Kamla, respondent No. 7 in Old Red Light Area, situated at Hazarilal Ki Sarai, Neemwali Gali, Bhind. By persuasion or by force, the petitioner too was admitted in this Brothel House, and was sexually exploited for the benefit of the two ladies.
- 3 Shri Anil Kumar Singh Bhadoriya a bachelor practising Advocate of Bhind claiming himself to be a sympathiser, of the petitioner, said to have come in the contact of the petitioner with the help of one Natraj Photo Studio, situated opposite to the house of respondent Nos. 7 and 8. The petitioner through Shri Bhadoriya, Advocate moved an application for her rescue, before the Sub-Divisional Magistrate, Bhind (in short SDM). The SDM issued a search warrant under Section 97 of the Code of Criminal Procedure, for the

production of the petitioner, pursuant to which, Town Inspector of City Kotwali, Bhind recovered the petitioner from the illegal custody of the respondent Nos. 7 and 8. The SDM after recording the statement of the petitioner, remanded her to be kept at Short Stay Home in Nari Niketan, Gwalior.

- 4 Feeling aggrieved by the order of SDM Shri Anil Kumar Singh Bhadoriya, has filed the present writ petition of Habeas Corpus on behalf the petitioner Priya, alleging that the petitioner was remanded to Short Stay Home by the SDM against her will and she is being subjected to bad behaviour and forced to surrender to the dictates of the Superintendent of Nari Niketan.
- 5 The petitioner was produced before this Court from Short Stay Home and she informed that she is comfortable there and was looked after very well. This in our opinion, totally belied all the allegations of Shri Bhadoriya, Advocate in so far as lodging of petitioner at Nari Niketan is concerned. The Superintendent of Nari Niketan in her affidavit had stated that Shri Bhadoriya, Advocate wanted the petitioner to get out of the Short Stay Home and on 6-11-2000, approached her offering to marry the petitioner, however, he was not allowed to meet the petitioner in absence of any permission from the Court.
- 6 In so far as other allegations against respondent Nos. 7 and 8 regarding their indulgence in the trade of sale of girls in cities like Bombay and from there to Dubai for sex purposes, CBI enquiry was ordered. The CBI enquiry revealed that the petitioner was enticed by Beena to accompany her on the pretext of offering a job of a Nurse in the Hospital at Bhind, where however, she was subjected to the sexual exploitation by force. The enquiry further revealed that in Sept., 2000, Shri Anil Kumar Singh Bhadoriya, went to Kamla's Brothel House as a customer and had sexual intercourse with the petitioner. He had enquired about her back ground and assured her of her release from the Brothel. For this end in view Shri Bhadoriya drafted an application on behalf of the petitioner and moved it before the SDM which, ultimately led to her recovery from the Brothel.
- 10 Section 16 of Immoral Traffic (Prevention) Act, 1956 (in short the 'Act') provides that where a Magistrate, has reason to believe from the information received from Police or from any other person authorised by the State Govt. in this behalf, or otherwise, that any

person is living or is carrying on or is being made to carry on, prostitution in a Brothel, he may direct a Police Officer, not below the rank of Sub-Inspector, to enter such Brothel and to remove therefrom such person and produce her before him. The police officer after removing the person, shall forthwith produce him before the Magistrate, issuing the order. Sub-section (2) of Section 17 of the Act, further provides that when the person is produced before the appropriate Magistrate, under Sub-section (5) of Section 15 or the Magistrate under Sub-section (2) of Section 16, he shall after giving him/her an opportunity of being heard, cause an enquiry to be made as to the correctness of the information received under Sub-section (1) of Section 16, the age, character, antecedents of the person and suitability of his/her parents, guardian or husband for taking charge of him/her and the nature of the influence which the conditions in his/her home are likely to have on him/her if he/she is sent home, and for this purpose, he/she may direct a probation officer appointed under the Probation of Offenders Act, 1959, to inquire into the above, circumstances, and into the personality of the person and the prospects of her rehabilitation.

- 11 In discharging his function under Sub-section (2), a Magistrate, may summon a panel of five respectable persons, three of whom shall, wherever practicable be women, to assist him and may, for this purpose, keep, a list of experienced social welfare workers, particularly women social welfare workers, in the field of suppression of immoral traffic in persons. Section 18 of the Act, lays down the procedure for closure of brothels and eviction of offenders from the premises.
- 12 Here it will not be out of place to mention that in the year 1988, two public interest writs bearing No. M.P. 16/1989 and 427/1989 (Ramsanehi vs. State of M.P. and Ors.), were filed in this Court complaining of and bringing to the notice of this Court the racket in women trafficking, pointing out two most unsatisfactory implementations of the suppression of Immoral Traffic in Women and Girls Act, 1956 in the State of M.P. The Division Bench of this Court by the interim order dated 12-3-1989, directed that as and when any application to any Court is made, claiming custody of any such girl, it shall be duty of that Court to stay hands and not to pass any instant order thereon but to hear the girl and make enquiry as to whether, the girls could be victim of sexual exploitation and the application was made bona fide in her interest. In any

case, in so far as orders of transferring custody are to be made, that power shall be exercised only by the learned Sessions Judges of the Districts and the orders shall be passed after hearing the girl and after holding proper enquiry. The direction was made in exercise of supervisory powers of this Court under Article 227 of the Constitution of India. The then Dy. Advocate General, Gwalior was asked to take necessary steps administratively to ensure that the directions are issued relating thereto, by the State and the concerned officers of the State duly comply with the same at all levels and the Bench Registry was also directed to circulate with due despatch copies of the said order to all the Sessions Judges of the State for compliance at their level and at the levels of subordinate Courts.

- 14 The directive principles of State policy as envisaged under Article 46 of the Constitution of India, provides that the State shall promote with special care the educational and economic interests of the weaker section of people and in particular all the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. "Needless to say" recalled His Lordship Justice Lahoti, in the case of Ramsanehi (supra), "that the social evil of immoral trafficking in women and girls is as old as women civilisation itself, deep rooted in the society indulged into, propagated and protected by white-collar criminals, effluent financially and politically at times can never be brought in control, not to speak of being eradicated, unless and until efforts as intensive and extensive as the evil itself are adopted with sincerity and devotion by those who matter. The country is amidst process of one of crucial mid-term polls, but none of the election manifestoes of several political parties appear to have taken note of this evil assuring the society of its consecrated efforts at eradicating or curbing the evil".....
- 15 Although, during the pendency of the present writ petition, additional submissions have been filed on behalf of the State, stating that on the basis of statement given by Ku, Priya, a case under Sections 366, 344, 376/34 of Indian Penal Code read with Section 3 (i) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and Sections 3, 7 and 8 of Prevention of Immoral Traffic Act, were registered against Smt. Kamla, Beena and brother-in-law of Priya namely Daver Chand and subsequently, the name of Shri Anil Kumar Singh Bhadoriya was included, however, the



accused persons are absconding and action under Section 82 of Cr.PC, against all the accused persons, are being taken. ...

- 16 For the present, we are satisfied that appropriate measures were taken to prevent recurrence of such evils. However, in our opinion, what is lacking, is the due execution of scheme with sincere devotion and efforts. We express our concern for the inaction on the part of Distt. Administration at Bhind to deal with the situation effectively in time. We therefore, direct, that immediate departmental action be taken against the then SDM, Bhind Shri H.B. Singh for not taking prompt action to get the criminal cases registered against respondent Nos. 7 and 8 and also for not making any arrangement for medical check up of the petitioner. It is further directed to initiate necessary enquiry for taking action against such Police Officers who are responsible for not taking any preventive and positive action in regard to the activities of a Brothel being run by the respondent Nos. 7 and 8.
- 17 So far as the present writ petition for issuance of writ of Habeas Corpus is concerned, the petitioner who was given chance many a times to appear before us has expressed her desire to go with her father, and it is also borne out from the report of CBI that she has attained the age of majority. She is therefore, allowed to be released from the Short Stay Home (Nari Niketan), Gwalior to go with her father. ...
- 18 It is further directed that the Superintendent of Police, Raipur, shall keep a watch over the girl Ku. Priya, without interfering in any manner in the liberty of the petitioner to see that she does not fall prey to any such anti-social elements, which may ruin her life in any way and to see that she is not made target of any sexual exploitation till the pendency of the criminal cases registered at Bhind, where her appearance as a witness may be required.
- 19 Since in our opinion, the writ petition has achieved its purpose in getting the petitioner set at liberty who has shown her willingness to go with her father, it is disposed of with the observations and the directions indicated hereinabove. A copy of CBI report be sent to the Chief Secretary for the State of Madhya Pradesh for initiating necessary departmental enquiry against the concerned erring officials as indicated hereinabove.

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

### Nilofar and Nilam Usman Shaikh vs. The State of Gujarat

(2004)3GLR2630

Decided On: 14.10.2004

#### Hon'ble Judges:

J.R. Vora, J.

#### JUDGEMENT

- 1 Applicants of both these revision applications are amongst the accused of Sessions case No. 32/2004. In the said case, in CR No. II-3002/2003, a charge-sheet came to be submitted against all the accused for the offences punishable under section 3,4,5,6,7 and 9 of Immoral Traffic (Prevention) Act, 1956. The case being triable by the Court of Sessions by virtue of section 6 and 9 of the said Act, was committed to the City Sessions Court, Ahmedabad. The applicant of Criminal Revision Application No. 628/2004 Nilofar @ Nilam daughter of Ushman Shaikh, vide application ex. 14, and applicant Hasmukh Rameshchandra Shah of Criminal Revision Application No. 641/2004, preferred an application at Exh. 3 to discharge them from the charges levelled against them. Both the said applications came to be dismissed vide order of Id. Addl. Sessions Judge, Court No. 19, Ahmedabad, dated 5.8.2004, and hence, these revision applications.
- 3 Facts indicate that P.I. Vaghela of Crime Branch, Ahmedabad City, had information that applicants, for prostitution, in contact with agents of outside of Gujarat, procure girls at Ahmedabad and keeps them in a house at Vanshri society and other two hotels named as "Signore" and "Platinum". ... After recording of the statements of victim girls and other necessary witnesses, a charge-sheet as above said, came to be filed against, in all, 12 accused persons, for the offence punishable, as aforesaid.
- 4 Ld. advocates for the revisionists-applicants made statements that though before the Court of Sessions, an application for discharge, vide ex. 3 and 14 were filed for discharging the applicants from all the charges, but so far as these revision applications are concerned, they restrict their arguments for the discharge of the applicants from the charge of section 6 and 9 of the Immoral Traffic (Prevention) Act, 1956.

- 5 Mr. NV Solanki, Id. advocate in Criminal Revision Application No. 641/2004 contended that the Id. trial judge erred in dismissing their applications for discharge at least in respect of Sections 6 and 9 of the Immoral Traffic (Prevention) Act, 1956. Drawing the attention of this Court towards Section 9 of the said Act, it was vehemently urged that two essential ingredients of the said section, namely "seduction" and "having the custody, charge or care of, or a position of authority, over any person", are totally missing even if prosecution case is taken on its face value. For section 6 of the said Act, it was also contended that the essential ingredients of detaining any person is missing referring to the definition of brothel as given by Section 2(a). It was contended that the place from where the girls staying on their own, found by the police could not be said to be brothel. These legal contentions were advanced with the aid of the facts of this case. ...It was, therefore, contended that none of the applicants can be tried for the offences punishable either under section 6 or under section 9 of the said Act, as there was no prima-facie such evidence against the applicants from the police papers. Id. advocates for the applicants placed heavy reliance on two decisions, one of the Apex Court in the matter of Ramesh vs. The State of Maharashtra, as reported in AIR 1962 SC 1908 and a decision of this Court in the matter of Suresh Prahlad Patel vs. State of Gujarat, in Criminal Revision Application NO. 414/2002 delivered on 22.10.2002. My attention was drawn to the decision of the Apex Court, wherein with reference to section 366A of Indian Penal Code, the Apex Court has interpreted the term "Seduce" as used in the said section. It is contended that word "seduction" as has been used in section 9 connotes the same meaning and interpretation herein in section 9 of the Immoral Traffix (Prevention) Act, 1956, as has been used in section 366A of Indian Penal Code. It was argued that seduction, according to the Supreme Court, amounts to surrender of her body by a woman who is otherwise reluctant or unwilling to submit herself to illicit intercourse in consequence of persuasion, flattery, blandishment or importunity, whether such surrender is for the first time or is preceded by similar surrender on earlier occasions. It was also contended that in para-8, the Apex Court made it clear that where a woman offers herself for intercourse for money, not casually but in the course of her profession as a prostitute, there are no scruples nor reluctance to be overcome, and such surrender by such woman is not seduction within the meaning of section 366A and the same meaning must be

of word “seduction” used in section 9 of the Act. It was contended that going through the statements of victim girls, it is clear that each victim girl was offering her body for intercourse by way of prostitution not casually but professionally for money. At the most, the applicants might have assisted but such assistance is not an offence within the meaning of section 6 or section 9, as observed in the above said judgement of Ramesh vs. State of Maharashtra (supra). It was stated that the Id. trial judge swayed away by a fact of socially exploitation of female, but if at all such offence is committed by the applicants, then it is taken care of by section 4, 5 and 7, but in no case, from the facts emerging as above said, section 6 or section 9 of the above said Act, any time attracted. ...

- 8 Having heard the Id. counsels for the parties in these revision applications, it is to be decided whether the order impugned rejecting the applications of revisionists is illegal, improper or irregular.
- 11 Main thrust of the argument was that there is no ingredient of detention as envisaged by section 6 of Immoral Traffic (Prevention) Act, 1956, and could not be established by the prosecution at even prima-facie stage nor two above mentioned essential ingredients of section 9 of the Act could be said to have been established by the prosecution and that the Id. trial judge did not consider this aspect.
- 12 Before going through the interpretation of “seduction” as laid down by the Apex Court in the case of Ramesh vs. State of Maharashtra (supra), it is necessary to look at the facts of the case in shape of the statements recorded by the Investigating Agency under section 161 of the Code of Criminal Procedure, and to shift and assess the same for the purpose whether charge under section 6 and 9 of the Act can be framed against applicants or whether even if the prosecution case taken on its face value would attract such charge qua applicants and in those circumstance they will be entitled to be discharged.
- 17 Now with reference to this statement, it is necessary to refer to the term “seduction” interpreted by the Supreme Court in the above said case of Ramesh vs. State of Maharashtra (supra). The Supreme Court in para-8, in unequivocal terms stated that seduction to illicit intercourse contemplated by the section does not mean merely straying from the path of virtue by a female for the first time. The verb ‘seduce’ is used in two senses. It is used in its ordinary and

narrow sense as inducing a woman to stray from the path of virtue for the first time; it is also used in the wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. It is in the latter sense that the expression has been used in Ss. 366 and 366A, which sections partially overlap.

- 18 Relying upon this interpretation made by the Supreme court of term 'seduction', it is argued that there is no compulsion in the present case on the part of the applicants to profess prostitution on any of the victim girl. It is necessary that para-8 of the above said decision may be quoted here:
- "8. We agree that seduction to illicit intercourse contemplated by the section does not mean merely straying from the path of virtue by a female for the first time. The verb 'seduce' is used in two senses. It is used in its ordinary and narrow sense as inducing a woman to stray from the path of virtue for the first time, it is also used in the wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. It is in the latter sense that the expression has been used in Ss. 366 and 366A of the Indian Penal Code which sections partially overlap. This view has been taken in a large number of cases by the Superior Courts in India, e.g. *Prafullkumar Basu vs. Emperor*, ILR 57 Cal 1074: (AIR 1930 Cal 209); *Emperor vs. Laxman Bala*, ILR 59 Bom 652: (AIR 1935 Bom 189); *Krishna Maharana vs. Emperor*, ILR 9 Pat 647: (AIR 1929 Pat 651); *In Re Khalandar Saheb*, AIR 1955 Andhra 59; *Suppiah vs. Emperor*, AIR 1930 Mad 980; *Pessumal vs. Emperor*, 27 Cri LJ 1292: (AIR 1927 Sind 97); *Emperor vs. Nga Ni Ta*, 1- Bur LR 199, and *Kartara vs. The State* ILR (1957) Punj 2003: (AIR 1958 Punj 323). The view expressed to the contrary in *Emperor vs. Baijnath*, ILR 54 All 756; (AIR 1932 All 409), *Shaheb Ali vs. Emperor* ILR 60 Cal 1457: (AIR 1933 Cal 718); *Aswini Kumar Roy vs. The State*, (S) AIR 1955 Cal 100, and *Nura vs. Emperor*, AIR 1934 Lah 227, that the phrase used in S. 366 of the Indian Penal Code is "properly applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl since the first act" is having regard to the object of the Legislature unduly restrictive of the content of the expression "seduce" used in the Code. But this is not a case in which a girl who had strayed from the path of virtue when she was in the custody of her guardian and had with a view to carry on her affair accompanied her seducer or another

person. Such a case may certainly fall within the terms of S. 366 or S. 366A whichever applies. But where a woman follows the profession of a prostitute, that is, she is accustomed to offer herself promiscuously for money to 'customers', and in following that profession she is encouraged or assisted by someone, no offence under S. 366A is committed by such person, for it cannot be said that the person who assists a girl accustomed to indulge in promiscuous intercourse for money in carrying on her profession acts with intent or knowledge that she will be forced or seduced to illicit intercourse. Intention of the part of Patilba, or knowledge that Anusaya will be forced to subject herself to illicit intercourse is ruled out by the evidence. Such a case was not even suggested. Seduction implies surrender of her body by a woman who is otherwise reluctant or unwilling to submit herself to illicit intercourse in consequence of persuasion, flattery, blandishment or importunity, whether such surrender is for the first time or is preceded by similar surrender on earlier occasions. But where a woman offers herself for intercourse for money - not casually but in the course of her profession as a prostitute - there are no scruples nor reluctance to be overcome, and surrender by her is not seduction within the Code. It would then be impossible to hold that a person who instigates another to assist a woman following the profession of a prostitute abets him to do an act with intent that she may nor with knowledge that she will be seduced to illicit intercourse."

- 19 It is also relied upon the observation of the Supreme Court that where a woman follows the profession of a prostitute, that is, she accustomed to offer herself promiscuously for money to "customer", and in following that profession she is encouraged or assisted by someone, no offence under section 366A is committed by such person. It was, therefore, argued that at the most the present applicants assisted victim girls who were promiscuously offering themselves to customers for money and were professing prostitution.
- 20 ... In the present case, the circumstances are different altogether and having regard to the statement of Nisha, even this sole statement is sufficient to invite section 9 of the Immoral Traffic (Prevention) Act, 1956, even as per the term interpreted by the Supreme Court. Girl Nisha was not professing prostitution before she contacted present applicants. On dire financial conditions, as

per the say of one Mahesh, she came to Ahmedabad and was kept at Vanshri Bungalow by the applicants and agreed to offer her body to customer for money. Only because she agreed as stated in her statement, it could not be said that she was professing prostitution and that applicants only assisted her. On the contrary, the facts of the case is well covered by the interpretation of Supreme Court made in the case of Ramesh vs. The State of Maharashtra (supra) that the term 'seduction in section 366 and 366A is used not only in its ordinary sense but in wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. Nowhere in the said judgement, the Supreme Court observed that for seduction there should be an element for compulsion. In para-8, the Supreme Court observed that seduction implies surrender of her body by a woman who is otherwise reluctant or unwilling to submit herself to illicit intercourse in consequence of persuasion, flattery, blandishment or importunity, whether such surrender is for the first time or is preceded by similar surrender on earlier occasions. This observation of the Supreme court covers the facts of the present case even considering a single statement of above witness Nisha for prima-facie application of section 9 and so far as ingredients seduction is concerned, that had the financial position of victim girl Nisha remained good, perhaps she would not have surrendered her body to a customer on the persuasion of applicants about good return etc. The network which is prima-facie disclosing from the police papers, it is clear that not directly but through other persons, females having dire need of money were searched and were brought to Ahmedabad and kept at Vanshri Bungalow by the present applicant.

- 21 All the statements of the victim girls denote that they were all in very bad shape financially as well as in family affairs. They were not known to Ahmedabad. Some of the victim girls were already professing prostitution and in temptation of earning more money they could be trapped to come to Ahmedabad for such profession. While girl like Nisha and Salma who did not know that they were to be lured to prostitution, were brought to Ahmedabad and kept either at Vanshri Bungalow or at some hotel. Except this, they had no resort to go. The expression used in section 9 "having the custody, charge or care of, or a position of authority over any person" must be construed in wider sense. There was perhaps no other alternative for these victim girls to go elsewhere except to stay at

Vanshri Bungalow or at some hotel where they were placed by the applicants. True, it is that their all movements might not have been restricted but that would not take out the case at present from the phrase as used in section 9 of “having the custody, charge or care of, or a position of authority over any person.” Ld. trial judge, therefore, rightly said that the elements of seduction as well as the other necessary ingredients of section 9 for the framing of the charge, were present in the prosecution case.

- 22 So far as section 6 of the Act is concerned, the term detaining is also required to be interpreted widely and in parity of expression used in section 9 “having the custody, charge or care of, or a position of authority over any person. Again the consent is not material for attracting section 6 even if any person agrees to stay in any brothel house or upon any premises as mentioned in clause (b) of section 6. Poor victim girls completely unknown to Ahmedabad, procured from out State through agents like Neha and Mahesh and kept at some place after providing lodging and boarding and other facilities, only for the purpose of sending them to willing customers for money, certainly amounts to detention within the section 6 of the Act. What is required at this stage, is if the prosecution case is taken on its face value whether any charge can be framed against the accused persons. Whether the prosecution case is true or false cannot be judged at this juncture....
- 23 Even the charge can be framed when material is produced before the court by the prosecution indicates strong suspicion about the complicity of the accused with the crime.
- 24 Therefore, this Court is unable to accept the contention that necessary ingredients of section 6 and section 9 of the Immoral Traffic (Prevention) Act, 1956 are missing and that no charge can be framed against the present applicants for the above said offences. So far as the decision of this court in Criminal Revision Application No. 414 of 2002 is concerned, the trial court is correct that facts was altogether different from the facts of this case. In the said case of Criminal Revision Application NO. 414/2002, the owner of hotel was temporarily providing facilities in shape of rooms to customers and girls for having intercourse. This by no stretch of reasoning could be said to be seduction of any person having custody, charge or care of, or a position of authority over any person for aiding prostitution. The present case is not a case wherein only facility



to customers and victim girls were provided as was provided by the owner of Highway Hotel in Criminal Revision Application No. 414/2002 of this court. On the contrary, the prosecution case discloses that though not through direct contact but with the aid of Agents, victim girls were called at Ahmedabad and were kept at Vanshri Bunglow or at some hotel. Customers were found and girls were sent to the customers. Even if, except victim girls Nisha and Salma, it is accepted that they were professional prostitutes, the question is not required to be probed deeply at this stage that the girls who voluntarily offers their body for money, cannot be said to have seduced by the applicants. Evidence of statements of Nisha and Salma, both is sufficient to invite charge under section 6 and 9 of the Immoral Traffic (Prevention) Act, 1956.

- 25 Needless, it is to say that these observations are being made by this court only for the purpose of framing of the charge against the accused which shall not come in the way of the Id. trial judge in any manner while deciding the trial.

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**Sahyog Mahila Mandal and Anr. vs. State of Gujarat and Others**

(2004)2GLR1764

Decided On: 18.03.2004

**Hon'ble Judges:**

R.K. Abichandani and D.H. Waghela, JJ.

**JUDGEMENT**

- 1 These two petitions raising common questions seek to challenge the provisions of Sections 7(1)(b), 14 and 15 of the Immoral Traffic (Prevention) Act, 1956 on the ground that they violate the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India. They also challenge the notification dated 23.2.2000 issued by the Commissioner of Police under the provisions of Section 7(1)(b) by which the areas within the jurisdiction of Chakla Bazar Police Station, Surat were notified rendering carrying on prostitution in any premises within those areas as an offence.
- 5 It has been contended by the learned counsel on behalf of the petitioners that the right to reside in "kohlis" (i.e. rooms) of the notified area of Chakla Bazar was a fundamental right of the prostitutes/sex workers and they cannot be prevented from occupying their residence except in accordance with law. It was submitted that merely because these women were in the prostitution trade, it did not deprive them of their right to life and liberty. It was submitted that prostitution, per se, was not a criminal offence and it was only when a prostitute operated within the notified area, the offence was committed. Therefore, prostitutes can reside in the notified area and had a right to carry on their trade outside the notified area. Even if the prostitutes carry on their work outside the notified area, where it was not an offence under Section 7 of the Act, their right to reside in the notified area cannot be taken away and no raids can be conducted at the places where they reside. It was submitted that even if, as a long term measure, they were required to be rehabilitated at some other places outside the notified area, since they were not going to be easily accepted by the society as honourable citizens, they were required to be kept together in the same locality and cannot be scattered, because, that would result in

depriving them of their livelihood. It was argued that the provisions of Section 7(1)(b) of the Act did not lay down any guidelines for the Commissioner of Police or the District Magistrate while issuing the order notifying the area in which prostitution would be an offence under Section 7 of the Act. It was submitted that there was no indication in Section 7(1)(b) as to what type of other places can be notified by the Commissioner or the Magistrate as the areas in which prostitution was prohibited in the premises situated in such areas. ...It was, therefore, submitted that both, the provisions of Section 7(1)(b) of the Act and the impugned notification issued under Section 7(1)(b) were arbitrary and discriminatory in nature and violative of the fundamental rights of the prostitutes of that area guaranteed by Articles 14, 19(1) (d) (e) (g) and 21 of the Constitution. The learned counsel argued that Section 14 of the Act, empowering arrest without warrant by making all offences under the Act as deemed to be cognisable offences, has the effect of treating unequals as equals inasmuch as, though the offences under Sections 7 and 8 committed by the prostitutes were of a minor nature, even such offenders could be arrested without warrant. It was, therefore, submitted that Section 14 of the Act violated the provisions of Article 14 of the Constitution. In the context of Section 15 of the Act, it was argued that the power to search without warrant was given to the Special Police Officers without laying down proper guidelines and was, therefore, likely to be abused. It was submitted that the provisions of Section 15(4) empowering the police officer to enter the premises and remove persons found therein was in blatant disregard of the rights of the persons living in the premises and violated Articles 14 and 21 of the Constitution. In the alternative, it was submitted by the learned counsel that prostitutes were the victims of the offences under the Act and of trafficking by unscrupulous elements, and should be appropriately rehabilitated without treating them as criminals. It was submitted that any rehabilitation scheme should be formulated only in consultation with the persons affected, namely, the prostitutes of the area and, as far as possible, they should be housed together. It was submitted that prostitutes cannot be removed to protection homes nor can their houses be invaded without the authority of law or without following the due process of law and, therefore, the police authorities should not take law in their own hands and enter the premises at their own will without following due process of law, until rehabilitation programme is formulated and gathers momentum.

- 5.1 In support of their submissions, the learned counsel for the petitioners relied upon the following decisions:
- (i) The decision of this Court in *Bai Shanta vs. State of Gujarat* reported in AIR 1967 GUJARAT 211 was cited for the proposition that the said Act did not aim at abolition of prostitutes and prostitution as such, and did not make it per se a criminal offence so as to punish a woman because she prostitutes herself, but its purpose was to inhibit or abolish the commercialised vice. However, certain exceptions to this are found in Sections 7 and 8 of the Act. Section 7 of the Act made punishable the practice of prostitution in or in the vicinity of certain public places and this provision inhibits the woman herself from the practice of her profession in contravention of its terms and to that extent renders prostitution a penal offence.
  - (ii) The decision of the Bombay High Court in *State vs. Gaya* reported in AIR 1960 BOMBAY 289 rendered in the context of the provisions of Section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 was cited for the proposition that the said Act was passed in pursuance of the International Convention signed at New York for the suppression of immoral traffic in women and girls and it was never intended that the women or girls used for such traffic should be liable to punishment when there was nothing to show in the complaint that they were either keeping or managing or acting or assisting in the keeping or management of a brothel.
  - (iii) The decision of the Allahabad High Court in *Shama Bai vs. State of Uttar Pradesh* reported in AIR 1959 ALLAHABAD 57 was cited for the proposition that, under Article 19(1)(g), every person has normally got a right to practise any profession or carry on any occupation, trade or business of his choice. Work of a prostitute is a profession, occupation or trade within the meaning of Article 19(1)(g) of the Constitution. The provisions of Sections 3 to 10, 12, 18 and 20 did not have the effect of stopping the profession or trade of a prostitute altogether. It was held that the provisions of Section 20 of the Act are unconstitutional as they violated Articles 14 and 19. We may note here that this decision of the Allahabad High Court has been overruled by the Constitution Bench of the Supreme Court by its decision in *State of U.P. vs. Kaushailiya* reported in AIR 1964 SC 416.

- (iv) The decision of the Madras High Court in *Re Ratnamala and Another* reported in AIR 1962 MADRAS 31 was cited for the proposition that the purpose of the said Act was to abolish commercialised vice, namely, the traffic in women and girls for the purpose of prostitution as an organised means of living. The idea is not to render prostitution per se a criminal offence or to punish a woman merely because she prostitutes herself as is clearly indicated by the last part of the definition of “brothel” in Section 2(a) of the Act, which implies that where a single woman practises prostitution for her own livelihood, without another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to “brothel”.
- (v) The decision of Kerala High Court in *T. Jacob vs. State of Kerala* reported in AIR 1971 KERALA 165 was cited for the proposition that prostitution in itself is no offence except in the manner covered under Sections 7 and 8.
- (vi) The decision of the Supreme Court of Bangladesh in *Bangladesh Society for the Enforcement of Human Rights vs. Government of Bangladesh* reported in Vol.LIII 2001 Dhaka Law Reports was cited for the proposition that sex workers as citizens had enforceable fundamental rights under Articles 31 and 32 of the Constitution of Bangladesh, 1972. It was held that, upon their wholesale eviction from Tanbazar and Nimali, prostitutes had been deprived of their livelihood which amounted to deprivation of the right to life making the action unconstitutional and illegal. It was also held that rehabilitation scheme must not be incompatible with their dignity and worth of human person but should be designed to uplift personal morals and family life and provide jobs giving them option to be rehabilitated or to be with their relations, and, facilities for better education and better economic opportunities should be provided to minimise the conditions that gave rise to prostitution.
- (vii) The decision in *Gaurav Jain vs. Union of India* reported in (1997) 8 SCC 114 was cited to point out that, in para 27 of the opinion of Justice K. Ramaswamy, it was observed that women found in the flesh trade should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. It was observed that: “...commercial exploitation

of sex may be regarded as a crime but those trapped in custom-oriented prostitution and gender-oriented prostitution should be viewed as victims of gender-oriented vulnerability.”

We may just note here that the Supreme Court in *Gaurav Jain and Union of India* reported in (1998) 4 SCC 270 reviewed the said decision and held that power conferred by Article 142(1) cannot contravene the provisions of Article 145(5) and set aside the directions given by Justice K. Ramaswamy relating to prostitution and/or its amelioration or eradication. It was, however, observed that this should not be understood as preventing the Union or State Governments from formulating their own policies in this area or taking measures to implement them.

- (viii) The decision of the Supreme Court in *State of Maharashtra vs. Madhukar Narayan Mardikar* reported in AIR 1991 SC 207 was cited for the proposition that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. She is entitled to protect her person if there is an attempt to violate it against her wish and is equally entitled to the protection of law. It was held that the observations of the High Court that the complainant being an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person was wrong. On the contrary, she was honest enough to admit the dark side of her life.
- 6 The learned Assistant Government Pleader, appearing for the respondent authorities, submitted that when police officers exercise their functions under the Act in discharge of statutory duties for implementing the provisions of the Act by effecting arrests and in searching premises, they did not violate any fundamental rights of the petitioners, including the right to privacy. It was submitted that the right to privacy cannot be pleaded against search of premises in which there are reasonable grounds to believe that offences punishable under the Act are being committed. It was submitted that prostitution per se was punishable in the notified area under Section 7 and also in any area under Section 8. Prostitution itself was considered to be illegal having regard to the various provisions of

the Act, including those for removal of prostitute from the localities as contemplated by Section 20 of the Act. It was submitted that having regard to the object sought to be achieved by the provisions of the Act and the nature of the offences involved, it was absolutely necessary to invest the police officer with the power of arrest without warrant and search without warrant. It was submitted that the provisions of the Act contained sufficient safeguards against any abuse of powers of search and arrest. Moreover, the restrictions imposed by the provisions were reasonable and in the interests of the general public. It was submitted that Sections 7, 14 and 15 of the Act did not in any manner violate Articles 14, 19(1) (d) (e) (g) or 21 of the Constitution. It was further submitted that rehabilitation of all the prostitutes in the same locality will not be useful in eradicating the evil and they would carry on the work of prostitution in the locality or area where they are rehabilitated, which again would create a situation similar to the one which existed for a number of decades in the Chakla Bazar, which is now brought under control by stringent enforcement of the provisions of the Act after issuance of the notification under Section 7(1)(b). The learned counsel submitted that the Government would respond positively to any suggestions or directions that may be given for evolving a mechanism which would solve the problems of sex workers as well as ensure that the provisions of the said Act are duly complied with. The learned counsel referred to the affidavits-in-reply filed on behalf of the respondents to point out the harm caused by the activities which were carried on in the Chakla Bazar in violation of the provisions of the said Act and also to point out that the police officers were acting in accordance with the provisions of law to carry out the mandate of the law.

- 6.1 In support of her submissions, the learned counsel for the respondent authorities relied upon the following decisions:
  - (i) The decision of the Supreme Court in State of Uttar Pradesh vs. Kaushailiya reported in AIR 1964 SC 416 was cited to point out that the Supreme Court had held that it cannot be gainsaid that the vice of prostitution is rampant in various parts of the country and that there cannot be two views on the question of its control and regulation. It was held, in the context of the provisions of Section 20 of the Act that the restrictions placed upon the prostitutes were certainly in the interests of the general public and, as the imposition of the restrictions is done through

a judicial process on the basis of a clearly disclosed policy, the said restrictions were clearly reasonable. The Supreme Court observed that, if the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. In para 12 of the judgement it was held that if the presence of a prostitute in a locality within the jurisdiction of a Magistrate has a demoralising influence on the public of that locality, having regard to the density of population, the existence of schools, colleges and other public institutions in that locality and other similar causes, “we do not see how an order of deportation may not be necessary to curb the evil and to improve the public morals”. It is held that if the activities of a prostitute in a particular area, having regard to the conditions obtaining therein, are so subversive of public morals and so destructive of public health that it is necessary in public interests to deport her from that place, “we do not see any reason why the restrictions should be held to be unreasonable”. The Supreme Court held that the provisions of Section 20 of the said Act were reasonable restrictions imposed in public interest within the meaning of Article 19(5) of the Constitution and, therefore, did not infringe the fundamental rights of the respondents-alleged to be prostitutes- under Article 19(1)(d) of the Constitution.

- (ii) The decision of the Supreme Court in P.N. Kaushal vs. Union of India reported in AIR 1978 SC 1457 was cited for the proposition reflected in para 37 of the judgement in the quotation of Field, J., that the manner and extent of regulation rest in the discretion of the governing authority. In para 56 of the judgement, the Court approvingly citing Das C.J. held ...“We have no hesitation, in our hearts and our heads, to hold that every systematic, profit oriented activity, however sinister, suppressive or socially diabolic, cannot, ipso facto, exalt itself into a trade”. The Court held that State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de-recognised as trade or business.
- (iii) The decision of the Supreme Court in Gaurav Jain vs. Union of India reported in AIR 1997 SC 3021 was cited to point out that



in para 16 of the judgement in the context of the provisions of Section 2 (a) of the said Act, it was held that all that was essential to prove was that a girl/woman should be a person offering her body for promiscuous sexual intercourse for hire and that sexual intercourse was not an essential ingredient. It was held that a single instance coupled with the surrounding circumstances may be sufficient to establish that the place was used as a brothel and the person was keeping it. The prosecution has to prove only that in a premises a female indulges in the act of offering her body for promiscuous sexual intercourse.

- (iv) The decision of the Supreme Court in Delhi Administration vs. Ram Singh reported in AIR 1962 SC 63 was cited for the proposition that the expression “police duties” in Section 2(i) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 included all the functions of the police in connection with the purpose of the Act and, in the special context of the Act, they will include the detection, prevention and investigation of offences and the other duties which have been specially imposed on them under the Act. The Supreme Court held that the Act provides machinery to deal with the offences created and its necessary implication must be that new machinery is to deal with those offences in accordance with the provisions of the special Act and, when there is no specific provision in such Act, in accordance with the general procedure and that no other machinery is to deal with those offences.
- (v) The decision of the Constitution Bench of the Supreme Court in Sub Divisional Magistrate vs. Mst. Ram Kali reported in AIR 1968 SC 1 was cited to point out that, after reviewing the provisions of Sections 3, 7 and 18 of the said Act it was held that, it was not correct to say that the set of facts to be proved in prosecution under Sections 3 or 7 and in proceedings under Section 18 was not identical. In the former, the prosecution to succeed has to establish either the intention or knowledge referred to therein but in the latter, they are not necessary ingredients. Section 18 provides for two classes of cases, namely, those coming either under Section 3 or 7 as well as under Section 18 and those coming only under Section 18. These were two distinct classes of cases and such classification has reasonable relationship with the object sought to be achieved. It was held that bearing in mind the purpose of these provisions as well as the scheme

of the Act and on a harmonious construction of the various provisions in the Act, it was of the opinion that the Magistrate, who was also a Court as provided in Section 22, must at the first instance proceed against the persons complained against under the penal provisions in Sections 3 or 7, as the case may be, and only after disposal of those cases, take action under Section 18 if there was an occasion for it. The Magistrate was bound to take cognisance of any cognisable offence brought to his notice under Sections 190(1)(b) of the Code of Criminal Procedure.

- (vi) The decision of the Supreme Court in *Krishnamurthy vs. Public Prosecutor* reported in AIR 1967 SC 567 was cited for the proposition that even a single instance with surrounding circumstances was sufficient proof for keeping a brothel. It was held that one will be guilty of the offence under Section 3(1) of the Act if he does any of the acts mentioned in that sub-section in relation to a brothel. The appellant's house on the facts found was being used as a brothel. The girls were offered for the purpose of prostitution. The house was used for such purposes undoubtedly for the gain of the appellant who pocketed the money which was given for committing prostitution on the girls.
- (vii) The decision of the Supreme Court in *Chitan J. Vaswani vs. State of West Bengal* reported in (1975) 2 SCC 829, which was rendered in the context of the provisions of Sections 3(1), 7(2) (a), 10(2) and 18 of the Act, was cited to point out that, Section 18(1) applied to brothel within the vicious distance of 200 yards of specified types of public institutions and Section 18(2) operated not merely in places within the offending distance of 200 yards but in all places where the activity of prostitution has been conducted. It was observed that Section 18(1) providing a summary procedure for closing down obnoxious places of prostitution, without going through the detailed process of a criminal prosecution, was a quick-acting defensive mechanism, "calculated to extinguish the brothel and promote immediate moral sanitation, having regard to the social susceptibility of places like shrines, schools, hostels, hospitals and the like". Section 18(2), on the other hand, operates only where persons have been convicted of offences under Section 3 or Section 7. It was held that it stands to reason that if the purpose of extirpating the commercial vice from that venue were to be successful, the occupier must be expelled therefrom.

(viii) The decision of the Supreme Court in P.N. Krishanlal and Others vs. Government of Kerala reported in 1995 Supp (2) SCC 187 was cited to point out that it was held that State has the power to prohibit trade or business which are illegal, immoral or injurious to the health and welfare of the people. The Supreme Court held that no citizen has a fundamental right to carry on any trade or business in activities which are inherently vicious, pernicious, criminal in propensity, immoral, obnoxious and injuries to health, safety and welfare of the general public. It is, therefore, a question of public expedience and public morality that the State is fully competent to regulate the business in liquor or intoxicating drug to mitigate its evil or to suppress it in its entirety and there was no inherent right in a citizen to conduct business or trade in adulterated intoxicated liquor by retail or wholesale. There is no inherent right in crime. Prohibition of trade or business of obnoxious or dangerous substances or goods by law is in the interest of social welfare.

(ix) The decision of the Bombay High Court in Sayed Abdul Khair vs. Babubhai Jamalbhai reported in 1974 Cri.L.J. 1337 was cited for the proposition that neither Article 14 nor any other provision of the Constitution gives the pimps, procurers or brothel-keepers any right to contend that a woman and a girl must be treated alike for all purposes by the Legislatures, and that the distinction between a woman and a girl in Section 15(4) of the Act was consistent with the objects sought to be achieved by the Legislation. It was held that Section 15(4) was not discriminatory inasmuch as young girls all over the world are special victims of the vice market. It was also held that power given to the Special Police Officer under Section 15 was not an arbitrary one and was subject to immediate scrutiny of the Magistrate as provided in Section 17(1). Further, Section 15(5) and Section 16(2) are safeguards enough against arbitrary exercise of his power by the special officer. Reasoning:

7 It was contended on behalf of the petitioners that prostitution is exercise of fundamental right of women to practice any profession or carry on any occupation, trade or business and it should be open for the women to reside in their homes in Chakla Bazar and carry on their profession. Since prostitution was not per se illegal, total restriction on the fundamental right of the prostitutes as imposed by the notification issued under Section 7(1)(b) and the police action

taken against them by raiding their premises were unwarranted and unconstitutional.

- 7.1 There has been a considerable acrimonious debate over the question: Is prostitution a form of exploitation to be abolished or an occupation to be regulated? The question is no longer about morality: is prostitution a vice and are those involved evil or lacking in morals? There are basically two camps, those seeking to eradicate prostitution and those who view the women involved as sex workers. The Court has to steer through the non-legal aspects of the debate, because, what social standards should be reflected in the laws in the matter of prostitution is in the legislative domain.
- 7.2 Prostitution in the modern times is not confined to street walking and its forms are diversified into various kinds, such as prostitution services, including date clubs, various kinds of services in adult entertainment, business facilities, meet and mate on the internet etc. Pornography acts as an arm of prostitution and often women coerced into pornography are coerced into prostitution.
- 8 ...Women in prostitution usually begin their career due to poverty and are kept indebted and poor by pimps and other middlemen who control their earnings and movements making them a legal non-person in a biased society. Article 23 of the Constitution of India prohibits traffic in human beings, begar and other similar form of forced labour....
- 8.1 ...The very nature of commodifying the human body devalues the respect that the Constitution regards as inherent in the human body by guaranteeing fundamental right against exploitation under Article 23 and by issuing directives under Articles 39(e) and 46 that the State should strive towards securing that, health and strength of men and women are not abused and citizens are not forced to enter avocations unsuited to their age or strength and to promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice and all forms of exploitations.
- 8.2 The most potent rejoinder against recognition of the degrading practice of prostitution, which undermines womanhood itself, comes from Article 51-A(e) of the Constitution, which ordains that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. The fact that prostitution

is a practice derogatory to the dignity of women is universally recognised and is clearly reflected from the "Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others", to which India was a signatory having signed it on 9.5.1950 and which was ratified on 9.5.1953. The Convention was approved by the General Assembly of the United Nations in its Resolution 317 (IV) of 02 December, 1949.

- 8.4 To recognise prostitution as a legitimate means of livelihood would be an open invitation to trafficking in women which is shunned internationally and in all the civilised nations of the world. "Trafficking in women and girls is one of the most corrosive forms of violation of human rights. It results in gradual total destruction of a woman's personal identity, and her right to live as a free human being in a civilised society. The victim is subjected to violence, total humiliation and violation of personal integrity. The victim of such devastating violence may also end up with life-threatening HIV/AIDS/STD or a lifetime of trauma, drug addiction or personality disintegration. It is a denial of the right to liberty and security of person, the right to freedom from torture, violence, cruelty or degrading treatment, the right to a home and a family, the right to education and employment, the right to health care - everything that makes for a life with dignity. Trafficking has been rightly referred to as a modern form of slavery". (See Consultation Paper on "Trafficking in Women and Girls" by Justice Sujata Manohar for the Expert Group Meeting on "Trafficking in women and girls" 18-22 November 2002 Glen Cove, New York, USA).
- 8.5 It is, therefore, difficult to accept the contention raised on behalf of the petitioners that the Court should recognise the right to prostitution as a fundamental right of women or girls in it, notwithstanding it being derogatory to the dignity of women, the United Nations's Resolution dated 16.12.1983, exhorting the States to combat prostitution by taking appropriate humane measures including legislations and the provisions of the said Act.... A multitude of research around the world has established that all prostitution causes harm to women. Approval to prostitution would tend to institutionalise, promote and teach the abuse of women and create an ever-expanding industry which normalises that abuse....

- 9.2 Section 7(1) makes prostitution an offence if committed in any premises which are within the area notified as per sub-section (3) of Section 7 and those which are within a distance of 200 metres of any place of public religious worship, educational institution, hospital, nursing home or such other public place of any kind as may be notified by the Commissioner or the District Magistrate in the prescribed manner under clause (b) of sub-section (1). The provision, therefore, contains intrinsic guidelines as to the nature of the area in which it would be an offence to carry on the activity of prostitution in any premises. Even while notifying “other public places of any kind”, the Commissioner of Police or the District Magistrate has to keep in mind the object of this provision which was to prohibit prostitution in or in the vicinity of public places. Section 7(3) also effectively guides the State Government in notifying the area in which prostitution per se would be an offence. These are: the kinds of persons frequenting the area, the nature and the density of the population in such area and other considerations which are relevant to the object underlying the Act which was enacted in the background of the “International Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others” signed and ratified by India, whereunder prostitution and the accompanying evil of traffic in persons for the purpose of prostitution are declared to be incompatible with the dignity and worth of the human person and as endangering the welfare of the individual, the family and the community. Under Article 253 of the Constitution, the Parliament has power to make any law for implementing any Treaty, Agreement or Convention with other countries or any decision made at any International Conference, Association or Body. Therefore, when the power is exercised under such law by the State executive or the judiciary, even the relevant covenants, agreements or decisions can provide useful guidelines for exercise of the powers under the Act in the matter of implementation of the statutory provisions so enacted.
- 10 It was argued that the right to privacy of prostitutes gets violated every time the law enforcing agencies barge in the precincts of the premises in their occupancy and, therefore, the provisions of Section 15 read with Section 7 of the Act enabling the police to search the premises in which prostitutes may be living violate Article 21 of the Constitution....

- 12 It was contended that prostitutes and other offenders are all treated alike and even a trafficked prostitute is treated on the same footing as the criminal indulging in trafficking or engaged in prostitution of others....
- 12.1 This takes us to the examination of the question as to what action the authorised police officer can legitimately take and to what extent victims of trafficking and of persons who are guilty of prostitution of others should be treated differently for the purpose of their rehabilitation under the provisions of the Act....
- 14 ...The provisions of Section 17(4) of the Act indicate that the victims of trafficking and offences committed by others under the Act deserve to be rescued and rehabilitated and not punished as criminals.
- 14.2 The above provisions, therefore, clearly call for identifying the victim-prostitutes, girls or other persons, who are trafficked persons or are under the control of pimps and procurers or brothel owners. A failure to correctly identify a trafficked person or a woman or girl or other person in respect of whom offence punishable under the Act is committed, i.e. a victim-prostitute, is likely to result in denial of that person's human rights. It is, therefore, obligatory on the part of the police officer and the magistrate dealing with such cases under the Act to ensure that the trafficked persons, including other victim prostitutes and the traffickers and persons committing offences in respect of prostitutes, including those who are involved in controlling and exploiting trafficked persons and other victim prostitutes are duly identified. The law is required to be strictly enforced against traffickers and those involved in controlling and exploiting prostitutes and committing offences in respect of prostitutes.
- 14.3 The primary responsibility to ensure safety and immediate well-being of trafficked persons, including victim prostitutes who are controlled and exploited by others in the trade lies heavily with the enforcement authorities and officials. It should be ensured that rescue operations do not further harm the rights and dignity of the victims of prostitution. India is a party to "Protocol to the United Nations Convention on Transnational Organised Crime to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children", which came into force from 25.12.2003. The Protocol was adopted by the Resolution No.A/RES/55/25 of

15.11.2000 at the 55th Session of the General Assembly of the United Nations. India signed it on 12.12.2002....

14.4 The word "trafficking" has been defined in the said Protocol under Article 3 as under:

"Article 3 Use of terms For the purposes of this Protocol:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
  - (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) to this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
  - (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in sub-paragraph (a) of this article;
  - (d) "Child" shall mean any person under eighteen years of age."
- 14.5 ...

14.6 Thus, far from dealing with all offenders under the Act indiscriminately, the said Act clearly reflects the international concern for human rights, of the victims of trafficking and the prostitutes living in brothels or any premises where offences are committed under the Act in respect of such women and girls. A strong indication of reformative approach comes from Section 10-A of the Act which provides for passing an order of detention in corrective institution for the term indicated thereunder in lieu of sentence of imprisonment when a female offender is found guilty of an offence under Section 7 or Section 8 of the Act and the character, state of health and mental condition of the offender and the circumstances of the case are such that it is expedient



that she should be subject to detention for such term and such instructions and discipline as are conducive to her correction. Even though order of detention is to be made by Court in such cases, sub-section (3) of Section 10-A empowers the State Government at any time after the expiration of six months from the date of an order of such detention, if it is satisfied that there is reasonable probability that the offender will lead a useful and industrious life, discharge her from such institution with or without conditions. Matching provisions are made in the Suppression of Immoral Traffic in Women and Girls Rules, 1985 framed under Section 23 of the Act, and Rule 5 thereof provides that where, in pursuance of sub-section (1) of Section 10-A or sub-section (4) of Section 17 or sub-section (3) of Section 19, a Magistrate passes an order directing that a woman or a girl be detained in a protective home or a corrective institution, a warrant of detention in Form II shall be prepared and forwarded to the superintendent of protective home or corrective institution. Under Rule 41, the State Government is required to appoint a Director of Social Defence for all the protective homes and corrective institutions in the State, inter alia, to superintend, supervise and control the working of the Rules. Provisions are made for education and training of inmates of protective homes/corrective institutions (Rule 21), for their daily routine (Rule 22), for their diet (Rule 23), supply of clothes to them (Rule 24), living space for each of them (Rule 25), religious and moral instructions to them by strictly maintaining the principle of secularism (Rule 26), libraries in the protective homes/ corrective institutions (Rule 27), regular medical examination of the inmates (Rule 12) etc., with a view to achieve the object of rehabilitation of the prostitutes who are the victims of traffickers or of the pimps, procurers or persons using premises as brothels. The prostitutes who commit the offence of prostitution under Section 7(1) or Section 8 and are not involved in any other offence under the Act, and those in respect of whom offences are committed under the Act and are removed from the premises in which they are living under Section 15(1) and produced before a Magistrate under Section 15(5) or those who are rescued and produced before a Magistrate under Section 16(2) are required to be dealt with keeping in mind the rehabilitation and reformatory provisions which are specifically devised for them under Sections 10-A, 17(4) and 19(3) read with Section 21 of the Act and Rule 5 of the Rules framed thereunder.

14.7 When premises are used as brothel as defined by Section 2(a), the offence of keeping a brothel or allowing premises to be used as brothel under Section 3 is committed in respect of the women or girls living in such premises. The offence under section 4 of living on the earnings of prostitution of any woman or girl is committed in respect of such woman or girl living in any premises where such offences are committed. Offence of procuring, inducing or taking woman or girl for the sake of prostitution under Section 5 is committed in respect of such woman or girl, taken or brought to any place where she is made to live for the purpose of prostitution. Offence under Section 6 of detaining a woman or a girl or other person in a brothel or other premises is committed in respect of such woman or girl living in such premises. Offence of seduction of a woman or a girl by any person having the custody, charge or care of or in position of authority over any woman or girl or other person by causing or aiding or abetting seduction for prostitution of such woman or girl or other person is committed in respect of such woman or girl when she is seduced while living in any place from where she is rescued or removed under the provisions of the Act. In all these cases when the offences are committed under the Act in respect of women or girls living in any premises, which are searched, such woman or girl or person in respect of whom such offences are committed and who is not involved in those offences, the proper course for the magisterial Court under Section 17(4) is to make an inquiry as contemplated therein and, if the information received is found to be correct and the Magistrate is satisfied that the woman or girl or other person in whose respect the offence is committed is in need of care and protection, he may make order of detention in a protective home and there is no scope for prosecuting such victims of the offences under the Act committed by other persons with respect to them. Therefore, prostitutes living in brothels or other premises in respect of whom offences by others are committed under the Act will, on search, be removed and produced before the Magistrate under Section 17(4) irrespective of whether such premises are within the notified area or not. However, a prostitute who is involved in any offence, other than mere offence under Sections 7(1) or Section 8, cannot claim the benefit of Section 17(4) or Section 10-A of the Act, and has to be tried and punished for those offences in accordance with law.

- 15 The scheme of the Act and the Rules thus clearly indicates that the victim-prostitutes, i.e. the trafficked persons and women, girls or other persons working as prostitutes under the control of pimps and procurers and those rescued from the premises in which offences are committed in respect of such women or girls, or from brothels as also those persons who are to be kept in protective or corrective detention, are all required to be dealt with by the police officials and other authorities with utmost care and concern in order to ensure that they are properly rescued, kept in safe custody and rehabilitated in accordance with the provisions of the Act and the Rules. It is essential to have a proper monitoring of the rescue and rehabilitation work by the concerned authorities. It was, therefore, suggested by the Court during the course of the arguments that there may be formed by the State Government a State level Rehabilitation Committee and a Local Cell, to start with, for the city and district of Surat, for looking into the legitimate grievances of the affected women and girls who deserve to be rescued and rehabilitated under the Act and the Rules. The State Government has, through the learned Assistant Government Pleader, accepted this suggestion inviting suitable directions in the matter by this Court.
- 15.1 We may note here that the subject of rescuing and rehabilitating prostitutes has received international attention and principles and guidelines on human rights and human trafficking have been recommended in the report of the United Nations High Commissioner for Human Rights to the Economic and Social Council of the United Nations (E/2002/68 Addl.) placed in the Substantive Session 2002 New York, 1-26 July 2002, on Item No.14 (g) of the Provisional Agenda. The report contains more important recommended principles on human rights and human trafficking indicating that human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. The States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons. Strategies aimed at preventing trafficking are required to address demand as a root cause of trafficking. States are required to exercise due diligence in identifying and eradicating public sector involvement or complicity in trafficking. All public officials suspected of being

involved in trafficking are required to be investigated, tried and, if convicted, appropriately punished. States are required to ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to co-operate in legal proceedings. Children who are victims of trafficking have to be identified as such and their best interests shall be considered paramount at all times. Some of the guidelines recommended on human rights and human trafficking are, promotion and protection of human rights, identification of trafficked persons and traffickers, adoption of effective and realistic anti-trafficking strategies, ensuring an adequate legal framework, ensuring an adequate law enforcement response, protection and support for trafficked persons, prevention of trafficking, special measures for the protection and support of child victims of trafficking, access to remedies of trafficked persons as victims of human rights violations, obligations of civil police etc.

Conclusions and Final order: 16. We, therefore, conclude, declare, direct and hereby order as under:

- (i) The provisions of Section 7(1)(b) of the Immoral Traffic (Prevention) Act, 1956 do not violate Articles 14, 19(1) (d) (e) (g) or Article 21 of the Constitution of India;
- (ii) The notification dated 23.2.2000 issued by the Commissioner of Police, Surat under Section 7(1)(b) is legal and valid and does not violate any fundamental rights guaranteed by Articles 14, 19(1) (d) (e) (g) or Article 21 of the Constitution;
- (iii) The provisions of Section 14 making any offence punishable under the Act to be deemed to be a cognisable offence and empowering special police officer to make arrest without warrant do not violate Article 14 or Article 21 of the Constitution;
- (iv) Section 15 of the Act empowering the special police officer or traffic police officer to make search without warrant does not violate Article 14 or Article 21 of the Constitution;
- (v) When a search is made, of the premises in which a woman, girl or other person is living, on the reasonable grounds for believing that an offence punishable under the said Act is committed in respect of such woman or girl or other person and such woman, girl or other person is removed from the premises

under Section 15(4) of the Act, she is required to be forthwith produced before the appropriate Magistrate and is required to be examined by a registered medical practitioner for the purpose of determining her age or for detection of any injuries, as a result of sexual abuse or for the presence of any sexually transmitted diseases under sub-section (5-A) of Section 15 and to be dealt with by the magisterial Court as per the provisions of Section 17 (2), (3), (4) and (5) of the Act for the purpose of safe custody and rehabilitation;

- (vi) Even a woman or girl living in a brothel or who is carrying on or being made to carry on prostitution in a brothel and removed therefrom on direction of Magistrate under Section 16(1) is required to be produced under Section 16(2) of the Act before the Magistrate issuing the order and is required to be dealt with in accordance with Section 17 (2), (3), (4) and (5) for the purposes of safe custody and rehabilitation;
- (vii) The female offender who is found guilty of an offence under Section 7 or Section 8 may be ordered by the Court to be detained in a corrective institution in lieu of sentence of imprisonment in accordance with the provisions of Section 10A of the Act;
- (viii) The provisions of the said Act contemplate identifying the victims of the offences under the Act committed by other persons and their rescue and rehabilitation in protective homes or corrective institutions and, therefore, the authorised police officers and the appropriate magistrates are required to exercise their functions and duties under the Act in a manner that would achieve the object of the Act of rehabilitation of the women and girls rescued or removed from brothels and other premises;
- (ix) Having regard to the statutory provisions authorising the appropriate magistrate to order detention of prostitutes in protective homes or corrective institutions as contemplated by Sections 10-A, 17(4) and 19(3) of the Act read with Rule 5 of the Rules framed thereunder, it is obligatory for the State Government to provide under Section 21 of the Act such number of protective homes and corrective institutions under the Act as are, in its discretion, sufficient and adequate;
- (x) For effective supervision and control of the rehabilitation of prostitutes, there shall be constituted by the State a high power

State Level Rehabilitation Committee comprising of the following members:

- (1) Additional Chief Secretary of the Social Welfare Department as Chairman,
  - (2) Secretary or Officer of equal rank of the Health Department,
  - (3) Secretary or Officer of equal rank of the Home Department,
  - (4) Secretary or Officer of equal rank of the Finance Department and
  - (5) a Member of State Level Commission for Women or a similar Government Body.
- (xi) There will also be constituted by the State Government a Local Cell for the District of Surat having the following members:-
- (1) Commissioner of Police or Additional Commissioner of Police, Surat as Chairman;
  - (2) District Health and Welfare Officer;
  - (3) Civil Surgeon or a medical officer (The name of Dr.Vikas Desai, in his capacity as the Senior Medical Officer, orally suggested in Court on behalf of the petitioners, may be considered);
  - (4) A representative of N.G.O. The name of "SAHAS" NGO orally suggested in Court on behalf of the petitioners for representing the case of the members of the petitioner organisation, may be considered).
- (xii) The State Level Committee for Rehabilitation will get acquainted with the "Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others" and other relevant International Conventions, Declarations, Agreements or Protocols etc. to which India is a Party, and which have a bearing on the suppression of immoral trafficking and rehabilitation of women and girls including the "Protocol to Prevent, Suppress and Punish Traffic in Persons Especially Women and Children" supplementing the "United Nation's Convention against Transnational Organised Crimes" and also the relevant provisions of the said Act and the Rules made thereunder having bearing on the aspects of rescue and rehabilitation of women or girls and children. The State Level Rehabilitation Committee

may also get acquainted with the Recommended Principles and Guidelines on Human Rights and Women Trafficking - Report of the United Nation's High Commissioner for Human Rights to the Economic and Social Council of the United Nations (E/2002/68-Addl.).

- (xiii) The State Level Rehabilitation Committee will prepare and circulate a note for guidance for all the authorities and officials concerned with such rescue and rehabilitation under the Act. This may be done expeditiously and preferably within three months from the date of this order;
- (xiv) The State Level Rehabilitation Committee may be entrusted by the State Government, subject to its ultimate control, power to take and implement its decisions in the matters of rescue and rehabilitation of the women, girls and children who are required to be dealt with for detention in protective homes and corrective institutions under the provisions of the Act.
- (xv) The State Level Rehabilitation Committee will take up the issue of rehabilitation of the prostitutes operating in Chakla Bazar area of Surat on priority basis, and collect data for identifying cases which are required to be put up before the magisterial courts through authorised police officers for being dealt with under Sections 17(2)(4) , 16 or 19(3) of the Act and issue directions to subordinate authorities for expeditiously dealing with such cases for the speedy rehabilitation of the women or girls and children affected by the trade of prostitution;
- (xvi) The State Level Rehabilitation Committee shall periodically convene, as per its convenience, at least once in two months, to review the progress in the matter of rescue and rehabilitation of the trafficked persons, especially women and children who are required to be rescued and rehabilitated as per the provisions of the said Act and the Rules made thereunder and the international norms reflected in the Conventions, Protocols and Agreements to which India is a party.
- (xvii) The State Level Rehabilitation Committee shall consider the recommendations and suggestions of the Local Cell which will study the nature and extent of the offences committed under the Act in the City of Surat and identify the trafficked persons and females and children who are required to be rescued and

rehabilitated under the provisions of the said Act and the Rules made thereunder and in consonance with the International Conventions and Protocols etc. to which India is a party and make suggestions or recommendations to the State Level Rehabilitation Committee towards rescue and rehabilitation of such persons;

- (xviii) The Local Cell shall periodically check-up the conditions in the protective homes or corrective institutions established under the Act in City and District of Surat, and, if any violation of the Rules relating to maintenance of such homes/institutions are noticed, report them immediately to the State Level Rehabilitation Committee with its suggestions and recommendations in the matter;
- (xix) The Local Cell shall inform, by suitable publications, posters or handbills in the localities involved, the women and girls working as prostitutes, about their right to make application under Section 19 for being kept in a protective home/ corrective institution and also about the facilities available in such homes and institutions under the various provisions of the Suppression of Immoral Traffic in Women and Girls (Gujarat) Rules, 1985, particularly drawing their attention to the provisions showing the facilities that are required to be made available in such homes/ institutions, such as medical examination of inmates (Rule 12), daily routine of inmates (Rule 22), diet to inmates (Rule 23), supply of clothes etc. (Rule 24), living space for inmates (Rule 25), religious and moral instructions to inmates (Rule 26), libraries for protective homes/institutions (Rule 27), and similar ameliorative provisions;
- (xx) The Local Cell will examine genuine grievances made against police officers and other authorities in writing with sufficient particulars by NGOs or the aggrieved women or girls or other persons involved in prostitution and try to locally sort them out in accordance with law and, if legal aid is called for in any case, refer the same to the appropriate authority under the Legal Service Authorities Act, 1987;
- (xxi) The Local Cell may make such suggestions and recommendations as deemed proper for attending to the grievances of affected women or girls or other persons who are victims of prostitution



at the hands of other persons, to the State Level Rehabilitation Committee for its consideration and decision;

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

Both the petitions stand disposed of accordingly with no order as to costs.

Sd/-

(R.K.Abichandani, J.)

Sd/-

(D.H.Waghela, J.)

(KMG Thilake)

**IN THE HIGH COURT OF BOMBAY**

**Prerana vs. The State of Maharashtra**

Date : 24.08.2000

**Hon'ble Judges:**

A.P. Shah and V.C. Daga, JJ.

**JUDGEMENT**

- 2 The petitioner Prerana is a registered society and a Non-Governmental Organisation (NGO) working since 1986 for the welfare and development of women and children who are victims of commercial sexual exploitation. It has its filed projects in the Kamathipura Municipal School and also the Falkland Road Municipal School, Khetwadi in Mumbai. Prerana has mainly focused its efforts at eliminating exploitation of the second-generation sex trade. Prerana has initiated an anti trafficking wing and collaborations with many rural based NGOs for red-light area social work intervention and ant-trafficking work. By the present petition under Article 226 Prerana is seeking directions to the State Government in respect of Kasturba Sadan lacing conditions of the inmates of Kasturba Sadan are absolutely appealing i.e.:
- a) There are extremely insufficient toilets and bathrooms.
  - b) Water is mostly not available during the day time, the supply is for a very early in the morning, and to compound the misery the water pressure is feeble.
  - c) The accesses to the toilets are very dirty and in unusable state.
  - d) The existing structure is in a dilapidated condition.
  - e) There is no facility for recreation indoor or outdoor.
  - f) There are no-medical facilities
  - g) The quality of the physically and mentally unwell inmates who are in dire need of some rest.
  - h) There is no constructive activity or positive engagement run by the Kasturba Sadan, which could prepare a proper background and ambience for a positive dialogue with them.
  - i) The Home had no professional counseling facility. The sporadic sermons given by the authority to the inmates are unintelligently termed as "Counseling" by the authority.

- j) The place was not equipped to deal with post rescue operations and the facilities were extremely inadequate to meet the demand.
  - k) The overall assessment implies that the atmosphere in the rescue home is only capable of demoralising, frustrating and compounding the misery of the inmates ultimately prompting them to financially seek any available alternative shelter and even to go back to the brothels.
- 3 In Vishal Jeet vs. Union of India and ors AIR 1990 SC 1412 the Apex Court issued inter alia following directions to the State Government:
- I. All the State Government and the Government of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.
  - II. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the Secretary of the Social Welfare women's organisations, members of Indian Council of Social Welfare as well as the members of various voluntary social organisation and associations etc., the main objects of the Advisory Committee being to make suggestions of:
    - a) the measures to be taken in eradicating the child prostitution and
    - b) The social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brother house or from the vices of the prostitution.
  - III. All the State Government and the Governments of Union Territories should take steps in providing adequate and rehabilitative houses planned by well-qualified trained social workers, psychiatrists and doctors.
  - IV. The Central Government and the Governments of States and Union Territories should devise machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

- 5 On 17.01.1996 the division bench directed the Government as under:
- a. To frame proper schemes so that the women including minor who are procured for sexual slavery are released from the confinement of their procurers.
  - b. For implementing this scheme, a proper cell, also involving social workers, be created so that the regular checking minors and others can be released and rehabilitated in the society.

Again on 07.02.1996 the division bench issued following directions:

- a. The respondents are directed to keep the rescued girls in proper custody and not to release them.
  - b. The women and child welfare department of the State of Maharashtra, which is headed by an IAS officer to carry out the rehabilitation work.
  - c. For seeing that the said department is properly assisted and its work is monitored the respondents are directed to frame a proper scheme with the assistance of various social organisations."
- 6 On 16.02.1996 it was further directed by the division bench as under:-

"All the 473 rescued child sex workers be kept in proper custody of Juvenile Home and other institutions. As few girls were kept in some school premises, objections were raised that they were shifted to other appropriate places. The State Government was also directed to provide adequate finance to the institutions for food, medicine and clothes of the rescued girls."

"The respondents were directed to evolve a long term policy so that minors are not sent to brothel houses by deception, fraud or misrepresentation and to provide residential accommodation to the girls rescued from the brothel houses so that they could be rehabilitated in the society after proper counseling. The court also directed that before the long term scheme is evolved, provision be made for medical treatment and counseling programmes of the rescued girl children.

- 7 "No doubt in recent years, both the Government of India and the State Government have been paying some attention and confronting the issue of child prostitution. However, if the number

of girls who are lured into sex trade every year is an indication the effort has not succeeded. The Directorate of Health Services, Government of Maharashtra there are about 30,000 girls in the sex trade most of them are in the city of Mumbai and other cities and a large number of them are children or minors.”

- 8 “To set up homes for rehabilitation of rescued sex workers including children so as to enable these rescued sex workers to acquire alternative source of employment. It is also to be noted that when the girls were rescued, it was difficult for the State Authorities to accommodate them. The State was not having any infrastructure to meet such situation. It is true that in Mumbai city premises are very costly but in the periphery of the city the State Government can certainly provide such facility, more industrialised, developed and civilised State in such a State, 473 rescued girls were not properly accommodated and no steps could be taken to rehabilitate them for want of premises and they were required to be sent to their respective home States. This type of situation arises only because of lack of interest in the part of the Supreme Court in the case of Vishal Jeet (supra).... During the course of hearing we have noted that there are no adequate facilities available in the State of Maharashtra, particularly in Mumbai, where these rescued girls could be rehabilitated or kept for some period for bringing them out of the clutches of unscrupulous elements who deal in trafficking of women. Adequate training facilities are also not available and it appears that serious thought is not given to this problem by the State Government. In a civilised state, it is the duty of the state to take preventive measures to eradicate child prostitution without giving room for any complaint of culpable indifference.”

**IN THE HIGH COURT OF BOMBAY**

**Prerana vs. State of Maharashtra and Others**

2003BomCR(Cri), 2003(2)MhLj105

Decided On: 07.10.2002

**Hon'ble Judges:**

A.P. Shah and Ranjana Desai, JJ.

**JUDGEMENT**

- 2 The petitioner is a registered organisation established in 1986. It does work in the red light areas of Mumbai and Navi Mumbai with the object of preventing the trafficking of women and children and rehabilitating the victims of forced prostitution. This petition is filed in public interest to protect children and minor girls rescued from the flesh trade against the pimps and brothel keepers keen on re-acquiring possession of the girls.
- 4 The facts, which give rise to the present petition, may be shortly stated. On 16-5-2002, the Social Service Branch raided the brothel at Santacruz. Four persons, who are alleged to be brothel keepers/pimps, were arrested. Twenty-four females were rescued. The four arrested accused were charged under Sections 3, 4 and 7(2)(a) of the Immoral Traffic (Prevention) Act, 1956 ("PITA" for short) under C. R. No. 00/02 (later converted to SP/LAC No. 20/2002 of 16-5-2002) by Social Service Branch. The twenty-four rescued females were not charged, but were taken into custody under Sections 15 and 17 of PITA for the purposes of ascertaining their age and family background.
- 5 The accused as well as the rescued females were produced before the learned Metropolitan Magistrate at Esplanade on 17-5-2002. The 3rd respondent appeared on behalf of the four accused. The accused were remanded to police custody and the rescued females were sent to the Government Special Rehabilitation Centre for Girls at Deonar so that they may be medically examined and enquiries be made about their parents and guardians. The learned Magistrate, in his order dated 17-5-2002, noted that the Investigating Officer as well as the Addl. Police Prosecutor had submitted that the detention of the rescued girls is necessary in the corrective home for further examination by medical officer and for making further enquiries about their parents and guardians. He also recorded that

the 3rd respondent strongly opposed the application for sending the rescued girls to the corrective home at Deonar. The order indicates that the 3rd respondent argued that the concerned officer had not followed Sections 15 and 16 of the PITA and therefore the girls should be released immediately. So far as accused 1 to 4 are concerned, it appears that the 3rd respondent argued that their further interrogation is not necessary as the owner of the brothel was known to the officer and he can be called for interrogation at any time.

- 6 The learned Magistrate, after considering the arguments, observed that custody of accused 1 to 4 was necessary to know from where they had procured the girls. Having regard to the provisions of Section 15 of the PITA, the learned Magistrate observed that the girls can be sent to the registered Medical Practitioner for the purpose of "ascertainment of their age, for detection of injuries and result of sexual abuse or presence of any sexually transmitted diseases". In view of this, the learned Magistrate remanded accused 1 to 4 to Police custody till 24-5-2002 and 24 girls along with the report were sent to Shaskiya Manila Sudharak Griha, Deonar for medical examination, to be kept there till 27-5-2002. A direction was given to the Probation Officer of the said Home to make enquiry with the help of the petitioner about the parents and guardians of the rescued girls and also to make enquiry with the girls and to file his report on or before 22-5-2002.
- 7 On 20-5-2002 the rescued females were sent for ossification test in which, 14 of them were found to be adults and remaining 10 were found to be juveniles (under 18 years of age). Of the 10 minor girls six were from Meghalaya, three from Andhra Pradesh and one from Assam.
- 8 The four accused were released on bail on 24-5-2002.
- 9 On 27-5-2002, the twenty-four rescued girls were produced before the learned Metropolitan Magistrate at Esplanade. According to the Petitioner, the 3rd respondent appeared on behalf of the rescued females and pleaded that they should be released. The 2nd respondent stated that further time was required to complete the home studies then in progress as all the girls were from distant places. By order dated 27-5-2002, the learned Magistrate released the adult females and directed that the juvenile females be produced before the Juvenile Court on 28-5-2002.

- 10 On 28-5-2002, the juvenile females were produced before the Child Welfare Committee as the Juvenile Justice Board sits only on Mondays and Fridays. According to the petitioner, 3rd respondent appeared on behalf of the minor females before the Child Welfare Committee and prayed that the minor rescued females be sent for another age verification test. The Child Welfare Committee conceded to the request and passed orders, but directed that the rescued girls be produced before the Juvenile Justice Board on the next date in accordance with the order dated 27-5-2002.
- 11 Admittedly, the minor rescued females were produced before the Juvenile Justice Board at Bombay Central Court on 29-5-2002, when the Board adjourned the matter to 13-6-2002. During the interregnum, the minor females remained in the care and protection of the Special Rehabilitation Centre for Girls at Deonar. The police surgeon refused to conduct the age verification test of these girls as he had already conducted one, a few days earlier.
- 12 The minor females were produced before the Juvenile Justice Board on 13-6-2002 at Bombay Central Court. According to the petitioner, 3rd respondent filed a vakalatnama dated 13-6-2002 on behalf of the minor girls. He filed a discharge application and prayed that the minor girls be discharged on the ground that they had not committed any offence and had been in custody for over a month. This was opposed by the 2nd respondent and the police. The 2nd respondent prayed for time as she had corresponded with the organisations in the States from where the rescued girls had come and was awaiting their response. On that day no parents or guardians of these minor girls were present in the court. By order dated 13-6-2002, the Board discharged the minor girls. While releasing the minor girls, the Board noted that the 3rd respondent had made an application for discharge of the girls on the ground that they had not committed any offence and they were in custody for more than a month. The order notices that the 2nd respondent and the police had opposed the said prayer. The learned Judge, presiding over the Board, then observed that he had personally asked every detained girl and all the girls had shown eagerness to be released. He further observed that under such circumstances it seemed to him that further detention of the girls was illegal and unwarranted because they had not committed any offence and they were victims of circumstances. He therefore ordered their release forthwith with condition that they shall not



enter into the local jurisdiction of Social Service Branch. Thus the minor girls were released from the Court itself. The 2nd respondent could not, therefore, take the minor girls to the Government Special Rehabilitation Centre for Girls at Deonar. It is in these circumstances, being shocked at the manner in which the rescued girls, though they were minors, were released contrary to the provisions of law, that the petitioner has rushed to this Court.

- 13 We have heard at some length Ms. Mahrukh Adenwalla with Mr. Y.M. Choudhari for petitioner, Mr. P. Janardhan, learned Additional Advocate General with Mr. I.S. Thakur, A.P.P. for respondent 1 and Mr. V.M. Thorat, learned counsel appearing for respondent 3. Respondent 2 is served. None has represented respondent 2.
- 14 Ms. Adenwalla urged that some of the rescued girls being under 18 years of age are victims and cannot be treated as accused. Under Section 8 of the PITA soliciting in a public place is an offence. The same provision cannot be applied to juveniles. The learned counsel urged that the law does not permit a girl under 18 years of age to consent to sexual intercourse. Hence, a child cannot be charged for soliciting as in the eyes of law, her consent has been vitiated. She also drew our attention to certain provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 ("the JJA" for short). She submitted that the said Act aims at providing proper care, protection and treatment of children under 18 years of age. 'Juvenile' or child is defined under the JJA as a child who has not completed 18 years of age. A child who is said to have committed an offence is described as a juvenile in conflict with law and destitute children who are likely to be grossly abused or tortured or who are mentally or physically challenged, are described as children in need of care and protection. She submitted that a juvenile in conflict with law has to be produced before Juvenile Justice Board and a child in need of care and protection has to be produced before the Child Welfare Committee. Thus, the JJA deals with two types of children, juveniles in conflict with law and children in need of care and protection. A juvenile girl found soliciting can be categorised both as a juvenile in conflict with law under Section 2(1) as well as child in need of care and protection under Section 2(d)(vi). The learned counsel contended that considering the fact that the girls under 18 years of age are victims of circumstances and are forcibly brought into flesh traffic by traffickers, who may include their family, relatives and friends, such girls cannot be

treated as accused. They would more appropriately fall in the category of children in need of care and protection under Section 2(d)(vi). She submitted that it is, therefore, necessary that all such girls should be produced before the Child Welfare Committee and not before the Juvenile Justice Board. This is because it is necessary to rehabilitate these girls rather than penalise them, for they are forced into these activities.

- 15 Referring to the facts of the case on hand, the learned counsel contended that entire matter has been handled in very casual manner. She submitted that the ossification test indicated that the girls were minors. They were taken charge of from a brothel. They were clearly victims of circumstances, acting at the dictates of the brothel keeper. They were therefore children in conflict with law and ought to have been produced before the Child Welfare Committee. They were wrongly produced before the Juvenile Board. The learned counsel further urged that the Juvenile Board fell into a serious error in releasing them. It could not have done so without recording a finding that they were not minors but adult females. Having regard to the provisions of the JJA, it was obligatory on the part of the Juvenile Board to send them to protective home. By releasing them, the Juvenile Board has driven them back to the flesh trade.
- 16 The learned counsel also contended that the conduct of respondent 3, advocate Shri Jaiswal is objectionable. Shri Jaiswal appeared for the brothel keepers, who are accused and got them released on bail. He also appeared for the victim girls, who were not accused. There is certainly a conflict of interest between the brothel keepers and the victims and the learned advocate could not have appeared for both. Ms. Adenwalla submitted that respondent 3 is guilty of professional misconduct. Respondent 3 even appeared before the Juvenile Justice Board and argued that the girls should be released. Serious note will have to be taken of the conduct of respondent 3. The learned counsel also contended that the rescued girls will have to be traced and hence this Court should direct that the investigation should go on. The learned counsel urged that this Court should issue necessary guidelines/directions which can be followed by the investigating agency and the Courts, while dealing with similar cases.

- 17 Mr. V.M. Thorat, the learned counsel appearing for respondent 3 contended that it is true that respondent 3 appeared for the rescued girls, but that does not amount to professional misconduct. He submitted that the girls were claiming to be adults. The girls and the four accused were claiming to be innocent and wanted to be released on bail. They were not making any allegations against each other. Respondent 3 was briefed at the last moment. There appeared to be no conflict between them and hence respondent 3 filed applications for all. No professional misconduct can be attributed to him. Respondent 3 has filed affidavit in this Court justifying his conduct and supporting the Court's orders. We shall advert to it at the appropriate stage.
- 18 Mr. Janardhan, the learned Addl. Advocate General supported the petitioner. He also emphasised the need for this Court to issue necessary directions to prevent recurrence of such events in future. He has taken us through the affidavit of Shabana Irshad Shaikh, Sub-Inspector of Police, Social Service Branch, Crime Branch, C.I.D. Mumbai. We shall refer to it shortly.
- 19 Before we deal with the rival contentions, it is necessary to have a look at the relevant provisions of law. We may first refer to certain provisions of the Constitution. Article 15(3) of the Constitution empowers the State to make any special provision for women and children. Under Article 23 of the Constitution, traffic in human beings is prohibited and any contravention of this provision is an offence punishable in accordance with law. Two important Directive Principles of State Policy are found in Article 39(e) and (f). They read as under :
- “39(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”
- 20 Article 48 imposes on the State a primary responsibility of ensuring that all children until they complete the age of 14 years are provided free and compulsory education. Chapter IV-A which was inserted in

the Constitution by the Constitution (42nd Amendment) Act, 1976 introduced fundamental duties in the Constitution. Article 15A(a) states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. The intention of the Constitution makers is clear. Stated in plain words, it means that women and children have to be protected. Trafficking in them has to be prevented and stopped. They must be allowed to develop in free and healthy conditions.

- 21 Various legislative measures have been taken to give effect to this intention. The Suppression of Immoral Traffic in Women and Girls Act, 1956 was a step in that direction. It was amended by Act No.44 of 1986. The title of the said Act was changed to the Immoral Traffic (Prevention) Act, 1956 ("PITA" for short). The purpose of this Act is to inhibit or abolish commercial vice namely, the traffic in persons for the purpose of prostitution as an organised means of living. We will refer to only the relevant provisions. Section 2(aa) of the PITA defines "child" to mean a person who has completed the age of sixteen years and Section 2(cb) defines "minor" to mean a person who has completed the age of sixteen years but has not completed the age of eighteen years. Section 2(f) states that "prostitution" means the sexual exploitation or abuse of persons for commercial purposes and expression "prostitute" has to be construed accordingly. Section 2(b) defines "corrective institution" to mean an institution in which persons who are in need of correction may be detained. Section 2(g) defines "protective home" to mean an institution in which persons who are in need of care and protection may be kept. The PITA provides for punishment for keeping a brothel or for allowing premises to be used as a brothel (Section 3), for living on the earning of prostitution (Section 4), for procuring, inducing or taking persons for the sake of prostitution (Section 5), for detaining a person in premises where prostitution is carried on (Section 6), for prostitution in or in the vicinity of public places and seduction of a person in custody (Section 7). Section 8 will have some relevance. It provides for punishment for seducing or soliciting for purpose of prostitution. Section 9 provides for punishment for seduction of a person in custody. Under Section 10A depending on circumstances, a female offender may be sent to a corrective institution for a term by a Court in lieu of sentence.
- 22 Section 14 makes offences punishable under the PITA cognisable. Under Section 15(4) a police officer is entitled to enter any

premises if he has reasonable grounds for believing that the offence punishable under the PITA has been or is being committed in respect of a person. Under Section 15(5-A) any person who is produced before a Magistrate has to be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases. Under Section 16 a Magistrate may direct that such a person be rescued from such a place and produced before him. Section 17 provides for intermediate custody of persons rescued under Section 15 or 16 and if such a person is in need of care and protection, the Magistrate can direct that he or she may be detained in a protective home. Section 20 provides for removal of prostitute from any place. Protective homes are provided under Section 21. Section 22B provides for summary trials.

- 23 Taking note of increasing world wide awareness of the problems of children particularly, problems of a girl child and various world conventions resolving to take measures to put an end to immoral traffic in children to some of which, India is a party, the legislature enacted the juvenile Justice (Care and Protection of Children) Act, 2000 ("JJA" for short). As its preamble reads, it is an Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection by providing for proper care, protection and treatment by catering to their developmental needs and by adopting a child friendly approach in the adjudication and disposal of matters in the best interest of children and for their ultimate rehabilitation to various institutions established under the said Act. It is necessary to refer to some relevant provisions of this Act, to appreciate the gradual change in the approach of the legislature towards destitute and erring children.
- 24 The JJA is a child friendly Act. It simply makes two categories of children. Under Section 2(k) juvenile or child means a person who has completed 18 years of age. Section 2(a) defines child in need of care and protection. In this category are children who are not involved in any offence but who are neglected, abused and are victims of circumstances. Section 2(d)(i) to (ix) describe the type of children who fall in this group. For the purposes of the present case it is necessary to read 2(d)(vi). It defines child in need of care and protection to mean a child who is being or is likely to be grossly

abused, tortured or exploited for purposes of sexual abuse or illegal acts.

- 25 Section 2(1) says that a juvenile in conflict with law means a juvenile who is alleged to have committed an offence. Section 4 provides for Juvenile Justice Board. Section 10 states that as soon as a juvenile in conflict with law is apprehended by police, the matter has to be reported to a member of the Board Section 15 of the JJA provides for the orders that may be passed against a juvenile who has committed an offence. The Board may, inter alia, ask the juvenile to go home after advice or provide for his counselling or direct that he may be sent to a special home. Under Section 16, a juvenile who has completed the age of 16 can be kept in a safe custody, but in no case can a juvenile be sentenced to death or life imprisonment. Under Section 20 cases which are pending on the date on which the JJA has come into force, shall be continued in the respective courts where they are pending, but if the court finds that juvenile has committed an offence, it shall record a finding to that effect and send the juvenile to the Board which shall pass orders as if it has been satisfied that the juvenile has committed the offence.
- 26 Under Section 29 of the JJA, the State Government may constitute a Child Welfare Committee. A child in need of care and protection has to be produced before the said Committee as per Section 32. If such a child has no family of ostensible support, the Committee may direct that the child may be remanded to children's home or shelter home. Chapter IV of the JJA is devoted to rehabilitation and social integration of children.
- 27 The JJA therefore intends improving the lot of children, be they children in need of care and protection or juveniles in conflict with law. The officers dealing with them have to be specially trained and instructed. Procedure to be adopted while dealing with them is different. The thrust is on rehabilitation. Adoption, foster-care, sponsorship or lodging them in after-care organisations are the options open to the authorities. Even where they are involved in offences they are not to be treated as offenders, but merely as children who have strayed their path for want of guidance. We will have to examine the present case against this background.
- 28 In almost all cases, where girls are rescued from a brothel, it is found that they are forced to submit to prostitution by brothel keepers. Cases are not unknown where young women from far of

corners of India have to leave their homes and come to city like Bombay in search of bread. They are a burden to their parents. Their marriages cost money. They are neglected and unwanted. Many a time they are brought to cities with false promises of better future and sold to brothel keepers. Once they are in the trade, it is impossible for them to get out of it. If it is a brazen case of voluntarily soliciting in public attracting Sections 7 or 8 of the PITA such girls can be described as children in conflict with law and will have to be produced before Juvenile Justice Board. Otherwise such girls can more aptly fall under Section 2(b)(v) of the JJA as children in need of care and protection i.e., children who are being or who are likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts and they will have to be produced before the Child Welfare Committee. While dealing with both these categories of minors a kindly approach is needed. Their reformation or rehabilitation must be the object. The provisions of the JJA will have to be strictly followed.

- 29 If the facts of the present case are examined, we find that the provisions of the JJA are completely ignored. Shabana Shaikh, Sub Inspector of Police, Crime Branch CID Mumbai has stated that the brothel was raided on 15-5-2002. Four brothel keepers were arrested on the spot. Twenty four girls were found in the premises. Against the said accused Special LAC No. 20/02 under Sections 3, 4, 7(2)(a) of the PITA, was registered. On 17-5-2002, the four accused as well as the twenty four girls were produced before the Additional Chief Metropolitan Magistrate's 3rd Court, Esplanade, Mumbai. The learned Magistrate remanded the four accused to police custody till 24-5-2002 and twenty four girls were sent to Shaskiya Mahila Sudhar Griha with a direction that their medical examination be carried out.
- 30 On 20-5-2002, the medical examination of the girls was carried out. Ten girls were found to be minors. On 24-5-2002, the four accused were released on cash bail. On 27-5-2002, the twenty four girls were produced before the learned Magistrate. Four major girls were released and ten minor girls were ordered to be produced before the Juvenile Court on 28-5-2002.
- 31 On 28-5-2002, the Probation Officer produced the ten minor girls before the Juvenile Welfare Board. Respondent 3, Advocate Jaiswal appeared for the minor girls and argued for their release claiming

that they are not minors. The Board ordered their re-examination and the matter was adjourned to 13-6-2002. On 11-6-2002, the Probation Officer produced the said ten girls before the Medical Officer of Nagpada Police Hospital for their re-examination to ascertain their ages. The Medical Officer expressed opinion that he had already examined them in detail and issued a certificate as to their age with a margin of error of 6 months on either side. According to the Medical Officer the certificate was issued after physical examination, ossification test, X-ray examination as per procedure prescribed in H. S. Mehta's Book of Medical Law and Ethics in India (1963) and hence re-examination of the said girls was not necessary.

- 32 With this report the said girls were again produced before the Juvenile Court, Mumbai on 13-6-2002. Respondent 3 again appeared for them and argued for their release. The Probation Officer opposed their release and contended that she had made correspondence with different Non-Governmental Organisations of different States about the girls and hence they may be detained for further 15 days. The Board released the girls on the condition that they shall not enter into the local jurisdiction of Social Service Branch.
- 33 We express our displeasure at the manner in which this case has been handled by the Board. First of all if the girls were minors and they were not involved in any offence, they could not have even been described as juveniles in conflict with law. They were children in need of care and protection as per the provisions of the JJA. They ought to have been produced before the Child Welfare Committee once their minority was confirmed. Assuming they had to be produced before the Magistrate to seek orders for their production before the appropriate forum, the Magistrate should have directed their production before the Child Welfare Committee and not before the Juvenile Justice Board because they were minors and not accused. Assuming further, that they could have been produced before the Juvenile Justice Board, there was no warrant for the Board to release them because the record before the Board clearly indicated that the girls were minors. The Board could have released them, without conditions, only if they were majors. Because they were minors, the Board was duty bound to follow the procedure prescribed under the JJA. The Board ought to have given due consideration to the request of the Probation Officer that



they should not be released because she was awaiting information about them from the States from where they had come. This request was obviously made to explore the possibility of finding out their parents so that their custody could be entrusted to them with some conditions. Surprisingly the Board released them on a condition that they shall not enter into the local jurisdiction of Social Welfare Branch.

- 34 We have referred to the relevant provisions of the JJA which make it evident that both, a juvenile in conflict with law or a child in need of care and protection have to be dealt with, keeping in mind the possibility of their reformation and rehabilitation. The JJA provides for Protective Homes or Special Homes where such girls have to be kept for safe custody, because the fear is that they may be driven back to the brothels. The Board should have been alive to this. By asking the girls not to enter into the local jurisdiction of Social Service Branch, the Board has treated them as confirmed prostitutes. Such orders can be passed under Section 20 of the PITA which empowers a Magistrate to order removal of prostitutes from any place and prohibit them from re-entering it. We wonder how the Board could have passed such harsh order to the detriment of the minor girls. The learned Magistrate presiding over the Board has observed that he had personally asked the girls and they had shown eagerness to be released. There is no provision under the JJA whereunder, the Board can release the minor girls because they desired to be released without giving a thought to their rehabilitation and the frightening possibility of their re-entry into brothels.
- 35 Another disturbing facet of the matter is that it is at the request of respondent 3, who had appeared for the brothel keepers, that the Board released the girls. Having appeared for the accused, respondent 3 could not have appeared for the victim girls who were not the accused. This was sufficient indication that the girls would be driven back to the brothels, and the Board should have realised this. The Board committed the greatest blunder in entertaining such an application and releasing the, girls pursuant thereto. The Board ought to have sent them to the Protective Home as requested by Probation Officer. In our opinion greatest injustice has been done to the minor girls.
- 36 We are also of the opinion that it was improper on the part of Advocate Jaiswal to appear for the accused as well as for the victim

girls. To us there appears to be a clear clash of interest between the accused and the victim girls. We have perused the affidavit filed by him in this Court. Through the affidavit respondent 3 has justified his conduct. We are not happy with the explanation offered by respondent 3. The tenor of the affidavit strikes a very unhappy note. Respondent 3 was present in the Court. We have also heard his advocate. Even in this Court we witnessed a defiant approach of respondent 3. We may not be however understood to have expressed any final opinion on the conduct of respondent 3, as in our opinion, the proper authority to consider this is the Bar Council of Maharashtra. We will therefore refer his case to the Bar Council to conduct appropriate enquiry and arrive at its conclusions without getting influenced by our observations about his conduct.

- 37 We feel that the following directions may prevent recurrence of such events in future.
- (A) No Magistrate can exercise jurisdiction over any person under 18 years of age whether that person is a juvenile in conflict with law or a child in need of care and protection, as defined by Sections 2(1) and 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000. At the first possible instance, the Magistrates must take steps to ascertain the age of a person who seems to be under 18 years of age. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law, or to the Child Welfare Committee if such a person is a child in need of care and protection.
  - (B) A Magistrate before whom persons rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place are produced, should, under Section 17(2) of the said Act, have their ages ascertained the very first time they are produced before him. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a Juvenile in conflict with law, or to the Child Welfare Committee if such person is a child in need of care and protection.
  - (C) Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the Probation Officer.

- (D) The said juvenile should be released only to the care and custody of a parent/guardian after such parent/guardian has been found fit by the Child Welfare Committee to have the care and custody of the rescued juvenile.
  - (E) If the parent/guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be followed for the rehabilitation of the rescued child.
  - (F) No advocate can appear before the Child Welfare Committee on behalf of a juvenile produced before the Child Welfare Committee after being rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place. Only the parents/guardian of such juvenile should be permitted to make representations before the Child Welfare Committee through themselves or through an advocate appointed for such purpose.
  - (G) An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (Prevention) Act, 1956.
- 38 We are anxious about the safety of the minor girls who are released. The statement made by the learned A.G.P. that the investigation will go on and vigorous efforts will be made to trace the minor girls has reduced our anxiety to some extent.
- 39 We have already indicated that respondent 3's conduct in this case needs to be examined by the Bar Council. We therefore direct the Bar Council of Maharashtra to conduct an inquiry into respondent 3, Advocate Jaiswal's conduct in this case, as per law. We make it clear that our observations about his conduct are prima facie observations and the Bar Council of Maharashtra should examine his case, after giving him a notice and after giving him an opportunity of hearing in accordance with law, without being influenced by our observations.
- 40 The petition is disposed of with above directions.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**Prerana vs. State of Maharashtra & others**

DATED : 18-4-2007

**Hon'ble Judge:**

Smt. Ranjana Desai,J.

**JUDGEMENT**

We have heard the learned Counsel for the petitioner and the learned counsel for the respondents for a considerable length. Both fairly stated that the petition can be disposed of by giving extensive directions and this court need not give reasons for the said directions. Hence we pass the following directions:

- 1 (a) "Anti-Trafficking Cell" of the police shall be created and established at the different levels in the police force, and such Cells shall be appropriately staffed.
- (b) In every district at the level of the Local Crime Branch a Senior Police Inspector shall be designated as head of the "Anti-Trafficking Cell" having jurisdiction all over the district.
- (c) At the Commissionerate level, a police officer of the rank of DCP shall be designated as head of the "Anti-Trafficking Cell" having jurisdiction all over the area falling under such Commissionerate.
- (d) Upon a raid under ITPA being conducted by the Special Police Officer, the concerned "Anti-Trafficking Cell" shall be forthwith informed of the same to enable such Cell to supervise the investigation.
- (e) An "Anti-Trafficking Cell" shall be created at the State level under the direct charge of the Deputy Inspector General of Police having jurisdiction all over Maharashtra.
- 2 (a) The Petitioner within 3 months shall prepare a list of suitable persons in every district who may be associated with the Special Police Officers to advise them in carrying out their functions under ITPA as envisaged under section 13(3)(b) of ITPA.
- (b) The State Government within 2 months of receipt of the aforementioned list shall issue a Notification to associate such persons with the Special Police Officers as a non- official

advisory board to advise them on the implementation of ITPA, and the said Notification shall be circulated amongst all police stations in Maharashtra.

- (c) The State Government shall circulate the said list amongst Magistrates all over Maharashtra to enable them to take the assistance of such persons whilst carrying out their functions under section 17(2) of ITPA as envisaged under section 17(5).

3 The Special Police Officers are directed :

- (a) to seek the association of the persons mentioned in the said list at clause 2(a) from the stage of raid till completion of trial;
- (b) to produce before the Magistrate within 24 hours all those persons found on the brothel premises, including the rescued victims;
- (c) to produce upon rescue operations an apparent child victim before the Child Welfare Committee;
- (d) to immediately upon rescue operations contact a lawyer nominated by the Maharashtra State Legal Services Authority on the panel constituted to provide free legal-aid to the rescued victims for protecting the interests of the rescued victim;
- (e) to record the detailed statements of the rescued victim at the place of safety in the presence of the persons mentioned in the said list and / or the Superintendent / Probation Officer / responsible staff of the institution;
- (f) to seize / recover the personal belongings and documents of the rescued victims at the time of rescue operation or soon thereafter, and to hand the same to the concerned rescued victim;
- (g) (i) to recover the child or children of the rescued victim at the time of raid or soon thereafter, and to reunite the child or children with their mother;
- (ii) to separate the child or children from their mother only on a reasoned order being passed on inquiry by the Child Welfare Committee under the Juvenile Justice [Care and Protection of Children] Act 2000;
- (h) to separate the rescued victims from the offenders immediately upon the rescue operation;

- (i) to convey the rescued victims and the offenders in separate vehicles from the brothel to the place of safety / police lock-up or from the place of safety / police lock-up to the court;
- (j) to place the rescued victims in a place of safety immediately upon the rescue operation, and in no event should the rescued victim be kept in the police station;
- (k) upon raid of a brothel, to immediately inform the District Magistrate or Sub-Divisional Magistrate of the same, with a request to initiate action under section 18(1) of ITPA for closure of the brothel;

4 The State Government is directed :

- (a) to take measures to ensure that the institutions housing rescued women and children are equipped with basic amenities, and are clean, pollution free and well ventilated;
- (b) to appoint at least 2 Counsellors for each State- run Protective Home expeditiously, preferably within six months;
- (c) to include the appointment of Counsellors as a mandatory condition for granting license to private institutions housing rescued victims;
- (d) to appoint at least 2 Probation Officers for each State- run Protective Home;
- (e) to fill the staff vacancies in each State- run Protective Home;
- (f) to provide the rescued victims with an opportunity to avail of formal education in the institutions, especially literacy programmes;
- (g) to extend the Vocational Training Scheme presently pending approval of cabinet to Protective Homes;
- (h) to frame Rules under section 23 of ITPA, especially for carrying into effect the provisions of section 18;
- (i) to include training on law related to children, including ITPA, on the curriculum of the Judicial Officer's Training Institute, Nagpur;
- (j) to include training on law related to children, including ITPA, on the curriculum of the Police Training Academy;

## TRAFFICKING AND THE LAW

- (k) to constitute Special Courts as envisaged under section 22A of ITPA within 6 months.
- 5 The Superintendents of the institutions housing rescued child victims or major victims are directed :
- (a) that no person shall be allowed access to a rescued child victim/major victim without permission of the Child Welfare Committee/Magistrate, as the case may be;
  - (b) that on the aforementioned permission being granted by the Child Welfare Committee/Magistrate, such person shall be given access in the presence of the Superintendent or Probation Officer or any other responsible staff of the institution;
  - (c) that the Superintendent or Probation Officer or any other responsible staff of the institution shall accompany the rescued child victim / major victim in the event of such rescued victim having to go outside the institution premises.
- 6 The Magistrates and Sessions Judges are instructed :
- (a) to ensure the presence of a Counsellor in court whilst a rescued child victim's testimony is being recorded;
  - (b) to provide the rescued child / major victim with the assistance of a lawyer nominated on the panel constituted by the Maharashtra State Legal Services Authority;
  - (c) to seek the assistance of lawyers nominated on the panel constituted by the Maharashtra State Legal Services Authority as friend of the court [amicus curae];
  - (d) to pass orders under section 18(1) of ITPA when convicting a person of an offence under section 3 and/or Section 7 of ITPA;
  - (e) to get verified the rescued victim's documentary evidence of age if the same shows her to be a major by directing the concerned police personnel to ascertain its veracity with the authority that has issued the said document and file a report before the court;
  - (f) to order a second medical examination to ascertain the age of the victim to be conducted by a medical officer attached to another public hospital, in case the results of the first medical examination are under doubt. Age verification shall be done in (1) Nair Hospital, Mumbai Central, (2) St. Georges Hospital, Mumbai (3) Cama and Albles Hospital, Mumbai and (4)

Lokmanya Tilak Medical Hospital, Sion, Mumbai, and all civil hospitals at District Headquarters and rural hospitals in mofussils.

- (g) to record the testimony of the rescued child / major victim within 1 month of the charge- sheet being filed so that the victim's rehabilitation is not hindered;
  - (h) to expedite the trial of cases relating to trafficking and commercial sexual exploitation, and preferably to dispose of such cases within 6 months of the charge- sheet being filed.
- 7 The Magistrates are directed to follow the following procedure when rescued major victims of trafficking are brought before them:
- (a) The Magistrate shall, after giving an opportunity of being heard to the rescued major victim, cause an inquiry to be made by the Probation Officer as to the correctness of the information received under Section 15 (1) or Section 16 (1) of ITPA, as the case maybe, the age, character, circumstances and antecedents of the person and the suitability of her parents, guardian or husband for taking charge of her and the nature of the influence which the conditions in her home are likely to have on her if she is sent home and the prospects of her rehabilitation as stipulated under Section 17 (1) of ITPA;
  - (b) The inquiry by the Probation Officer should be completed as expeditiously as possible and in any case within three weeks of the date of the order;
  - (c) During the period of such inquiry by the Probation Officer, the major victim shall be kept in a place of safe custody and she should not be kept in the custody of any person likely to have a harmful influence over her;
  - (d) The Magistrate shall consider the report of the Probation Officer in consultation with the persons mentioned in the said list under Section 17 (5) of ITPA [item No.2(c) above] and thereafter pass appropriate orders under the Act of rehabilitation, repatriation or release, as the case maybe.
- 8 The Magistrates are directed to initiate prompt action when an application under section 16 of ITPA is filed before them so that the victim is rescued from the flesh trade.



- 9 The Maharashtra State Legal Services Authority are directed :
  - (a) To provide free legal-aid to the rescued victims immediately upon the rescue operation and till completion of trial;
  - (b) to distribute the names and particulars of the lawyers to all Magistrates and Sessions Judges and Child Welfare Committees.
- 10 The Auditor General shall consider and decide within 1 month the proposal pending before him about providing petty cash to Superintendents of State- run institutions.
- 11 (a) The Public Works Department shall complete the construction of the institution for rescued victims under Swadhar Project in Mumbai expeditiously and preferably within two years;
- (b) The Women & Child Development Department, Government of Maharashtra shall make operational the institution for rescued victims under Swadhar Project in Mumbai within 2 months from completion of its construction.
- 12 Trafficking Police Officer shall investigate cases registered under ITPA as contemplated under Section 13(4) thereof or assist any investigation of any cases under ITPA.
- 13 (a) The State Legal Advisory Committee to formulate an effective rehabilitation programme, including the mode of its implementation, within 4 months of its constitution. S L A C may involve the corporate sector and employment agencies in their rehabilitation project.'
- (b) The Women & Child Development Department, Government of Maharashtra shall implement the rehabilitation programme in all its institutions housing victims of trafficking and commercial sexual exploitation.
- (c) The SLAC shall annually evaluate the rehabilitation programme, and submit its evaluation report with its suggestions to the State Level Advisory Committee and the Women and Child Development Department, Government of Maharashtra for appropriate action.
- 14 (a) The Maharashtra State Commission for Women shall research and publish annual reports with regards to the scale and incidence of trafficking of women and children for commercial sexual exploitation.

- (b) The Women and Child Development Department, Government of Maharashtra to make operational within two months the software titled "Victim Trafficking Registry", and the data so collected to be kept confidential for use of the government departments and police officials to optimise social and legal intervention. The petitioner shall render all active assistance for establishing this Registry.

15 Petition is disposed of.

**IN THE HIGH COURT OF BOMBAY AT GOA**

**Savera a Society registered under the Societies Registration Act  
1860, through its President Smt. Tara Kerkar and Others vs.  
State of Goa, through the Chief Secretary and Others**

Decided On: 21.07.2003

**Hon'ble Judges:**

F.I. Rebello and P.V. Hardas, JJ.

**JUDGEMENT**

- 1 This writ petition was filed by the petitioners, of which petitioner No.1 is a Society, registered under the Societies Registration Act, which has as its objectives, amongst others to help its members to defend moral, cultural and social interest.... It is the case of the petitioners that on account of unfounded social sanctions and the circumstances of being born poor, ill-fed, ill-housed, ill-educated and on top of it being illiterate, certain women, most of whom are migrants from other States, have been trapped in the unorganised flesh trade. The petition filed is with the object of their readjustment and rehabilitation by economic empowerment, social justice and self-sustenance, giving them equality of status and dignity as persons in truth and reality and for their social integration in the mainstream of the society. It is pointed out that pursuant to the Judgement, in the case of Gaurav Jain vs. Union of India, the Apex Court has issued various directions including setting up of State Committee, Local Committee, Advisory Committee and Monitoring Committee, setting up of Child Development and Care Centre, Service facilities, Institutional Care.

The Government of Goa has not taken steps for compliance of the directions contained in the Judgement of the Apex Court and on the contrary, has taken aggressive attitude against the fallen women and other residents of Baina area, by committing large scale police atrocities. It is contended that instead of treating the sex workers with sympathy, the police officers at Vasco have started assaulting the sex workers at Baina red light area, including the people doing business in the area, visitors in the area, members of families and the guests visiting the area. It is pointed out that there are no proper facilities, including medical care facilities and, therefore, it is necessary to take steps so as to treat the women involved in the flesh trade to leave with human dignity and see to it that their

children are rehabilitated and do not fall into the same trade and for that purpose to take steps to counselling, cajoling and coercion. It is pointed out that Baina red light area is a declared slum area and, therefore, was entitled for improvement within the declared slum area.

- 2 ...By the present petition, the petitioners have prayed for various directions, including setting up of a Committee for supervising the rehabilitation programme as would be ordered by this Court. Further to direct the Committee to function under the supervision of this Court, so as to improve the situation and curb and prevent the flesh trade, by rehabilitating the fallen women and other people around into better persons by opening counselling courses, educational institutions, and starting classes for teaching self employment Various other directions are also sought, which we need not advert to....

The National Commission for Women also intervned on a complaint made to them on behalf of the sex workers and appointed a Commission to look into the grievances. A Committee was constituted to be headed by Justice G.D. Kamat (Retired), former Chief Justice of Gujarat High Court.

- 4 In response to the petition, the Superintendent of Police has filed an affidavit on 25.11.1997. It is denied that police were assaulting the women and that several sex workers had been removed from their hutments either in the monsoon season or otherwise....
- 5 On behalf of the State, an affidavit was filed by the Director of Woman and Child Development, who is also a Member of the State Commission for Women....
- 6 Further Affidavit dated 1.7.2003 has been filed by A.K. Wasnik. In that it is pointed out that the Government of India, Ministry of Human Resource Development (Department of Women & Child Development) have directed all States/Union Territories to submit biannual report on the action taken pursuant to the Judgement of the Apex Court in Vishal Jeet, vs. Union of India and ors. A.I.R. 1990 SC 1412. The Department accordingly has been sending biannual report in the prescribed format....
- 7 The Committee appointed by the National Commission for Women had submitted its report, which was forwarded to the State Government by letter of January 8, 2000. The report is a study

of the problems of the women in prostitution in Baina and the recommendations for their rehabilitation....

...The committee has recommended that The Government of Goa needs to make a clear statement of the need to evict the women in prostitution, after considering the recommendations by ensuring alternate site and in the event, displacement is inevitable, the State Government to provide appropriate rehabilitation measures vis-a-vis, shelter, livelihood, health facilities, vocational assistance. It further recommended that survey needs to be done to find out whether the unfortunate sex workers want to go back to their respective States, in which event, the National Commission for Women, with the assistance of respective State Government and respective State Commission for Women should work out rehabilitation programme. It has further recommended that steps should be taken for the purpose of prevention of trafficking of women/girls into Goa from neighbouring States and the National Commission for Women should take up with the Central Government and other State Governments to take measures to eradicate the root causes and to control trafficking of women and girls and stop the migration of sex workers from one State to another. There are other recommendations of the Committee.

- 8 Apart from the letter dated January 8, 2000 forwarding the report with State Government . We are not aware whether the National Commission for Women has taken any steps or follow up measures. However, from the affidavit of the State Government, it is clear that some of the issues are before the Apex Court, in the pending case filed by Shakti Vahini.
- 9 ...In the light of that, the following directions need to be issued.
- (1) The State Government is directed to take steps based on the report of the Inquiry Committee headed by Justice Kamat (Retd) appointed by the National Commission for Women and forwarded by letter of January 8, 2000 to the extent it is within the jurisdiction of the State Government and submit compliance report.
  - (2) take steps to effectively implement the Judgement of the Apex Court in Gaurav Jain vs. Union of India and ors. to the extent it is not yet implemented.

- (3) considering the finding of the Committee that 250 cubicles are being used for carrying on sex trade, and the objection by the local community the District Collector of the concerned area is directed to take steps along with other concerned officers under the provisions of I.T.P.A. or the other relevant laws, to close down the said cubicles by following the due process of law.
  - (A) If the said 250 cubicles constructions are illegal and on the government or land belonging to local authorities then to take steps to evict the illegal occupants and then demolish them by following due process of law.
- (4) the State Government also to take adequate steps to prevent the CSWs being brought into the State of Goa on contract basis as noted by the Justice Kamat Commission.
- (5) Since the Commercial Sex Workers are being brought from outside the State of Goa, into the State of Goa, the Government of Goa is not bound to rehabilitate them except to the extent provided by specific directions in the judgements of the Apex Court. The rescued Commercial Sex Workers be deported to the State from where they come. The Goa State Commission for Women with the National Commission for Women to take steps so that the said women are rehabilitated in the State from where they hail with the assistance of the respective State Governments.
- (6) National Commission for women within nine months from today to file report with this Court as to what steps they have taken for implementing the recommendations of the Justice Kamat (Retd) Committee appointed by them.

We direct all concerned parties to submit the compliance report to this Court within nine months on the directions. A copy of the order be sent by the Registry to the National Commission for Women, New Delhi.

**IN THE HIGH COURT OF KERALA**

**Sinu Sainudheen vs. Sub Inspector of Police**

2002CriLJ3205

Decided On: 12.02.2002

**Hon'ble Judges:**

G. Sasidharan, J.

**JUDGEMENT**

- 1 This petition is filed by accused numbers 4 and 5 in Crime No. 312 of 2001 of Thrikkakkara Police Station registered under Sections 3, 4(1) and 5 of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as "the Act"). The Sub Inspector of Police, Thrikkakkara conducted a raid in the house of the first accused where the petitioners were also present and alleging that they were conducting prosecution, arrested them. Crime was registered by the Sub Inspector of Police, Thrikkakkara.
- 4 According to the petitioners, the statement in the First Information Report will not disclose the commission of offences under Sections 3, 4(1) and 5 of the Act. It is also stated that the arrest of the petitioners and the other accused and search of the house were not properly conducted by the Sub Inspector of Police, Thrikkakkara. It is maintained that the search of the house and also the arrest were not done as provided in the Act.
- 5 Section 14 of the Act says that notwithstanding anything contained in the Code of Criminal Procedure, any offence punishable under the Act shall be deemed to be a cognisable offence within the meaning of that Code. The proviso to the above Section says that notwithstanding anything contained in the Criminal Procedure Code, arrest without warrants may be made only by the special police officer or under his direction or guidance or subject to his prior approval. The second proviso to the Section enjoins that when the Special Police Officer requires any Officer subordinate to him to arrest without warrant otherwise then in his presence any person for an offence under the Act, he shall give that subordinate officer an order in writing specifying the person to be arrested and the offence for which the arrest is being made.
- 6 Here what is said is that before conducting the raid of the house of the first accused, the Sub Inspector of Police, Thrikkakkara sought

permission of the Assistant Commissioner of Police, Thrikkakkara for conducting raid. The submission made by the learned Public Prosecutor is that the order made by the Assistant Commissioner of Police in the written request made by the Sub Inspector of Police was that sanction was given to the Sub Inspector of Police for taking suitable legal action after raiding the premises.

- 7 What is said in the second proviso to Section 14 is that for the purpose of arresting any person, an order in writing specifying the person to be arrested has to be given to the subordinate officer by the special police officer. Such an order in writing can be given by the special police officer specifying the person to be arrested only after seeing that a particular person has committed an offence. There is also provision in the proviso which says that in the order in writing given by the special police officer the offence for which the arrest is being made also has to be mentioned. That also would indicate that the special police officer can give an order in writing to a subordinate officer for arresting a person only after he is being convinced that there are reasons to believe that a particular person has committed an offence. Here the sanction govern by the Assistant Commissioner of Police who is the special police officer cannot at all be said to be a sanction given for effecting arrest by a subordinate officer as is said in the second proviso to Section 14 since the sanction order was made even before the raiding of the house of the first accused. For the reason it cannot be said that there was sufficient authorisation given by the special police officer to the Sub Inspector of Police for effecting arrest as mentioned in Section 14 of the Act.
- 8 Section 15 of the Act is the provision which deals with search without warrant. The above Section says that notwithstanding anything contained in any other law for the time being in force, whenever the special police officer or the trafficking police officer, as the case may be, has reasonable grounds for believing that an offence punishable under the Act has been or is being committed in respect of a person living in any premises and that search of the premises with warrant cannot be made without undue delay, the special police officer may after recording the grounds of his belief enter and search such premises without a warrant. There is no provision which says that the special police officer or the trafficking police officer can authorise any of the subordinate officers for conducting search without warrant.



- 9 Section 15(2) envisages that before making a search under Sub-section (1), the special police officer or the trafficking police officer shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place is to be searched is situate, to attend and witness the search. Section 15(6A) of the Act says that special police officer or the trafficking police officer as the case may e, making a search under this section shall be accompanied by at least two women police officers. It is pointed out that there were two women Police Officers in the police party which raided the house. Coming go Sub-section (2) of Section 5, the submission made by the learned counsel appearing for the petitioners is that at the time of conducting the search there was no respectable woman inhabitant of the locality where the house in which the search was conducted is situated....
- 10 In *T. Jacob vs. State of Kerala* (AIR 1971 Ker. 166), this Court had occasion to consider the question whether the requirement in Section 15(2) of the Act is mandatory. In paragraph 7 of the judgement, this Court said that the provision which requires that at least one woman has to be there to witness the search is a mandatory provision. In *Public Prosecutor, Andhra Pradesh vs. Uttaravalli Nageswararao* (1965 (1) CrL. L.J. 543) the High Court of Andhra Pradesh considered the question whether the requirement in Sub-section (2) of Section 15 of the Act that at least a woman has to be there for attending and witnessing the search is mandatory. In paragraph 6 of the judgement, the Court said that all the directions contained in Sub-section (2) of Section 15 are mandatory. The same question was consideration *Laxmi Maruthi Yelkeri and Ors. vs. State* (1980 CrL. L.J. 28). Relying on the decision in AIR 1971 Ker. 116 (supra) it was stated in the above decision that the provision that at least one of the witnesses should be a female from the locality is a mandatory provision and the failure to comply with the essential requirement vitiates the entire proceedings. In *Bai Radha vs. State of Gujarat* (AIR 1970 SC 1396) the Supreme Court had the occasion to consider the effect of non-compliance of the requirement under Section 15(2) of the Suppression of Immoral Traffic in Women and Girls Act, 1956. The Act was having the short title 'The Suppression of Immoral Traffic in Women and Girls Act' till 26.1.1987 and the title was changed from that day as "The Immoral Traffic (Prevention) Act'. In the above case, the Supreme Court said that investigating agencies cannot and ought

not to show complete disregard of the provisions contained in Sub-section (1) and (2) of Section 15 of the Act and that the legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving in roads on the privacy of citizens and handling of delicate situations in respect of females. The Supreme Court proceeded on to observe that the entire proceeding and the trial do not become illegal and vitiated owing to the non-observance of or non-compliance with the directions contained in the aforesaid provisions. So, it is not correct to say that the proceedings have to be quashed for the reason that the requirement under Section 15(2) has not been complied at the time of search.

- 11 The Sub Inspector of Police is not an Officer competent to conduct search under Section 15 of the Act because the Section specifically provides that the special police officer or the trafficking police officer is to conduct search. Illegality in conducting search and arrest can be ground for quashing the proceedings, if it is found that search and arrest were done by the officer not in accordance with the provisions of law and the possibility of the case ending in a conviction is not there. If the proceedings are allowed to go on even after it is found that the search and arrest were not conducted on observing the mandatory provision of law, that will be an abuse of process of court. Under Section 482 of the Criminal Procedure Code, the Court will be justified in quashing the proceedings to prevent the abuse of process of court or otherwise to secure the ends of justice. In *Roy vs. State of Kerala* (2001 (1) KLT 86 (SC)), the Supreme Court considered what would be the effect of search and arrest which are per se illegal. That was a case in which it was found by the Supreme Court that the search and arrest made under the provisions of the Narcotic Drugs and Psychotropic Substances Act were not in accordance with the provisions of the Act. Here also search as well as the arrest made by the Sub Inspector of Police, Thrikkakkara are per se found to be illegal. In the decision of the Supreme Court, it is observed that the power under Section 482 of the Criminal Procedure Code has to be exercised by the High Court to prevent abuse of process of Court or otherwise to secure the ends of justice. The further observation made by the Supreme Court is that where criminal proceedings are initiated based in illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction ad sentence based on such

material, but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of process of court. In this case, it is seen that search conducted and arrest made are illegal and if the proceedings are not quashed and are allowed to continue that would certainly perpetuate abuse of process of court resulting in injustice to the persons who are alleged to have committed the offence. Hence I find that there is sufficient ground for quashing the First Information Report, Annexure I and further proceedings.

This Criminal Miscellaneous Case is allowed on quashing the First Information Report and all further proceedings.

**IN THE HIGH COURT OF ORISSA**

**Sushanta Kumar Patra alias Hemanta Kumar Das and two  
Others vs. State of Orissa**

2000CriLJ2689, 2000(1)OLR647

Decided On: 21.04.2000

**Hon'ble Judges:**

L. Mohapatra, J.

**JUDGEMENT**

- 1 This application Under Section 482 of the Code of Criminal Procedure has been filed challenging the order dated 18.9.1996 passed by the learned Sub divisional Judicial Magistrate. Bhubaneswar, taking cognisance of the offences under Sees. 3, 4, 5. 6 and 7 of the Immoral Traffic (Prevention) Act, 1956 (for short, 'the Act').
- 2 On 1 8.9.1995 the Inspector-in-charge of Bhubaneswar P.S. drew up a plain paper FIR stating that on the same day after receiving a reliable information with regard to prostitution at Sangam (Shiva) Lodge at Dhauli Junction, he conducted a raid with the assistance of other police officers and some local persons and during search three women were located in the ground floor concealing themselves under a bed. All the three women were within the age group of 1 8 to 26. During raid, five customers were apprehended including all the three petitioners. It is further stated in the FIR that during raid the petitioners and the other two accused persons were trying to escape. On the basis of such allegations, investigation was taken up and charge-sheet was submitted for offences committed Under Sections 3. 4, 5. 6 and 7 of the Act.
- 4 Before discussing the materials on record, it is necessary to refer to the relevant provisions of the Act. Section 3 of the Act prescribes that any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable in the manner indicated in the said section. Section 4 of the Act prescribes for punishment for living on the earnings of prostitution. Section 5 prescribes that any person who procures or attempts to procure a person, whether with or without his consent, for the purpose of prostitution or induces a person to go from any place for the purpose of prostitution or takes or attempts to take a person, or

causes a person to be taken, from one place to another for the purpose of prostitution, or causes or induces a person to carry on prostitution, shall be punished in the manner indicated in the section. Section 6 prescribes that any person who detains any other person, whether with or without his consent, in any brothel, or in or upon any premises with intent that such person may have sexual intercourse with a person who is not the spouse of such person shall be punished in the manner indicated in the section.

- 5 The facts giving rise to this case, as is evident from the FIR as well as the statements recorded during investigation, is that a raid was conducted in the aforesaid hotel on 18.9.1995 and during raid, three girls were found concealing themselves under a bed in the ground floor of the hotel. The petitioners and two others were apprehended while trying to escape. The undergarments of the petitioners were seized and sent for examination. The report of the District Forensic Science Laboratory, Khurda, indicates that the said undergarments sent for examination did not contain any semen stain. From these facts I am of the view that offences so far as Sections 3, 4, 5 and 6 are concerned are not at all attracted....
- 6 Accordingly, I allow the application and quash the order dated 18.9.1996 taking cognisance of the offences Under Sections 3, 4, 5, 6 and 7 of the Act against the three petitioners, namely, Sushanta Kumar Patra alias Hemanta Kumar Das, Aditya Prasad Patra and Smrutiranjan Ray.

**IN THE HIGH COURT OF BOMBAY**

**Geeta Kancha Tamang vs. State of Maharashtra**

Decided on 23.11.2009

**Hon'ble Judges:**

Roshan Dalvi, J.

1. This case involves trafficking in a child by the Applicant, who is stated to be a brothel owner/brothel keeper. She has been convicted, inter alia, under Section 6 of the Immoral Traffic (Prevention) Act, 1956 (the ITP Act) for detaining, inter alia, a minor in the brothel which she runs and for detaining her for use in commercial sex with persons.
2. The impugned judgement shows that in a raid conducted by the Police, a minor child, inter alia, has complained that she was detained and ill-treated by the accused after being brought from her native place, Nanded, to the accused. She wanted to be rescued. Along with her several other girls had been rescued. These are children in need of care and protection under the Juvenile Justice (Care and Protection of Children) Act, 2000.
3. The prosecution case that is made out is of trafficking in children/child upon the rescue of several girls in the raid. The Applicant also claims to have two minor children, though that fact is not substantiated. It is seen that a mother of two minor children has been convicted of offence involving use of minor children, incapable of consenting, for the purpose of prostitution.
4. Mr. Warunjikar has not referred to the evidence. He argued essentially upon the fact that the Applicant is a lady who has already undergone sentence of 15 months.

5. After trial, the Applicant has been convicted. She has been in custody since 8-9-2008 and accordingly, has undergone a sentence of 14 months thus far.
6. The first aspect that the Court has to consider for such a heinous crime is that trafficking in persons is prohibited under Article 23 of the Constitution of India. It is, therefore, the Fundamental Right of every Indian citizen not to be trafficked. Such act constitutes the grossest violence of the Human Rights of the victim child.
7. The offence is prone to repetition since the Applicant is shown to be a brothel owner and accordingly carries on the business of running a brothel, in which, inter alia, a child was detained. Despite the specific provision under Section 18 of the ITP Act, the learned APP states, upon instructions, that the prosecution has not taken any steps for closure of the brothel or for eviction of the offenders from the brothel premises. In fact, the Applicant's Advocate also stated to Court that the brothel has not been sealed, as required under Section 18 of the ITP Act. The same offence, albeit for violations upon other persons, including children, is liable to be committed if the Applicant is released, since she is the owner of the brothel which has not even been closed/sealed.
8. No case for release on bail by suspension of the sentence is made out. Application rejected.

## IN THE SUPREME COURT OF INDIA

**Guria, Swayam Sevi Sanstham vs. State of U.P. and Ors.**

Decided on 31.07.2009

**Hon'ble Judges:**

S.B. Sinha and Cyriac Joseph, JJ.

2. Appellant is a Non-Governmental Organisation. It came to learn that some children had been detained in the 'red light area' at Varanasi. It approached the police for their rescue. More than thirty young girls and children were rescued. A complaint was filed by the appellant in respect thereof.
4. The Investigating Officer upon completion of the investigation filed a charge sheet under Sections 5, 6 and 9 of the Immoral Traffic (Prevention) Act, 1956 (for short "the Act") and Sections 323, 504, 506, 117, 366A and 373 of the Indian Penal Code against 23 persons. Another charge sheet was filed under Sections 3, 5, 6, 7 and 9 of the Act and Sections 323, 504 and 506 of the Indian Penal Code against 13 persons.
5. The learned Sessions Judge rejected the said applications for bail, *inter alia*, stating:

...It is *prima facie* evident from the investigation carried out in this manner that these people bring the customers to get indulged in forceful immoral traffic with the minor girls and recover the charges in lieu thereof and have made their main business and brought the minor girls at the said place on having purchased them. In this reference only on having conducted the raid by the police and other social service institutions on the stated date 31 minor girls have been recovered from the houses of Rahmat, Tulsi, etc. Therefore, commissioning of the offence under Immoral Traffic (Prevention) Act by these people becomes evident. From the said acts of the applicants/ agents instigates to commit the said offence and these people enhance the immoral traffic of prostitution which is the act against the society. In case the applicants are released, these people would again indulge in these acts because they have no other business. As far as the question of Sheikh Mohammad, applicant is a Tempo driver, is concerned, no evidence has been produced on his behalf. After considering all the facts and circumstances of the case in my opinion no proper ground is found to release the



accused persons on bail. Therefore, all the above-stated four bail applications submitted by the applicants/ accused are rejected.

6. The High Court, however, by reason of the impugned judgement, allowed the said applications for bail on furnishing personal bonds with two sureties each of the like amount to the satisfaction of the Chief Judicial Magistrate, stating:

...It is pertinent to mention that in the statement of the aforesaid witnesses though the name of some of the applicants emerged but no specific role has been assigned to them nor there is any description of their activities in the statement of the witnesses recorded under Section 161 Cr.P.C. Moreover, no statement of these witnesses was got recorded under Section 164 Cr.P.C. which could give weight to their testimony. There is no specific evidence regarding inducing or taking a specific person for the sake of the prostitution.

Besides that some legal pleas were also taken, i.e., search of the premises can be made by a special police officer which is very relevant for the purpose of bail.

In the circumstances, I am of the opinion, that the applicants deserve to bail.

7. Ms. Aparna Bhat, learned Counsel appearing on behalf of the appellant, would contend that the girls who were victims had wrongly been made accused and in that view of the matter as also otherwise the High Court committed a serious error in granting bail inter alia on the premise that they had not been identified.
8. Mr. S.R. Singh, learned senior counsel appearing on behalf of the respondent, on the other hand, would contend that five different cases are pending trial and only in one of them a judgement of conviction has been recorded.
10. We may place on record that whereas under Section 3 of the Act, punishment of three years rigorous imprisonment is provided for keeping a brothel or allowing premises to be used as a brothel, under Section 4 punishment of not less than seven years and not more than ten years is provided for living on the earning of prostitution. Section 5 relating to offences for procuring, inducing or taking person for the sake of prostitution, provides for punishment with rigorous imprisonment for a term of not less than three years and not more than seven years or if any offence under

Section 5(1)(d) is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years. Section 6 of the Act involving detaining a person in the premises where prostitution is carried out provides for imprisonment for life.

11. The question as regards grant of bail, therefore, should be considered having regard to the gravity of the offence wherewith the accused had been charged. The High Court, therefore, in our opinion, was not correct in dealing with the matter in such a cursory manner.
12. Our attention was drawn on a decision of this Court in *Puran v. Rambilas and Anr.* (2001) 6 SCC 338 wherein it has inter alia been held that one of the grounds for cancellation of bail would be where material evidence brought on record have been ignored and that too without any reasons. We respectfully agree with the said observation.
13. We, however, keeping in view the peculiar facts and circumstances of this case, are of the opinion that as the private respondents have been granted bail long time back and in some cases trials have also been concluded, it would not be proper on our part to cancel the bail at this stage. We, however, would place on record that in a case of this nature, the High Court should have dealt the matter cautiously. The appeal is dismissed with the aforementioned observations.

IN THE HIGH COURT OF DELHI

**Kamaljeet Singh (In Judicial Custody) vs. State**

Decided on 29.01.2008

**Hon'ble Judges:**

Reva Khetrpal, J.

1. By this appeal filed under Section 12 of the Maharashtra Control of organised Crimes Act, 1999 (for short the MCOCA), the appellant seeks to assail the order on charge dated 12th October, 2006 and the charge dated 3-11-2006 whereby the learned Special Judge, MCOCA, New Delhi has charged the appellant under Sections 4 and 5 of the Immoral Traffic (Prevention) Act, 1956 (for short the ITP Act), Sections 3(1)(ii), 3(4), 3(5) and Section 4 of the MCOCA and Section 420 read with Section 120B of the IPC in FIR No. 96/2005, Police Station Chanakya Puri.
2. The brief facts as they emerge from the record are that on 19th April, 2005, SI Sajjan Singh, on receipt of information that the appellant Kamaljeet Singh and his associate Pappi supply girls for prostitution in Five Star Hotels. ...
4. The decoy customer, Charan Singh told SI Sajjan Singh that Arvinder Pal Singh @ Pappi while presenting both the girls had told him that, to have sex with them Rs. 20,000/- each would be charged and Rs. 5,000/- had to be paid in advance. Meanwhile, Pooja while winking her left eye and stretching herself made gestures presenting herself for sex and the other girl Sonali also displayed vulgar gestures. Arvinder Pal Singh demanded the advance money and Charan Singh handed over the said ten currency notes in the denomination of Rs. 500/- each, which Arvinder Pal Singh kept in his shirt pocket.
7. During investigation, it was revealed that appellant Kamaljit Singh was involved in prostitution racket since 1985-86 and had amassed huge property both movable and immovable out of this trade...
10. The whole modus operandi and evidences that has emerged against all the accused during investigation may be analysed and appreciated in light of following:

Several phone connections in the name of Kamaljit Singh and his associates.

Abnormally high calls between Kamaljit Singh and his associates and amongst themselves without any explainable business or personal relationship.

Mindboggling phone bills for short durations.

High number of calls made to five star hotels without any related business with them.

Documentary evidence from Bank and hotels corroborating the disclosures of Kamaljit Singh and Arvinder Pal Singh.

Confessional statement made by co-accused Neeraj Chopra before DCP and Chief Judicial Magistrate.

High number of air tickets (Mostly PTA) booked by Kamaljit Singh and his associates.

13. Before considering the submissions of the appellant and the counter submissions made on behalf of the respondent/State, it is deemed expedient to refer to the Statement of Objects and Reasons of the Act, which appear to have a direct bearing on the matter in issue and read as under:

Statement of Objects and Reasons.- organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.

It is also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an

indispensable aid to law enforcement and the administration of justice.

2. The existing legal frame work i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime.
14. Section 2(d), (e) and (f) of the Act define the terms “continuing unlawful activity”, “organised crime” and “organised crime syndicate” as under:
  - (d) “continuing unlawful activity” means an activity prohibited by law for the time being in force, which is a cognisable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognisance of such offence;
  - (e) “organised crime” means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;
  - (f) “organised crime syndicate” means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime;
15. Section 3 of the MCOCA deals with punishment for organised crime.
16. Mr. Aman Lekhi on behalf of the appellant has mounted an assault on the order framing charge principally on the ground that the alleged offences under Sections 4 and 5 of the ITP Act read with Section 420/120B IPC were not intended by the legislature to be covered within the ambit of the MCOCA, 1999 as extended to

Delhi. According to Mr. Lekhi, the ingredients of Section 3 of the MCOCA are not made out, inasmuch as the appellant has never been a member of any “organised syndicate” within the meaning of Section 2(f) of the MCOCA nor has indulged in any “continuing unlawful activity”, as envisaged by Section 2(e) of the MCOCA. According to him, it is the case of the prosecution that the appellant and his associates were involved in an “apparently soft crime” and as such the alleged offences by the appellant did not involve the “use of violence on threat of violence or intimidation or coercion” nor is there any allegation to this effect in the charge-sheet filed by the prosecution.

17. The further contention of Mr. Aman Lekhi is that in view of the Statement of Objects and Reasons of MCOCA, the words “other unlawful means” contained in Section 2(e) be read as *eiusdem generis/noscitur a sociis* with the words: (i) violence, (ii) threat of violence, (iii) intimidation or (iv) coercion. It is submitted that none of the offences alleged to have been committed by the appellant are alleged to involve the use of (i) violence, (ii) threat of violence, (iii) intimidation or (iv) coercion and hence the provisions of Sections 3 and 4 of MCOCA are not applicable to the present case.
18. In order to fortify his contention that the words “other unlawful activity” necessarily involve “the use of violence, threat of violence, intimidation or coercion”, Mr. Lekhi relied upon the well-established principle of statutory interpretation that:

“To ascertain the meaning of a clause in a statute the court must look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself.” (Principles of Statutory Interpretation by G.P. Singh, 9th Edn. 2004 417, page 32).

Reliance was also placed by him upon the observations made in *Canada Sugar Refining Co. v. R* (1898) AC 735 p. 742 wherein Lord Davey said:

Every clause of statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

24. The Statement of Objects and Reasons clearly states as to why the said Act had to be enacted. Thus, it will be safe to presume that the expression “any unlawful means” must refer to any such act which

has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control. In other words, an offence falling within the definition of organised crime and committed by an organised crime syndicate is the offence contemplated by the Statement of Objects and Reasons.

22. In the same context, Mr. Lekhi relied upon the Constitutional Bench judgement of the Hon'ble Supreme Court in Tolaram and Relumal and Anr. v. [1955]1SCR158 . The relevant observations made by the Constitution Bench read as under: AIR SC .496

It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature. As pointed out by Lord Macmillan in L & N.E. Rly. Co. v. Berriman 1946 AC 278 ,

Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language.

25. He contended that the confessional statement of co-accused Neeraj Chopra @ Dev Chopra recorded under Section 18 of the Act had not been recorded in terms of the guidelines laid down by the Constitution Bench of the Supreme Court in the case of Kartar Singh v. State of Punjab while dealing with Rule-15 of Terrorist and Disruptive Activities (Prevention) Rules, 1987, which is parametrical to Section 18 of the MCOCA, and, therefore, the said confessional statement cannot be relied upon. As borne out by the records, Neeraj Chopra had been asked by the police officials to co-operate, otherwise he will get involved in this case. Hence, the said confessional statement was not voluntary in nature as Neeraj Chopra had been forced to make the statement before the CMM, Delhi, while in police custody.
27. Countering the aforesaid submissions made by Mr. Aman Lekhi, the learned senior Counsel for the appellant, Ms. Mukta Gupta, the learned Standing Counsel for the State strongly contended that when the language of the Act is plain and unambiguous, no question of construction of the statute arises for the Act speaks for itself. When a statute is to be interpreted as far as possible an ordinary meaning is to be given to the words contained therein and only when the words are vague or ambiguous are the principles of statutory interpretation to be resorted to. Ms. Gupta submitted that the words "any unlawful means" are plain and unambiguous and

thus they have to be given their natural meaning.

28. Rebutting the contention of Mr. Aman Lekhi, the learned senior Counsel for the appellant that the rule of *noscitur a sociis* should be applied for the interpretation of the words “any unlawful means”, Ms. Gupta urged that the said rule is merely a rule of construction and cannot apply in a case where the intention of the Legislature is made clear by the statute itself. Reliance was placed by Ms. Gupta, in this context, upon the observations made in the case of *State of Bombay v. Hospital Mazdoor Sabha (1960)ILLJ251SC* :

*Noscitur a Sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful or otherwise not clear that the rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the Legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service.

29. In the alternative, Ms. Gupta submitted that assuming that the words “other unlawful means” are vague, even then the offences under ITP Act would fall within the ambit of “other unlawful means” as cognate to violence, threat of violence, intimidation and coercion. ‘Prostitution’ is a form of physical violence where the body of a woman is sexually abused. ‘Prostitution’ is defined under the ITP Act as “the sexual exploitation or abuse of persons for commercial purposes”. Thus from the above definitions it is clear that “Prostitution” would also fall within the ambit of “other unlawful means” as cognate to violence, threat of violence, intimidation or coercion.
30. It was further submitted by Ms. Gupta that the preamble of a statute like the long title is a part of the Act and is an admissible aid to construction. Although not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the long title. It may recite the ground and cause of making the statute, the evils sought to be remedied or the doubts which may be intended to be settled. The principle enunciated by the Supreme Court, in *Burakar Coal Co. Ltd. v. UOI*



[1962]1SCR44.

(iv) The observations made by the Supreme Court in the case of *State of Rajasthan v. Mrs. Leela Jain and Ors.* reported as [1965]1SCR276 :

When the words in the statute are reasonably capable of more than one interpretation, the object and purpose of the statute, a general conspectus of its provisions and the context in which they occur might induce a court to adopt a more liberal or a more strict view of the provisions, as the case may be, as being more consonant with the underlying purpose. But it is not possible to reject words used in an enactment merely for the reason that they do not accord with the context in which they occur, or with the purpose of the legislation as gathered from the preamble or long title. The preamble may, no doubt, be used to solve any ambiguity or to fix the meaning of words which may have more than one meaning, but it can, however, not be used to eliminate as redundant or unintended, the operative provisions of a statute.

(v) The principle laid down in the judgement of *Rashtriya Mill Mazdoor Sangh v. National Textile Corporation Ltd. and Ors.* reported as (1996)ILLJ787SC :

It is one of the cardinal principles of the statutory construction that where the language of an Act is clear, the Preamble cannot be invoked to curtail or restrict the scope of the enactment and only where the object or meaning of an enactment is not clear the Preamble may be resorted to explain it.

31. Referring to the preamble of the Act, Ms. Gupta laid particular emphasis on the following:

It knows no national boundaries and is fueled by illegal wealth generated by contract killing, extortion, smuggling in contrabands, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the 'organised crime' is very huge, and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries....

32. A reference to the provisions of the Prevention of Money Laundering

Act, 2002, Ms. Gupta contended, shows that Sections 5/6/8/9 of the Immoral Traffic (Prevention) Act are offences under Schedule 'A' of the said Act and as per the said Act, the proceeds of the crime i.e. the property derived directly or indirectly by a person as a result of criminal activity relating to a scheduled offence is an offence of money laundering, which is specifically referred to in the Aims and Objectives of MCOCA as "organised crime". Thus, looked at it from any angle, the provisions of the MCOCA are clearly attracted to the present case.

19. Prostitution is not confined, as in the ITP Act, to offering of the body to a person for promiscuous sexual intercourse. Normally, the word "prostitution" means an act of promiscuous sexual intercourse for hire or offer or agreement to perform an act of sexual intercourse or any unlawful sexual act for hire as was the connotation of the Act. By amendment the act of a female and exploitation of her person by an act or process of exploitation for commercial purpose making use of or working up for exploitation of the person of the women taking unjust and unlawful advantage of trapped women for one's benefit or sexual intercourse has been brought within its frame. The word "abuse" has a very wide meaning - everything which is contrary to good order established by usage amounts to abuse. Physical or mental maltreatment also is an abuse. An injury to genital organs in an attempt of sexual intercourse also amounts to sexual abuse. Any injury to private parts of a girl constitutes abuse under the JJ Act....
43. In December, 2002 India became a signatory to "UN Convention Against Trans-National organised Crime", which includes the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children. By becoming the participant in the Convention, a global instrument which advocates international and national action against organised crime, the Government of India has given a clear mandate to confront evils of trafficking of women and children.
45. In Usha Badri Poonawala v. K. Kuriam Babu AIR2002Bom292, a Single Judge of the Bombay High Court (Hon'ble Mr. Justice D.Y. Chandrachud, J.) that the expression "violence" must be construed liberally so as to include violence of a kind which will damage the reputation of women. In para-5 of the said judgement, the definition of "violence" was given as follows:

5. ...Violence against women takes several forms: rape, child sexual abuse, trafficking in women, domestic violence, pornography, selective abortion of female foetuses and dowry deaths are all forms of violence which denigrate the dignity of women. (For a comprehensive analysis, see "Domestic Violence And Law: Report of Colloquium on Justice for Women-Empowerment Through Law, Butterworths India, 2000 Edition page xliii). The Declaration on the Elimination of All Forms of Violence Against Women was adopted by the General Assembly of United Nations on 20th December, 1993. Article 1 defines violence against women as meaning any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. According to Article 2, violence against women encompasses: (a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation, (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution, (c) Physical, sexual and psychological violence perpetrated or condoned by the State wherever it occurs.

47. It is in this backdrop that the provisions of the Maharashtra Control of organised Crime Act, 1999 must be viewed and their scope and ambit examined in the context of the present case.
48. Before doing so, however, it is proposed to extract the relevant portion of the order of a learned Single Judge of this Court in Bail Appln. No. 2033/2006 decided on 20.08.2007 entitled Kamal Jeet Singh v. State before whom bail was sought by the appellant on the same grounds as urged in the present appeal. While rejecting the bail plea of the appellant, the learned Judge held as follows:
10. Even de hors the charge under MACOCA, there are serious allegations against the petitioner for which charges under ITP Act are also framed. Learned Counsel for the respondent had taken me through the record and also the allegations, note whereof has

already been taken above. He also pointed out that as many as 15 cases were registered against the petitioner out of which 12 are under ITP Act. He also referred to the various calls made from one mobile phone to other between the co-accused inter se as well as between the accused persons and the girls involved in sex trade, who were recovered. He pointed out that these girls were also provided with mobile phones, who were residing in other cities and there were calls made by co-accused persons to those girls on those phones. He also referred to the statements of the accused persons recorded during investigation throwing light on the manner in which air ticket bookings for these girls used to be made and the modus of making payments to these girls adopted by the petitioner and other co-accused. It is, however, not necessary to go into these allegations in detail. Suffice it to state that the charges against the petitioner are of serious nature and I am, therefore, not inclined to grant bail to the petitioner. This petition is accordingly dismissed at this stage.

49. Now a look at the judicial pronouncements on the subject. In *Bharat Shanti Lal Shah v. State of Maharashtra* reported in (2002)1BOMLR527, a Division Bench of the Bombay High Court, while upholding the constitutional validity of Sections 2(d), (e) and (f) and Sections 3 and 4 of the MCOCA, with reference to the provisions of Section 2(1)(d) which defines "continuing unlawful activities" observed as follows:

...is intended to prevent and control 'organised crime' is something which is continued unlawful activity and that 'continuing unlawful activity' as repeatedly indulging or facing charge of indulgence in a crime punishable with three years or more. The definition, therefore, thus defines with clarity what is meant by 'continuing unlawful activity' for the purpose of achieving the object of the Act. There is, therefore, no vagueness nor any violation of Article 14 of the Constitution.

50. The aforesaid judgement of the Bombay High Court assumes importance for the reason that the Bombay High Court after minutely examining the provisions of Section 2(1)(d) has clearly laid down that what has been defined as 'continuing unlawful activity' by a member of an 'organised crime syndicate' is an activity prohibited by law and done repeatedly, i.e., more than once for which the charge-sheet has been filed in the Court of competent

jurisdiction in the past ten years.

52. The present case clearly being a case involving provisions of the ITP Act and the IPC, it is not possible to hold that the invocation of MCOCA to the present case was unjustified.
53. The reliance of the learned Counsel for the Appellant on the decision of Ranjit Singh Brahmjit Singh Sharma (supra) is also, in my view, wholly unjustified in view of the fact that the Supreme Court in the said case was dealing with the bail applications of persons charged for offences under Sections 120B/255/249/472/474/260/263(a) & (b) 478 read with Section 34 IPC and it was in this context that the Supreme Court expressed a prima facie opinion that if the words 'any unlawful means' are widely construed having regard to commission of the offences of cheating or criminal breach of trust, the provisions of MCOCA can be applied, which prima facie, does not appear to have been intended by the Parliament.
54. Insofar as the present case is concerned, the support sought to be drawn by the learned Counsel for the appellant from the aforesaid judgement in Ranjit Singh's case clearly cannot be drawn. On the contrary, paragraph-24 of the judgement clarifies the position of law as follows:

24. The Statement of Objects and Reasons clearly states as to why the said Act had to be enacted. Thus, it will be safe to presume that the expression "any unlawful means" must refer to any such act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control. In other words, an offence falling within the definition of organised crime and committed by an organised crime syndicate is the offence contemplated by the Statement of Objects and Reasons. There are offences and offences under the Indian Penal Code and other penal statutes providing for punishment of three years or more and in relation to such offences more than one charge-sheet may be filed. As we have indicated hereinbefore, only because a person cheats or commits a criminal breach of trust, more than once, the same by itself may not be sufficient to attract the provisions of MCOCA. Furthermore, means read is a necessary ingredient for commission of a crime under MCOCA.

55. The charges in the present case of 'continuing unlawful activity'

by an 'organised crime syndicate' with a wide network for illegal trafficking and prostitution, in my considered opinion, it is not possible to hold that the invocation of MCOCA in the present case was unjustified. It is also not possible to hold that the words "other unlawful means" contained in Section 2(e) are to be read as *eiusdem generis/noscitur a sociis* with the words violence, threat of violence, intimidation or coercion. However, even assuming the words "other unlawful means" are to be so construed, illegal trafficking of persons can safely be said to involve the use of violence, threat of violence, intimidation or coercion.

56. Adverting next to the contentions of the learned Counsel for the appellant that the confessional statement of Neeraj Chopra @ Dev Chopra under Section 18 of the MCOCA was not voluntary in nature...
57. A bare glance at the provisions of Section 18 of the MCOCA reproduced above, makes it abundantly clear that confession made by a person before the police officer not below the rank of Superintendent of Police and recorded by such officer in the manner provided in the said section, shall be admissible in the trial of such person or his co-accused, abettor or conspirator.
58. It is not in dispute that the confession of Neeraj Chopra @ Dev Chopra in the instant case was recorded by a police officer not below the rank of Superintendent of Police, Thus, there is no warrant for the assumption that the said confession was not properly recorded or was not recorded in accordance with the guidelines laid down by the Supreme Court in the Kartar Singh case.
59. Dealing next with the contention of the learned Counsel for the appellant that the confession was not a voluntary one, the said contention does not appear to be borne out from the record. A perusal of the record shows that Neeraj Chopra, as per his own admission, he was not beaten up or subjected to any sort of custodial torture he gave a statement of his own free will.
61. In the result, it is not difficult to concur with the findings of the learned Special Judge that there is sufficient material for framing of charges against the accused persons under the various provisions of law and a prima facie case is made out against the appellant under Sections 4 & 5 of the ITP Act, Section 3(i)(ii), 3(4), 3(5) and Section 4 MCOCA and Sections 420/120B IPC. Before parting

with the case, however, it is directed that since in the meantime the bail plea of the appellant has been rejected by this Court, the learned Special Judge shall proceed with the trial of the case as expeditiously as possible.

62. The appeal is accordingly dismissed. CrI. M.A. Nos.336 and 338/2007 also stand dismissed. There will be no order as to costs.

## IN THE SUPREME COURT OF INDIA

**State of Maharashtra and Anr. vs. Mohd. Sajid Husain Mohd. S. Husain etc.**

Decided on 10.10.2007

**Hon'ble Judges:**

S.B. Sinha, Harjit Singh Bedi, JJ.

2. This appeal is directed against a judgement and order dated 27.06.2007 passed by the High Court of Bombay, Aurangabad Bench at Aurangabad granting anticipatory bail to the respondents herein for commission of an offence punishable under Sections 376, 342 read with Section 34 of the Indian Penal Code (IPC) and under Section 5 of the Prevention of Immoral Trafficking Act.
3. Respondents herein comprise of police officers, politicians and a businessman.
4. A First Information Report was lodged by a girl, who is said to be minor, showing how she was driven to the flash trade by accused Shamim Tabassum.

...She was offered a soft drink. Having consumed it, she felt reeling in her head. She was also not able to walk. Allegedly, against her will, she was subjected to rape. She was taken back to the house by accused Tabassum. She thereafter allegedly had regularly been sent out with various persons.

She was medically examined on 22.04.2007. Her Radiological (Bone) Assessment suggested her age to be between 14-16 years. Respondents herein were not named in the First Information Report. However, Puja made several statements thereafter implicating the respondents herein.

Respondents, having come to know that they have been named by the said girl, absconded. They filed an application for anticipatory bail before the learned Sessions Judge, Aurangabad. The same was dismissed by an order dated 24.05.2007

6. Respondents moved the High Court there against and by reason of the impugned judgement dated 27.06.2007, the said application for anticipatory bail was allowed, inter alia, holding that the prosecutrix being major and having willingly consented for sex for



consideration, prima facie, a case under Section 376 IPC has not been made out.

7. The State is, thus, before us.
8. Mr. Ravindra Keshavrao Adsure, learned Counsel appearing on behalf of the State, would, inter alia, submit that the High Court committed a serious error in passing the impugned judgement inasmuch as from various public documents, it is evident that the date of birth of the prosecutrix is 28.06.1991 and, thus, at all material times, namely, from January 2007 to 22.04.2007, she was minor and in that view of the matter, the purported consent given by her would not be of much significance.

The learned Counsel would contend that it is true that in the First Information Report, the names of the respondents had not been taken, but in a case of this nature, the court should have considered the fact that she had been arrested by the police and as such it is just possible that she was not in a position to recollect all the details.

9. Mr. Paramjit Singh Patwalia, learned Senior Counsel appearing on behalf of the respondents, on the other hand, pointed out that in the First Information Report, in her medical examination as also in her supplementary statement, the prosecutrix stated her age to be 18 years. Even her aunt stated her age to be 18 years. It was in the aforementioned situation, it was urged, no reliance can be placed on the purported birth certificate, which was issued on 29.05.2007 by the Parbhani Municipal Council and the School Leave Certificates by different schools as also the medical certificate, stating her age to be between 14 to 16 years.

The learned Counsel would submit that prima facie the girl was above 16 years and she being a consenting party and having been getting consideration, no case under Section 376 IPC having been made out and, thus, this Court should not interfere with the impugned judgement.

It was contended that pursuant to the interim order passed by the High Court, the respondent have fully been cooperating with the Investigating Officer and except for four days, they have scrupulously complied with the conditions imposed by interim order passed by the High Court as also the conditions imposed upon them by the High Court in the impugned judgement.

The learned Counsel would contend that although there exists a distinction in regard to the exercise of jurisdiction of this Court on an appeal from an order granting or refusing the prayer for grant of anticipatory bail and one of cancellation of bail; it is trite that this Court ordinarily would not interfere. Strong reliance, in this behalf, has been placed on State of U.P. through CBI v. Amarmani Tripathi etc.: 2005CriLJ4149 and Jagdish and Ors. v. Harendrajit Singh (1985)4SCC508

13. The four factors, which are relevant for considering the application for grant of anticipatory bail, are:
  - (i) the nature and gravity or seriousness of accusation as apprehended by the applicant;
  - (ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognisable offence;
  - (iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and
  - (iv) the possibility of the appellant, if granted anticipatory bail, fleeing from justice.
14. It is not in dispute that if the prosecutrix was a minor, consent on her part will pale into insignificance. She had been medically examined and her approximate age on the basis of radiological test was determined to be between 14 to 16 years. It may be true that in the First Information Report as also in her first supplementary examination, her age was recorded as 18 years, but she had been examined medically. The possibility of her trying to shield her from prosecution at the time of her arrest and for that purpose disclosing her age to be 18 years cannot be ruled out.
17. In Vinod G. Asrani v. State of Maharashtra: AIR2007SC1253 , this Court stated:
 

There is no hard and fast rule that the First information Report' must always contain the names of all persons who were involved in the commission of an offence. Very often the names of the culprits are not even mentioned in the F.I.R. and they surface only at the stage of the investigation....
18. Out of the eight respondents, five are police officers, two are politicians and one is owner of a hotel. It is not in dispute that

after having come to learn that their names had been taken by the prosecutrix in her supplementary statement, they had been absconding for a long time. It is not necessary for us to record their respective period of abscondance. We may furthermore notice that the respondents had not scrupulously complied with the conditions imposed upon them. Admittedly, at least on four occasions, some of them were not present.

21. Immoral trafficking is now widespread. Victims, who are lured, coerced or threatened for the purpose of bringing them to the trade should be given all protection. We at this stage although cannot enter into the details in regard to the merit of the matter so as to prejudice the case of one party or the other at the trial, but it is now well-settled principle of law that while granting anticipatory bail, the court must record the reasons therefore.
23. A case of this nature should be allowed to be fully investigated. Once a criminal case is set in motion by lodging an information in regard to the commission of the offence in terms of Section 154 Cr. PC, it may not always be held to be imperative that all the accused persons must be named in the First Information Report. It has not been denied nor disputed that the prosecutrix does not bear any animosity against the respondents. There is no reason for her to falsely implicate them. It is also not a case that she did so at the behest of some other person, who may be inimically disposed of towards the respondents. The prosecution has disclosed the manner in which she was being taken from place to place which finds some corroboration from the testimonies of the other witnesses and, thus, we can safely arrive at a conclusion that at least at this stage her evidence should not be rejected outrightly.
26. Immoral conduct on the part of police officers should not be encouraged. We fail to understand as to how the police officers could go underground. They had been changing their residence very frequently. Although most of them were police officers, their whereabouts were not known. During the aforementioned period attempts had been made even by Mahananda to obtain the custody of the girl at whose instance, we do not know. It, therefore, in our opinion, is a case where no anticipatory bail should have been granted.
28. We may also notice that the High Court itself has refused to grant regular bail to the accused against whom charge-sheet has been

submitted. The learned Session Judge also did not grant bail to some of the accused persons. If on the same materials, prayer for regular bail has been rejected, we fail to see any reason as to why and on what basis the respondents could be enlarged on anticipatory bail.

29. In the peculiar fact and circumstances of the case, we are of the opinion that the High Court ought not to have granted anticipatory bail to the respondents. The impugned judgement, therefore, cannot be sustained which is set aside accordingly. The appeal is allowed.

**IN THE HIGH COURT OF BOMBAY**

**Sunny Kamalsingh Mathur vs. Office of Commissioner of Police  
and Ors.**

Decided on 14.10.2008

**Hon'ble Judges:**

Bilal Nazki and A.A. Kumbhakoni, JJ.

2. An order passed by the Commissioner of Police in terms of Section 18 of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as "the Act") has been challenged in this petition. By the order under Section 18(1)(b), the Magistrate directed the petitioner that during the period of one year from the date of the order, he shall obtain his previous approval before leasing/letting out or handing over the possession of the said premises to any other person. This order was passed after a show-cause notice was given to the petitioner, and he was heard.
3. The allegations against the petitioner were based on a report received by the Magistrate/Commissioner from the Senior Inspector of Police, Anti-Trafficking Cell. During a raid, the petitioner was found along with his associates (pimps) carrying on prostitution by keeping three girls. Then the Commissioner of Police was satisfied that the petitioner and his associates were in possession of the premises, which were being used improperly for prostitution as a brothel for carrying on illegal trade within the meaning of Section 7(1) of the Act, and the aforesaid premises fall within two hundred metres from a temple and a sports academy. These allegations were found substantiated and, therefore, the impugned order was passed.
4. The learned Counsel for the petitioner has only attacked this order on one ground, that the Hon'ble Supreme Court has laid down the law that action under Section 18(1) of the Act cannot be taken till prosecution under Section 3 or 7, as the case may be, is not initiated and disposed of. In order to appreciate the argument made by the learned Counsel for the petitioner and also to understand the law laid down by the Hon'ble Supreme Court in its Constitution Bench Judgement reported in A.C. Aggarwal, Sub-Divisional Magistrate, Delhi, and Anr. v. Mst. Ram Kali, etc. reported in 1968CriLJ82 ,

8. The Hon'ble Supreme Court, while analysing the relevant Sections, was of the view that since a complaint made before the Magistrate would normally disclose an offence under Section 3 or 7, therefore, Magistrate was bound, under Section 190 of the Code of Criminal Procedure, to take cognisance of the matter, and once cognisance of the matter was taken, the trial had to proceed and reach its normal consequences, and if there was conviction, action could be taken under Section 18(1).
9. Therefore, the learned Counsel for the petitioner submits that when you initiate action under Section 3 or 7, you have to wait for its results to take action under Section 18, and if the facts disclose cognisable offences within the parameters of Section 3 or 7, then no order can be passed under Section 18, unless the prosecution succeeds in the prosecution. There is no doubt that the interpretation placed by the learned Counsel for the petitioner on the judgement of the Hon'ble Supreme Court is absolutely in order and correct.
10. But the law has undergone a change after the Hon'ble Supreme Court passed the judgement. The Supreme Court judgement was passed in 1968. Amendment was carried in Section 22 with effect from 2nd October, 1979.

12. Section 2(c) defines 'Magistrate' in the following terms:

'Magistrate' means a Magistrate specified in the second column of the Schedule as being competent to exercise the powers conferred by the Section in which the expression occurs and which is specified in the first column of the Schedule.

This Section makes a reference to the Schedule. Therefore, for definitions of 'Magistrate', one has to look into the Schedule and for Section 18 as well as Section 7, the District Magistrate was the concerned Magistrate. It is understandable, as, in those days, Executive Magistrates had also judicial powers. Therefore, when the Hon'ble Supreme Court held that when facts were brought to the notice of the Magistrate disclosing a cognisable offence, the Magistrate was bound under Section 190 of the Code of Criminal Procedure to take cognisance of the matter.

13. Things have now changed. Section 22 dealt with trials, and before amendment, the Section read:

No Court, inferior to that of a Magistrate as defined in Clause (c) of Section 2, shall try any offence under Section 3, Section 4, Section 5, Section 6, Section 7 or Section 8.

Going by the definition in Section 2(c) read with unamended Section 22, the Hon'ble Supreme Court held that the offence must be first tried before an order under Section 18(1) is passed. But after amendment of Section 22, the situation changed, and now, Section 22 reads as under:

No Court, inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class, shall try any offence under Section 3, Section 4, Section 5, Section 6, Section 7 or Section 8.

14. It emerges from the discussion hereinabove that, the trial under Section 22 has to be conducted by a Magistrate or a Judicial Magistrate, whereas under Section 18(1), the power has to be exercised by a District Magistrate or a Sub-Divisional Magistrate in terms of the Schedule of the Act. Therefore, the legislature has taken note of the fact that whereas power under Section 18(1) is a preventive power, power under other section like Sections 3, 4, 5, 6, 7 or 8 is of penal nature, which should be given to the Judicial Magistrates. But if a Magistrate does not take action under Section 18(1), the Judicial Magistrate empowered to conduct trial under the amended provisions of Section 22 may still take action under Section 18(2) after a person is convicted by such a Judicial Magistrate under Section 3 or 7. Since Section 22 has undergone amendment, we do not feel that the judgement of the Hon'ble Supreme Court will apply to the controversy.
15. In view of a drastic shift that has occurred in the jurisdiction/ power to conduct trials Under Sections 3 and 7 of the Act due to amendment of Section 22 of the Act made effective from 2nd October, 1979, whereby words "a Magistrate as defined in Clause (c) of Section 2" have been substituted by words "a Metropolitan Magistrate or a Judicial Magistrate of First Class", the scheme of Section 18 of the Act is now as under

(a) Sub-section (1) of Section 18:

This power is preventive in nature and can be exercised by "a Magistrate" (Section 2(c) r/w the Schedule to the said Act) i.e. by a District Magistrate or Sub Divisional Magistrate. Before passing an order, in addition to the other requirements of

this provision, such a Magistrate has to issue a show cause notice as contemplated by Section 18(1), hear the person concerned and record his satisfaction as contemplated by the said provision. An action under this provision can be taken irrespective of whether an action under Sections 3 and/or 7 of the said Act are taken or not i.e. even when a matter is pending in the Court Under Section 3 and/or 7 of the said Act.

(b) Sub-section (2) of Section 18:

This power is punitive in nature and can be exercised only by "a Court" not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of First Class. "A Magistrate" (Section 2(c) r/w the Schedule to the said Act) i.e. a District Magistrate or Sub-Divisional Magistrate cannot exercise power under this provision. An order can be passed in exercise of power conferred by this provision under Section 18(1) only when a person is convicted of an offence Under Section 3 or 7 of the said Act. It is open for such 'Court' to pass an order in exercise of power conferred by this provision even without further notice to such a person against whom the order is being passed, to show cause as required by Sub-section (1) of Section 18.

16. For these reason's, we do not find merit in the petition. It is accordingly dismissed. Rule discharged.





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**PART IV**  
**JUDGEMENTS ON ADOPTION**

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## IN THE SUPREME COURT OF INDIA

**St. Theresa's Tender Loving Care Home and Others vs. State of Andhra Pradesh**

AIR2005SC4375, 2005(8)SCALE610

Decided On: 24.10.2005

**Hon'ble Judges:**

Arijit Pasayat and Arun Kumar, JJ.

**JUDGEMENT**

- 1 Leave granted.
- 2 The basic issue involved in this appeal is whether the appellant no.1 should be permitted to make arrangement for adoption of a child named Sahiti presently about five years by appellant nos. 2 and 3. Appellant no.1 claims to be an organisation interested in the welfare of abandoned children and to secure a congenial atmosphere for their upbringing. Challenge in this appeal is to an order dated 23.12.2002 passed by the Andhra Pradesh High Court dismissing the appeal purported to have been filed under Section 19(1) of the Family Courts Act, 1984 (in short the 'Act') and Section 47 of the Guardians and Wards Act, 1890 (in short the 'Guardians Act'). The appeal before the Andhra Pradesh High Court was filed by the appellants questioning correctness of the order dated 8.7.2002 passed by the learned Judge, Family Court, Secunderabad, rejecting the prayer made by the appellants under Sections 7 to 10 of the Guardian Act. Stand of the appellants before the Family Court was that it is a society registered under the Andhra Pradesh (Telangana Area) Public Societies Registration Act, 1350 Fasli (in short 'Societies Act') purportedly for carrying social service activities. One of its main objectives is to provide shelter to abandoned children more particularly by unwed mothers, and as noted above to see them comfortably settled in adopted homes. The appellants 2 and 3 are residents of U.S.A. According to petition they were married on 19.10.1999. They had earlier adopted one son, but wanted to adopt a female child from India and for that purpose wanted to adopt the girl named Sahiti, born on 14.6.2000. The claim that they are well settled in life with decent income, would be eligible for adopting the child and also were sure to provide a happy home to the adopted child. The minor

child Sahiti was stated to be daughter of an unmarried mother by name Esther, a native of Hyderabad and earning livelihood as a labourer. Due to social stigma she relinquished the child in favour of the appellant no.1 on 14.6.2000 and executed a Relinquishment Deed. The child suffered from various ailments and her adoption in India did not materialise. On that ground the Voluntary Coordination Agency( in short 'VCA') gave clearance for the minor to be given in adoption abroad. It was stated in the petition that inquiries made by appellant no.1 revealed that none of her relatives were ready and willing to take care of the minor. Since 14.6.2000 the child has been under the care and custody of appellant no.1. The State of Andhra Pradesh represented by the Director of Women Development and Child Welfare Department resisted the claim. Their stand was that it had come to the notice of the Government that some unscrupulous organisations in Andhra Pradesh were indulging in child trafficking. With a view to curb menaces, the Government had issued G.O.Ms. No.16 of 2001 banning relinquishment of a child. Since the claim of the appellant was based primarily on a Relinquishment Deed purported to have been executed by the mother of the child, inquiry was directed to be conducted by the Crime Branch of CID along with other cases. After inquiry, Crime Branch (CID) reported that the Relinquishment Deed was a fake and fabricated document and the witnesses to the Relinquishment Deed were employees of appellant no.1. Therefore, paper notification dated 4.6.2001 was made calling for claims by biological parents within 30 days in respect of child Sahiti and eight other cases. The Government of India had also addressed to the Central Adoption Resource Agency ( in short 'CARA') about the false claim made by appellant no.1 and requested to initiate action against appellant no.1. The Family Court rejected the application holding that the VCA issued no objection certificate on the ground that Indian parents had refused to adopt the child on the ground that she was suffered from skin disease. The Family Court was of the view that the so called reasons did not merit acceptance. The child was also referred to child study report which indicated that the child Page 1512 did not suffer from any ailment. It was noted that letters of rejection by Indian parents were not filed and the efforts of VCA for in county adoption were not established. It was noted that the effort was to be made in the light of decision of this Court in Lakshmi Kant Pandey vs. Union of India. It was noted that in term

of G.O.Ms. No.16 of 2001 relinquishment of a child by biological parents on grounds of poverty, number of children or unwanted girl child could not be permitted. Accordingly the petition filed was rejected.

- 3 The view of the Family Court was affirmed by the High Court. High Court noticed that appellant no.1 based its claim on fabricated document and there was no genuine effort to see that the child was adopted by Indian parents.
- 4 ... In Lakshmi Kant Pandey case (supra) the guidelines and the norms to be followed in the case of adoption by foreigners were indicated in detail.
- 5 .... In India this consciousness is reflected in the provisions enacted in the Constitution of India, 1950 (in short the 'Constitution'). Clause (3) of Article 15 enables the State to make special provision, inter-alia, for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter-alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. As was observed by a learned Justice Children are innocent, vulnerable and dependent. Abandoning children and enclinging good foundation of life for them is a crime against humanity. Children cannot and should not be treated as chattels or saleable commodities or play things. For full and harmonious development of their personality, children should grow up in an atmosphere of happiness, love and understanding. ... The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children.
- 7 The essence of the directions given in Lakshmi Kant Pandey case (supra) is as follows:

- (1) Every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter- country adoption' should be acceptable.
- (2) Such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents.
- (3) There is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activating themselves in the field of inter-county adoption with a view to trafficking in children.
- (4) Following are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans- cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the

court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agency licensed or recognised by the government and it would not therefore use any difficulty, hardship or inconvenience if it is insisted that every application form a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised by the government of the county in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency.

- (5) The position in regard to biological parents of the child proposed to be taken in adoption has to be noted. What are the safeguards which are required to be provided insofar as biological parents are concerned? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together or the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the institution or center or home for child care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all



the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision.

- (6) But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the institution or center or home for child care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duty signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the brother of the child and its background, health and development.

But where the child is an orphan, destitute or abandoned child and its parents are not known, the institution or center or home for child care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced name it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

- (7) Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centers which are active in inter-country adoptions. Such Central Adoption Research Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward agencies in the courts. Every social or child welfare agency taking children under its care can then be required to sent to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency."

In terms of this Court's decision in Lakshmi Kant Pandey case (supra), CARA was formed and it published "Guidelines for adoption". Under these guidelines every State has a VCA to co-ordinate and oversees inter-state adoptions.

- 9 In the background of what has been noticed by the Family Court and the High Court it is crystal clear that the orders passed do not suffer from any infirmity to warrant interference. It has been printed out by learned counsel for the State and Mr. Gonsalves, that the appellant no. 1 has been prosecution for offences punishable under various provisions of the Indian Penal Code, 1860 (in short 'IPC'). The accusations relate to cheating, manipulation/fabrication of documents. Some of the functionaries of the appellant no. 1 have already been convicted while permitting any organisation to keep a child or give him or her in adoption its credentials are to be minutely scrutinised. It should be ensured that behind the mask of social service or upliftment and evil design of child trafficking is not lurking. It is the duty of the State to ensure a safe roof over an abandoned child. Keeping in view the welfare of the child all possible efforts should be made by the State Governments to explore e possibility of adoption under the supervision of the designated agency. Keeping in view the guidelines indicated by this Court in Lakshmi Kant Pandey case adoption by foreign parents may in appropriate cases be permitted.

## TRAFFICKING AND THE LAW

- 10 While making the requisite and prescribed exercise it has to be kept in mind that child is a precious gift and merely because he or she for various reasons is abandoned by the parents that cannot be a reason for further neglect by the society...
- 12 With the aforesaid observations the appeal is dismissed with no orders as to costs.

## IN THE SUPREME COURT OF INDIA

### Indian Council Social Welfare and Others vs. State of A.P. and Others

2003(10)SCALE53, (1999)6SCC365

Decided On: 14.07.1999

#### **Hon'ble Judges:**

Sujata V. Manohar and R.P. Sethi, JJ.

#### **JUDGEMENT**

- 2 In view of the investigations regarding allegations of malpractices relating to trafficking in children raised against two organisations in the State of Andhra Pradesh, the four petitioners before us who are not connected in any way with those organisations are being prevented from proceeding with applications for guardianship filed by them before the Family Court/District Court in respect of specific children in their custody. The petitioners also contend that even in respect of those children in their custody where after scrutiny a guardianship certificate has been issued by the Family Court/District Court concerned the child in question is not being allowed to be sent abroad to the guardian so appointed. This is on account of a letter dated 6-4-1999 issued by the Secretary, Department of Women Development, Child Welfare & Disabled Welfare, Government of Andhra Pradesh.
  
- 3 There are no allegations of any malpractice against the four petitioners. Under the revised guidelines for adoption of Indian children issued by the Ministry of Welfare, Government of India known as the Central Adoption Resource Agency, CARA Guidelines, (Chapter 3 para 3.2.) the State Government is required to separately maintain a list of all agencies handling in country and inter-country adoption of children, and it is required to identify those institutions/agencies which have children who are legally free for adoption. The State Government is required to recognise the Indian Adoption Agencies for in-country adoption as per the procedure laid down and is also required to forward applications of Indian Agencies seeking recognition for intercountry adoption to the Central Adoption Resource Agency after proper verification according to the criteria laid down in these guidelines....

- 4 The petitioners are seeking a limited relief relating to those children whose applications for guardianship are pending either before the Family Court or a District Court in Andhra Pradesh and those children in respect of whom, after proper scrutiny, guardianship certificates have already been issued by the Family Court or the District Court concerned in Andhra Pradesh....
- 5 It is necessary to note that before a guardianship certificate is issued by the Family Court or the District Court concerned, a letter of relinquishment, VCA clearance, no-objection certificate from CARA and other relevant documents such as the home study of the proposed guardians, no-objection certificate from the agency which has scrutinised the application of the proposed foreign guardians, as also approval from the scrutinising agency in India who scrutinises these applications (in the case of the State of Andhra Pradesh this scrutinising agency is the Indian Council of Child Welfare) are required....
- 6 In view of this strict and adequate procedure, we direct that those children in the custody of the following four organisations who are the petitioners before, us, namely, Indian Council of Social Welfare, A.P. , John Abraham Memorial Bethany Home, Tandur, District Ranga Reddy, Andhra Pradesh-501 141, Missions to the Nation, D. No. 3-19-6. Plot No. 18 Kannayakapunagar, Kakinada-533 003 and St. Theresa Tender Loving Care Home, St. Theresa's Hospital, Hyderabad-500 018 in respect of whom guardianship certificates have been granted by the Family Court or the District Court concerned in Andhra Pradesh, may be allowed to be sent to their guardians so appointed. We further direct that in respect of those children in the custody of the said institutions where guardianship applications are pending before the Family Court or the District Court concerned in Andhra Pradesh the Family Court or the District Court will process and proceed with these applications in accordance with law. In the event of a guardianship certificate being granted in any of these matters the child concerned should be allowed to be sent to the guardian so appointed.
- 8 We also make it clear that wherever there are allegations of malpractices against any specific organisation or in any specific case, the State Government is entitled to investigate those organisations or cases....

## IN THE SUPREME COURT OF INDIA

**Lakshmi Kant Pandey vs. Union of India (UOI)**

AIR1984SC469, [1984]2SCR795

Decided On: 06.02.1984

**Hon'ble Judges:**

Amarendra Nath Sen, P.N. Bhagwati and R.S. Pathak, JJ.

**JUDGEMENT**

- 1 This writ petition has been initiated on the basis of a letter addressed by one Laxmi Kant Pandey, an advocate practising in this Court, complaining of mal-practices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. ... The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. ...
- 7 It is obvious that in a civilised society the importance of child welfare cannot be over-emphasised, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. ... In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the Constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these

constitutional provisions evolved a National Policy for the Welfare of Children. ...

- 8 There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20th November, 1959. The Declaration in its Preamble points out that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", and that "mankind owes to the child the best it has to give" and proceeds to formulate several Principles of which the following are material for our present purpose :

PRINCIPLE 2 : The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means, to enable him to develop physically mentally morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

PRINCIPLE 3 : The child shall be entitled from his birth to a name and a nationality.

PRINCIPLE 6 : The Child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow Up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be seperated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

PRINCIPLE 9 : The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

PRINCIPLE 10 : The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance

friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men....

- 9 But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest' the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption....

Pursuant to this mandate an expert Group meeting was convened in Geneva in December, 1978 and this Expert Group adopted a "Draft declaration on social and legal principles relating to the protection and welfare of children with special reference of foster placement and adoption, nationally and internationally". The Commission for Social Development considered the draft Declaration at its 26th Session and expressed agreement with its contents and the Economic and Social Council approved the draft Declaration and requested the General Assembly to consider it in a suitable manner....

- 25 ...Thereafter at the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1931, draft guidelines of procedure concerning inter-country adoption were formulated and, as pointed out above, they were approved at the Workshop held in Brighton, U.K. on 4th September, 1982....

...We shall examine these provisions of the Draft Declaration and the draft guidelines of procedure when we proceed to consider and lay down the principles and norms which should be followed in intercountry adoption.

- 15 We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be



the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare.

- 16 Let us first consider what are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.
- 17 Firstly, it will help to reduce, if not eliminate altogether the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral

and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agencies licensed or recognised by the government and it would not therefore cause any difficulty hardship or inconvenience if it is insisted that every application from a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised or recognised by the government of the country in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the application of the foreigner for adopting a child has been sponsored by it. The home study report should broadly include information in regard to the various matters set out in Annexure 'A' to this judgement though it need not strictly adhere to the requirements of that Annexure and it should also contain an assessment by the social or child welfare agency as to whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives. Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsoring such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certificate by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income-tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration

stating that they are willing to be appointed guardian of the child and undertaking that they would adopt the child according to the law of their country within a period of not more than two years from the time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India processing their case, they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in favour of an Officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorise the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents which must accompany the application of the foreigner for taking a child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an Officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an Officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the foreigner must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is effected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in

case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. We may point out that the Swedish Embassy has in Annexure II to the affidavit filed on its behalf by Ulf Waltre, given names of seven Swedish organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for intercountry adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that application of foreigners for appointment of themselves as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgement.

- 18 We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided in so far as biological

parents are concerned ? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together or the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoptions including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. ... But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to

an Institution or Centre or Home for Child Care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the Institution or Centre or Home for Child Care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time-after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

- 19 We may now turn to consider the safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". ... We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter-country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other

social or child welfare agency for the purpose of inter-country adoptions, provided such social or child welfare agency enjoys good reputation and is known for its work in the field of child care and welfare. ...

- 20 Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it....
- 21 The government of India should, with the assistance of the Government of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for intercountry adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within

its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adoption and if the Indian family wants to see the child study report in respect of any particular child, child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months



and it can and must take immediate steps for the purpose of giving such child in inter-country adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and community and send the photograph and child study report of such child to the foreigner for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

- 22 ... There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount

from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. ...

- 23 It is also necessary to point out that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must, before offering a child in adoption, make sure that the child is free to be adopted. Where the parents have relinquished the child for adoption and there is a document of surrender, the child must obviously be taken to be free for adoption. So also where a child is an orphan or destitute or abandoned child and it has not been possible by the concerned social or child welfare agency to trace its parents or where the child is committed by a juvenile court to an institution, centre or home for committed children and is declared to be a destitute by the juvenile court, it must be regarded as free for adoption. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for the

adoption. It is also necessary that the recognised welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that no such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file along with the application for guardianship, a certificate reciting such satisfaction.

- 24 We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. ... But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any mal-practice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil. ... It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new

country so that the assimilation of the child to the new environment is facilitated....

- 25 We must emphasise strongly that the entire procedure which we have indicated above including preparation of child study report, making of necessary enquiries and taking of requisite steps leading upto the filing of an application for guardianship of the child proposed to be given in adoption, must be completed expeditiously so that the child does not have to remain in the care and custody of a social or child welfare agency without the warmth and affection of family life, longer than is absolutely necessary.
- 26 We may also point out that if a child is to be given in intercountry adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. ...But we make it clear that we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. ... We would suggest that even children above the age of 7 years may be given in inter-country adoption but we would recommend that in such cases, their wishes may be ascertained if they are in a position to indicate any preference. ...
- 27 Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hard ship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility

also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We should direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare or the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgement have been observed and followed, whether the foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied, then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for

and reason. We may point out that such a provision is to be found in Clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the Court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the Court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly counter-signed by an officer of the court. This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the application for guardianship of the child. The proceedings on the application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed. When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situated and copies of such order shall also be forwarded to the two respective ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them

and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible mal-treatment, exploitation or use for ulterior purposes and to immediately report any instance of mal-treatment, negligence or exploitation to the Government of India for suitable action.

- 28 We may add even at the cost of repetition that the biological parents of a child taken in adoption should not under any circumstances be able to know who are the adoptive parents of the child nor should they have any access to the home study report or the child study report or the other papers and proceedings in the application for guardianship of the child. The foreign parents who have taken a child in adoption would normally have the child study report with them before they select the child for adoption and in case they do not have the child study report, the same should be supplied to them by the recognised social or child welfare agency processing the application for guardianship and from the child study report, they would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when, to inform the child about its biological parents. Once a child is taken in adoption by a foreigner and the child grows up in the surroundings of the country of adoption and becomes a part of the society of that country, it may not be desirable to give information to the child about its biological parents whilst it is young, as that might have the effect of exciting his curiosity to meet its biological parents resulting in unsettling effect on its mind. But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child attains maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.
- 29 These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this

procedure is followed, we have no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical intellectual and spiritual development. ...

30 The writ petition shall stand disposed of in these terms...



IN THE HIGH COURT OF DELHI

**Child Welfare Committee vs. Govt. of N.C.T. of Delhi and Ors.**

Decided on 03.09.2008

**Hon'ble Judges:**

Ajit Prakash Shar, C.J. and S. Muralidhar, J.

1. The genesis of this petition is a letter dated 12th September 2007 addressed to a learned Judge of this Court by Dr. Bharti Sharma, Chairperson, Child Welfare Committee (CWC). The minor girl was a domestic worker with a placement agency by the name of Adivasi Sewa Samiti, Shakurpur. According to the minor girl, the placement agency sold her infant to a couple. Taking a cue from Section 228A IPC, and with a view to protecting the identity of the girl, she will be referred to hereafter in this judgement as S.
3. The police questioned `S at Shakurpur and recorded her statement in which she disclosed that she had been raped. Though S was not married she decided to retain the child with her whereas Preeti and her husband wanted to sell the child. They contacted one Santosh for this purpose. After a male infant was born to S they handed him over to Santosh and informed S that her child had been born dead. Santosh in turn sold the infant to one Veena for Rs. 23,000/- and the money was shared between Santosh, Preeti and Vinod. S disclosed to the police that when she protested, Preeti, Vinod and Santosh confined her in their premises.
6. In her letter to this Court, Dr. Bharti Sharma pointed out to this Court that the adoption provisions under the JJ Act as well as the Central Adoption Resource Agency (CARA) Guidelines were totally flouted and that what has transpired in this case is not just against the law (minor girl being sent to Women s home, baby being handed back to the persons who have `bought it illegally), but also not in the best interest of the children. Accordingly, Dr. Sharma urged this Court to take immediate cognisance and initiate necessary action.
8. The letter sent by Dr. Bharti Sharma to this Court was registered as Writ Petition (Civil) No. 6830 of 2007. After notice was directed to issue to the respondents on 19th September 2007, a detailed order was passed by this Court on 21st November. Since it is a fairly comprehensive order containing several directions, it is reproduced in full hereunder:

W.P. (C) No. 6830/2007

1. Our attention is drawn to Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as, the Act). The said provision deals with the manner and mode of the process of rehabilitation and adoption of the children who are orphan and abandoned.
3. So far as the alleged adoption is concerned, we feel that such adoption should be in terms of and after following the procedure under Sections 40 and 41 of the Act. The said procedure has not been followed in the present case. The alleged adoption cannot be accepted as the same is not in accordance with the Act.
5. The child in question would definitely come within the ambit of the child in need of care and protection under Section 2(d) of the Juvenile Justice Act 2000 as amended in 2006 and if that be so, then the Child Welfare Committee, which is a statutory authority, will have jurisdiction and power to pass such orders as deemed fit and proper for giving effect to the provisions of Act, which is a welfare legislation.
6. The direction and order passed by the Metropolitan Magistrate, Rohini Courts, unfortunately ignores and fails to take into consideration the provisions and object of the Act. The Factual averments made in the application filed by the Child Welfare Committee and the Police required deeper consideration and analysis keeping in mind the provisions of the Act. The role of the Child Welfare Committee with respect to the process of adoption is very clear from the plain reading of Section 41 of the Act, which reads as under:

41. Adoption:- (1) The primary responsibility for providing care and protection to children shall be that of his family.

No child shall be offered for adoption

- (a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,
- (b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and
- (c) without his consent in the case of a child who can understand and express his consent.

7. This is very unfortunate that a Metropolitan Magistrate who is vested with certain responsibilities has passed such an order.
8. The child is present in Court and we direct that the custody of the child be immediately handed over to the Child Welfare Committee who shall take care and provide for the child concerned, until we pass further orders in this regard.
9. The natural mother and the child are to live together under the supervision of the Child Welfare Committee.
10. The custody and possession of the child has been handed over to Dr. Bharti Sharma, Chairperson, Child Welfare Committee today in the Court.
11. The Child Welfare Committee shall also carry out enquiry in terms of the provisions of the Act and shall submit a report to this Court before the next date. The natural mother shall also be present in the Court on the next date.
12. This order shall be given effect to immediately and copy of this order be sent to the concerned Metropolitan Magistrate, wherever she is posted. Copy of this order will also be sent to the Chief Metropolitan Magistrate for being circulated.

**Renotify on 12th December, 2007.**

9. What is important is that from 21st November 2007 onwards the custody of the infant was given to the CWC under whose protection S already was. In the further order dated 12th December 2007, this Court noted that the infant was in the custody of S. The Court allowed time to S to take a decision as regards the custody or adoption of the infant.
10. On 5th March 2008, the following order came to be passed by the Court:

Pursuant to our order, the Child Welfare Committee, who was given custody of the mother and the child, is looking after the welfare of both the mother and the child at the present moment. Counsel appearing for the Child Welfare Committee, however, states before us that the mother wants to give the child in adoption. Our attention is also drawn to Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000. There is already one applicant for custody of the child contending, inter alia, that they are interested in taking the boy in adoption in the family as there

is no male child in the family. There is some complaint against the said applicant also.

Be that as it may, without going into the merits of the claims and counter claims in respect of custody of the child, we direct the Juvenile Justice Board No. 1 to examine the matter as to who could be given the adoption/custody of the child and to whom the mother is desirous of giving the child in adoption, keeping in mind the welfare of the child. All the parties, who are interested in the issue, may appear before the Juvenile Justice Board No. 1 on 27th March, 2008, when a further date in the matter will be given by the Board for making necessary inquiries.

**Renotify on 30th April, 2008.**

Copy of the order be sent to the Juvenile Justice Board No. 1.

11. The JJB has examined the statements made before it and the relevant records and concluded that `S in all probability did not freely consent to her child being given away in adoption. In this context she has explained that she was unable to lactate as she was not having milk to feed the infant and came to know that the place she was staying housed other small children for whom there was provision for milk. It is possible that the helpless minor girl, who was not aware of her rights or the fact that she and her child were entitled to be provided shelter, food and clothing by the state run institutions, which would enable her to keep her child with her, probably out of helplessness and exasperation exercised the only option that she thought was available to her i.e.: to allow her child to remain with Veena and Ram Lal in a hope that there he at least would get shelter and food.
12. Further the JJB concluded that the payment made by Veena in the sum of Rs. 23,000/- for taking the neglected child in adoption was violative of Section 9(5) and Section 17 of the Hindu Adoption and Maintenance Act, 1956 which prohibits any person from receiving any payment in consideration of adoption of any person or making or giving or agreeing to make or to give to any person, any payment or reward that is prohibited by that provision. The JJB also noted that the act of giving away of the infant in adoption was in the teeth of the guidelines laid down by the Supreme Court in *Laxmi Kant Pandey v. Union of India* [1984]2SCR795.

13. Referring to the provisions of Section 41 of the JJ Act and Rule 33(4) of the Juvenile Justice (Care and Protection of Children) Rules 2007 [JJ Rules], the JJB pointed out that even if this were to be considered to be a case of a surrendered child, without the concerned parent/parents having been counseled and/or being informed of possibility of retaining the child, the surrender cannot be taken to be voluntary nor does it go with the legislative spirit. In addition, reference has been made to guideline 1.1.3(iv)(f) which reads as under:

In case of a child born out of wedlock, the mother herself and none else can surrender the child. If she is a minor, the signature of an accompanying relative will be obtained on the surrender document.

14. The CWC got `S examined by Dr. Achal Bhagat, Director, Saarthak who was also a Senior Consultant Psychiatrist and Psychotherapist at the Apollo Hospital and Ms. Bharti Tiwari, Assistant Director, Saarthak and Consultant, Clinical Psychologist. The said report has been enclosed with the status report filed before this Court by the CWC on 12th December 2007. In the said report, it has been observed as under:

S is in a dilemma about her future. She wants to bring up the child. She also feels that for the present the best place for her is with her family. She is not sure how her other siblings will behave with her and the child. She said that she loves the baby and now wants to bring up the child and not give him for adoption.

If S were to remain in Delhi, it is important that the court or the child welfare committee give directions for her to be trained to be able to economically and psycho-socially independent. It is recommended that she be placed in an environment which is safe, non-judgemental and helps to bring up her child. If such an environment is not possible and she has to be sent home, given the reluctance of her father to support the child, other care arrangements, including adoption should be considered for S's child.

15. After taking note of the above report, the JJB has concluded as under:

S fully understands her responsibility towards her child and is ready to take necessary steps to ensure that her child is brought up in an

atmosphere of love and affection.

16. We appreciate the effort taken by the JJB and accept its report. It is a comprehensive report containing certain useful suggestions. Inter alia it has been suggested that in the background of the provisions contained in Article 15(3) read with Articles 24 and 39 (e) and (f) of the Constitution, as explained by the Supreme Court, it is obligatory for the State to provide for the infant so that he can be brought up in a congenial manner without being deprived of the love, care and affection of his natural mother who wishes to retain him.
18. At the hearing on 16th July 2008, this Court was informed by Ms. Mukta Gupta, the learned Senior Standing Counsel appearing for the Government of National Capital Territory of Delhi (GNCTD) that the GNCTD is willing to give employment to S as House Aunty in a state run institution for care for which a fixed honorarium is paid.
19. In view of the statement made by the GNCTD and the willingness expressed by `S , we direct that the GNCTD will employ S as House Aunty and arrange for her stay in the institution to which she will be attached along with her child by relaxing the educational qualification. This should be done within a period of four weeks from today. We further direct that all possible assistance will be extended to S by the GNCTD to enable her to pursue her education and for being trained in any vocational skills of her choice. The GNCTD will also ensure that her infant child is provided free education till he completes the age of fourteen and even thereafter if he chooses to continue. We would request the CWC to continue to monitor the progress and welfare of both the girl and the infant. It would be open to the girl and her child, as well as the CWC to approach this Court for any directions they may require in connection with this case.
20. This case brings to light the poignant plight of several child domestic workers who are taken in by placement agencies, and in turn are placed in many households in this city. These young children come from far away places in the country and, as in this case, belong largely to the disadvantaged sections of the society. The employment of such children for work is driven essentially by poverty which compels poor parents to part with their children for money. Despite the notification under the Child Labour (Prohibition and Regulation) Act, 1986 [ `CLPRA ] issued by the Central

Government prohibiting employment of children in domestic households it is not uncommon to find in our immediate environs little girls employed as carers of babies and toddlers. They work for long hours on arduous tasks unsuited to their tender age. All this is, no doubt, illegal but it would be too simplistic to consider this to be a merely legal issue. It needs no reiteration that the JJ Act has itself been made in terms of Article 15(3), Article 39 (e) and (f), Articles 45 and 47 as well as the International Convention on the Rights of the Child (CRC) which has been ratified by India. The preamble to the JJ Act makes express reference to these provisions as well as to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (1990). The need to strictly enforce all these provisions is even more urgent and it would hardly suffice to be sanguine that the mere enactment of the Act would itself bring about the transformation in the lives of destitute children. Apart from awareness of legal provisions, the State would have to be constantly reminded of its obligations under the Constitution to create circumstances conducive to the healthy development and care of children in their homes. The GNCTD and the Delhi Police will also pay attention to the need for sensitising concerned Station Housing Officers (SHOs) in cases arising under the JJ Act so that the applications made by the prosecution before the JJB or MM, are not mechanically drawn up as was perhaps done in this matter.

21. This Court would urge the GNCTD to create greater awareness of the provisions of the JJ Act and the CLPRA both through the print and electronic media and in particular in schools and residential colonies, through the resident welfare associations. The monitoring of the functioning of placement agencies would have to be undertaken on a far more rigorous scale to ensure that minors are not allowed to be employed and placed in domestic households. We would suggest to the GNCTD to seek the involvement of the Child Rights Commission at the Central and State levels in formulating scheme and programmes in the area.
22. While commending the efforts of the CWC as well as the JJB, this Court would also like to remind the learned MMs exercising powers under the JJ Act to be far more vigilant and cautious before making orders placing young children in the custody of unrelated adults without examining the ramifications of such orders. In particular

this Court would like to reiterate the directions already issued in its detailed order dated 21st November, 2007, which has been reproduced in full hereinabove. In addition, this Court would like to draw attention to the mandatory nature of Rule 77(3) of the JJ rules which requires that In case of a child in need of care and protection and produced as a victim of a crime before a Magistrate not empowered under the Act, such Magistrate shall transfer the matter concerning care and protection, rehabilitation and restoration of the child to the appropriate Committee. Therefore, the presentation or transfer of the case by the Magistrate to the CWC or the JJB at the earliest possible stage is of utmost importance. The judicial officer should immediately transfer the case without going into details of claims and counter claims, to the JJB and/or the CWC which are specialised bodies constituted under a special Act meant for care and protection, rehabilitation and restoration of the child in need of care and protection.

23. Before parting with the case, this Court would like to make an observation as regards providing legal services and legal aid to children under the JJ Act and CLPRA. Despite each child being mandatorily entitled to free legal aid under Section 12 of the Legal Services Authorities Act, 1987 and there being a specific provision in the form of Rule 14 of the JJ Rules very often the CWC and JJB are having to resort to the services of NGOs. While the efforts made by the NGOs in this case, i.e., both `PALNA and `HAQ are indeed commendable and deserve unreserved appreciation, it is essential that both the District Legal Services Committees as well as the Delhi State Legal Services Authority, on a priority basis, constitute a special panel of advocates with the requisite degree of sensitivity to such cases to handle on a daily basis in the proceedings in the JJB as well as CWC. They should be available round the clock on call and a complete list of names with their telephone and mobile numbers should be made available to these authorities for that purpose. This court would add that the payment for rendering such services should be commensurate with the expertise and standing of such advocates so that their continued assistance at all times is available to the JJB and the CWC. The panel should be constantly reviewed after getting a feedback.



**IN THE HIGH COURT OF ANDHRA PRADESH AT HYDERABAD**

**John Clements and Anr. vs. All Concerned and Ors.**

Decided on 02.05.2003

**Hon'ble Judges:**

B.S.A. Swamy and G. Yethirajulu, J.J

1. These appeals are directed against the order of the Family Court, Hyderabad dismissing the petition filed by the appellants for appointment of appellants as guardians of a minor girl under Sections 7 - 10 and 26 of the Guardians and Wards Act, 1890 to permit them to take her to the United States of America. The averments of the petition are briefly as under: P.2 and P.3 are citizens of USA. An application made by them for adoption was forwarded by an Adoptive Service Information Agency, USA along with their Home Study Report and recommendations to the first petitioner. On receipt of the said application, the first petitioner submitted an application to the Central Adoption Resource Agency (CARA) for placement of the minor child "HASEENA". The CARA through its letter dated 23-3-2001 has expressed no objection for inter-country adoption of the minor child, pursuant to the clearance given by the Voluntary Adoption Co-ordinating Agency (VACA). The minor girl was relinquished by her unwed mother due to social stigma and handed over the child to P.1 on 20-1-2000 and executed a Relinquishment Deed in favour of P.1. Since the minor child has deformity of both the feet, her adoption in India did not materialise.
10. The Family Court after considering the oral and documentary evidence adduced by both parties dismissed the petition with costs.
11. The appellants being aggrieved by the order of the Family Court preferred this appeal challenging its validity and legality?
12. The points for consideration are:
  - (1) Whether P.2 and P.3 are entitled to be appointed as guardians of the minor girl HASEENA to enable them to take the girl to USA and to adopt her?
  - (2) Whether the order of the Family Court needs any interference as pleaded by the appellants?

Point No. 1:

13. The appellants/Petitioners 2 and 3 contend that they identified the baby for adoption after fulfilling all the formalities required under law through P.1. They fulfilled all formalities and there was a clearance from VACA and NOC from CARA, But, the Family Court failed to clear the baby by appointing them as guardians, therefore, they request that the appeal be allowed by setting aside the order of the Family Court.
14. The learned Government Pleader representing the 2nd respondent submitted that though VACA and CARA cleared the case of HASEENA, the subsequent developments which lead to the prosecution of the heads of the agencies prima facie revealed that they resorted to play large scale fraud by forging the documents and mentioning the fictitious names for the purpose of getting clearance from VACA and CARA. He further submitted that the processing agency P.1 i.e., VACA and CARA failed to follow the guidelines issued by the Government of India in pursuance of the judgement of the Supreme Court in *Lakshmi Kanth Pandey v. Union of India*, [1984]2SCR795 , and the clarifications issued in the subsequent judgements. Therefore the child cannot be cleared for inter-country adoption to the appellants and requested to dismiss the appeal by confirming the judgement of the Family Court.
15. As per the guidelines for adoption issued by the Ministry of Welfare through its resolution dated 29-5-1995, the procedure indicated therein has to be followed and in the event of violation of the procedure prescribed under the guidelines, cases for inter-country adoption cannot be cleared.
16. Certain instances have come to the notice of the Supreme Court in 1984 regarding the inter-country adoption of destitute, abandoned, and relinquished children from India. The Supreme Court after taking the assistance of Advocates from various parts of the country and abroad gave a landmark judgement in *Lakshmi Kanth Pandey v. Union of India* (supra) touching upon the malpractices and trafficking in children in connection with adoption of Indian children by foreigners and issued directions laying down certain principles and norms to be followed in cases of such adoptions. The Supreme Court in Para 6 of its judgement while commenting about the abuse of the tender age of the children observed as follows:

26. Along with the original petition, P.1 filed some important documents in proof of the plea of adoption. The scrutinising agency appointed by the Family Court noticed the following deficiencies:
- a. The stamp paper of the Relinquishment Deed is not in the name of the parent who relinquished the child;
  - b. The addresses of the witnesses to the relinquishment deed are not furnished; and
  - c. The medical report is not from a pediatrician.

The scrutinising agency suggested that the above defects are to be rectified.

**Findings of Family Court”:**

27. The Family Court while commenting on the documents marked in the petition in support of the case of the appellants herein observed as follows:
- (1) Ex.A.8-medical report is not by a pediatrician.
  - (2) The opinion of the doctor in Ex.A.8 is in different ink.
  - (3) No mention in Ex.A.7 about the deformity of the feet of the child.
  - (4) Address of the relinquished mother not mentioned in the Relinquishment Deed.
  - (5) Date of Relinquishment Deed is 20-1-2000 whereas the Stamp paper was purchased on 11-1-2000.
  - (6) Full particulars of the witnesses of the Relinquishment Deed are not given.
  - (7) No witnesses examined to prove the genuineness of the Relinquishment Deed. The Family Court observed that the Relinquishment Deed is not of much importance, since the child was declared as an abandoned child, as per Ex.R.1- paper publication.
  - (8) The 5th respondent did not keep the complete record in chronological order for the efforts made by it in locating the Indian parents
  - (9) No reasons assigned for non-placement of the child for in-country adoption, with the particulars of Indian parents as required under Guideline No. 4.7.

28. The non-production of the relevant records is leading to an inference that no efforts were made by the placement agency. The contention of the appellants that the clearance given by VACA and NOC given by CARA gives a presumption that the placement agency followed the procedure is highly untenable and it is not the spirit of the guidelines. The willingness of the appellants herein to adopt the child is of no consequence and it amounts to encouraging the violation of mandatory requirements of the guidelines. The Family Court by making the above observations dismissed the petition holding that the petitioners 2 and 3 (appellants herein) are not entitled to be appointed as guardians of the minor child HASEENA.
31. The learned Government Pleader representing the 2nd respondent further submitted that P.1 is indulging in so many malpractices in processing the children for adoption and he listed out the following:
- (1) Making false propaganda of deemed licence by misleading the State and confusing the prospective parents.
  - (2) Indulging in purchasing children and using fabricated and false documents.
  - (3) Maintaining false records.
  - (4) Committed financial irregularities and received Memo from CARA for financial anomalies.
  - (5) Unwed mothers are not surrendering children. R.5 is procuring children from different parts of the State through its agents.
  - (6) The children are not shown to the prospective Indian parents registered with the agency, though they are free for adoption.
  - (7) Fabricated relinquishment deeds in about 19 cases in the names of the non-existing parents and failed to furnish correct address of the biological parents and other witnesses for confirmation of the relinquishment.
  - (8) The attesters of relinquishment deeds are no other than the employees of R.5.
  - (9) Procuring children in the name of adoption by paying rupees five to ten thousand as consideration to the biological tribal parents, as per the information given by the Superintendent of Police, Nalgonda referring seven instances.

- (10) Prepared relinquishment deed in July, 2001 and processed the case for inter-country adoption despite imposition of ban on relinquishment of children from 18-4-2001.
  - (11) Fabricated documents, including medical reports, in 38 inter-country adoption cases to get clearance of VACA.
  - (12) Indulged in getting copies of internal correspondence of the Government and filing cases in Courts putting the Government in embarrassing position.
  - (13) Using non-judicial stamps for creation of anti-dated relinquishment deeds.
  - (14) Maintaining two sets of medical reports, one for getting clearance of VACA and the other to the prospective foreign parents for selection of the child.
  - (15) Not showing inclination for in-country adoption though there are more than 2000 Indian parents registered their names for adoption and in waiting list.
34. During the course of arguments it was brought to our notice that the placement agencies are trading in children. They are keeping children of fair complexion and good health separately for inter-country adoption and are resorting to place the crippled, mentally retarded, mentally handicapped, underweighing and sick children for selection by Indian parents. The agencies are not allowing Indian parents to good children for selection. Though there is no definite information before this Court regarding the said modus operandi, we are made to understand that there is every likelihood of truth in it, which is gaining support from the facts placed before us regarding the processing of the children for adoption.
35. The medical reports said to be prepared at the time of receiving many children indicate that they were healthy and fair in complexion, but from the remarks made in the rejection letters of the Indian parents it is astonishing to note that they were mentioned as black in complexion, sick and underweight. This is leading to another doubt whether the placement agencies are showing different children by impersonation to Indian parents in the names of the children reserved for foreign adoption to get rejection letters from them?
36. Sri L. Ravichander, a Counsel representing the foreign parents, said they had developed bondage with the respective children and as

they developed love and affection towards the children, they are with a legitimate expectation that the children would be given to them in adoption, without taking into consideration the subsequent developments, by their cases as exceptional cases, and requested to grant the equitable relief of appointing the foreign parents as guardians to the children without taking serious note of the omissions, if any, in following the guidelines of the Government of India. He further submitted that the foreign parents did not commit any illegality in expressing their willingness to adopt, hence they may not be deprived of the children. The learned Counsel cited decisions of the Supreme Court for the proposition that Courts in India are not only Courts of Law, but also Courts of Equity and thus power has to be exercised with good conscience and in furtherance of cause of justice.

39. In substance, the argument of the learned Counsel is that for this time these petitions may be allowed and the foreign parents may be appointed as guardians for the minor children, covered by this appeal and other similar appeals, pending before this Court as a one time relief, without making it a precedent for future cases.
40. On the other hand, the learned Counsel for the respondents drew the attention of this Court to certain judgements of the Hon'ble Supreme Court on the principle of equity.
44. If the request of Sri L. Ravichander is accepted, it amounts to perpetrating illegality and supporting gross violation of the guidelines framed by the Government in pursuance of the directions of the Supreme Court in Lakshmi Kanth Pandey (supra) apart from giving seal of approval to the fraud played by the placement agencies and the casual approach of approval the same by the officials of VACA and CARA. The denial of relief to the appellants in these cases is not going to have any effect on the larger section of the society. On the other hand, conceding the request of the learned Counsel is counterproductive and it will be a signal to every agency that the Courts do not take serious note of the illegalities committed by them and the Courts are tend to pardon them with large heartedness, unmindful of the object behind the framing of the guidelines and the efforts to streamline the process of inter-country adoption. As pointed out by the Supreme Court in Lakshmi Kant Pandey (supra), the endeavour shall always be to promote adoption of the abandoned or relinquished children

to Indian parents is the reflection of the voice of the people. If the placement agencies are allowed to give healthy children who represent human resource of this country to foreign parents and if the crippled, mentally retarded, mentally handicapped children are allowed to remain with Indian parents, it leads to an adverse effect on the society in the long run. Hence the Government and the State should not encourage the placement agencies to deviate the guidelines to fulfil their selfish ends. There shall be an endeavour on the part of every organ of the State to preserve the intellectual property of the nation, which is an immeasurable wealth of the country, and will be helpful to the country to prove its greatness to the rest of the world.

45. Next, we are unable to agree with the contention of Mr. Ravichander that the prospective foreign parents are not aware of the fraud played by the concerned in India and as such they cannot be penalised for the illegalities committed by others. If they have no role to play, they would have approached CARA, but not directly the placement authorities. Secondly, if they have not adopted backdoor methods in securing the child, the moment they came to know of the fraud, they would have walked out of the muddle and would have allowed the law of the land to be implemented. We therefore agree with the findings of the lower Court and confirm the order accordingly.
46. Before parting with this case, we would like to go on record that every well intended legislation or a decision of the Government in our country is not giving desired results in its implementation defeating the object and purpose for which the action was intended to by the Government. Lack of commitment to implementing agencies is the root cause for such failures.
49. It is represented by the Assistant Director of Women and Child Development Department, who is in-charge of the affairs of VACA, that in order to identify the children, they keep a paper ring to the hand of each child mentioning the name of the child and after getting acquainted with the child, they remove the tag and it is easy for them to identify the children by their faces. This is not a foolproof method of identification of the children and there is every likelihood of change of tags of one child to the other or replacing one child to the other with the same name after removing the tag. It is astonishing to note as to why the placement agencies and other

institutions who are receiving and maintaining the children are not noting down the permanent identification marks like black moles on the body to enable anybody to identify the child with reference to those identification marks, which remain permanent on the body.

50. It was brought to our notice that after the expiry of the licence to the placement agencies, they were not renewed in the light of the fraud came to light and the Women and Child Development Department of the Government of Andhra Pradesh is looking after the processing work of the children for adoption by replacing VACA which was in existence during the relevant period and they are taking all precautions to follow the guidelines in the processing of the children for in-country and inter-country adoptions.
51. It was further brought to our notice that whenever Indian parents are informed about the availability of the child for adoption there is no practice of allowing them into the rooms where the children are kept. The prospective parents will be asked to wait in the drawing room and the person in-charge of the children will initially bring one child to the prospective parents and ascertain from them whether they like the child. If those prospective parents do not like the child they will bring another child and if that child is not liked by the prospective parents, the person in-charge of the Home may or may not bring another child for approval and inform the Indian parents that since they are not liking the children shown to them, they may sign on the letters that they rejected the children for adoption for the reasons mentioned therein.
52. It was also brought to our notice during the course of arguments that there were instances of the placement agency obtaining signatures of its employees on rejection letters as witnesses. After knowing about various methods adopted by placement agencies to make money through the children, we are of the opinion that the procedure for adoption of children, whether in-country or inter-country, has to be further strengthened to prevent recurrence of irregularities or illegalities pointed out in this case and other similar cases.
53. Despite the guidelines prepared by the Government of India on the directions of the Supreme Court, there are certain gaps regarding the detailed procedure, which is giving scope for unscrupulous agencies to take advantage of such gaps and to trade in children in the foreign market for consideration in the form of dollars. With



due respect to the directions given by the Hon'ble Supreme Court and due regard to the guidelines framed by the Government of India, we wish to give certain suggestions in the form of additional guidelines in the process of in-country and inter-country adoptions directing the Government of India to consider these guidelines and to incorporate them as additional guidelines to encourage the in-country adoptions and to regulate the inter-country adoptions without giving scope to the agencies to trade in children.

55. After Lakshmi Kant Pandey (supra), the Supreme Court gave some more clarificatory judgements. Despite that, the placement agencies are taking advantage of the gaps in the guidelines or contradictions in some guidelines and could successfully violate them silencing the authorities of CARA and VACA.
72. ... we wish to give the following directions :

**Directions:**

- (1) Processing of both inter-country and in-country adoption of the relinquished, destitute or abandoned child should be done only by the CARA at the Central level and VACA at the State level.
- (2) The placement agencies should not have any role, except informing these authorities about the child coming to their care and collecting the expenses incurred on the child at the time of finalisation of adoption of the child.
- (3) The scrutinising agency in the present form should be abolished.
- (4) Legally trained persons be appointed for VACA and CARA by making them responsible to scrutinise the documents and submit the reports to the Court.
- (5) The child-care agency shall have no role to play in the process of inter-country adoptions.
- (6) Regulations shall be framed as per Para 2.11 of the Guidelines.
- (7) It shall be specified as to whom the steering committee constituted under Para 2.11 shall give policy directions.
- (8) Committee under Guideline 2.12 shall be constituted.
- (9) Central and State Governments to constitute CARA as well as VACA consisting of official and non-official members who

have nothing to do with inter-country adoptions to process the applications.

- (10) At the State level VACA has to maintain separate list of prospective adoptive parents category-wise mentioned in Para 4.5 and update the same from time to time by using both electronic and print media.
- (11) Since CARA is looking after the adoptions both inter-country and in-country at the National Level, it should also get the list of prospective adoptive parents from all the States, and as and when VACA of a particular State is not able to find a suitable Indian parent, it should try to find out a prospective Indian parent from other States to adopt the child. The system of maintaining a list of prospective adoptive parents by the placement agency should be given up.
- (12) Identification of biological and prospective parents may be done simultaneously to avoid further loss of time.
- (13) If CARA fails to find an Indian parent to adopt the child, it must make efforts as per the priorities mentioned in paragraph 4.5.
- (14) The procedure for fixation of date of birth, prescribed under para 4.17 shall be simplified.
- (15) VACA as well as CARA shall maintain a separate file for each child available for adoption with the complete case history including medical report.
- (16) The placement agency has to communicate the particulars of the child along with medical certificate to VACA.
- (17) The VACA shall place the full details of the child with his medical background on the web site.
- (18) In case of a child being surrendered by the biological parents, the placement agency should obtain the surrender documents on stamped papers in the presence of two responsible persons whom the agency should be able to produce, if necessity arises. The witnesses shall not be their employees and they should be responsible persons in the society. The agency should show the correct addresses of these witnesses.
- (19) In case of abandoned or destitute child, any person other than the biological parents may also surrender the child to the

placement agency and the agency should obtain documents to that effect from that person in the presence of respectable persons. The surrender document should contain the full particulars and postal addresses of the person who surrenders the child and the witnesses. The agency should be in a position to produce the person who surrendered the child and the witnesses if necessity arises.

- (20) As and when an abandoned or relinquished child is brought to the child home, the authorities of the Home shall immediately enter the particulars of the child in the registers and intimate VACA about the child to keep it in the list of children available for adoption,
- (21) The procedure prescribed for fixation of date of birth of the child in Para 4.18 can be given up and the Home should be directed to get the child examined by a team of three Doctors comprising a Doctor practising on general side, a paediatrician and a paediatric surgeon and get the child study report prepared containing the medical history, date of birth, moles on the body, photo for identification of the child etc. If any deformities or disabilities or health problems are noticed by the Doctors, they should also state whether the problem of the child is curable or not and the treatment that has to be given.
- (22) Every placement agency should engage the services of a Paediatrician to look after the health of the inmates of the Home till they are given in adoption.
- (23) If a particular child is identified by more than one parent, VACA has to select the best possible parent to offer the child in adoption.
- (24) VACA shall maintain the Registers mentioned in Para 4.34 (iii) scrupulously.
- (25) VACA shall ensure that the child is given nutritious diet during his/her stay with the voluntary agencies and the agencies may be permitted to claim such amount, as prescribed under the guidelines.
- (26) It is also open to VACA to invite donations from the prospective parents by getting Income Tax exemption etc. to effectively

discharge its functions without depending upon the assistance from the Government.

- (27) The Central and concerned State Government Department Officials shall invariably conduct annual inspection of the records and accounts of CARA, VACA and placement agencies to find out whether any irregularities are being committed. If so, to take action against the concerned and to initiate remedial measures to prevent their recurrence in future.
- (28) To have transparency in the process of adoption of children the following methods can be adopted:
- (a) A closed circuit T.V. be placed projecting the children available in the Home through such T.V. to the prospective parents to enable them to see and to point out such children whom they should bring for the purpose of selection.
  - (b) The photos and the bio-data of the children be kept in Internet to enable the prospective parents to see the children from their respective places and to request for physical production of such child for consideration.
  - (c) A photo album of all the available children be made available to the prospective parents to enable them to see the photos with bio-data i.e., date of birth, date of receipt of the child by the agency, child's health condition and other necessary particulars to enable them to select one or two photos of the children for their physical verification and finalisation for adoption.
  - (d) Immediately after receipt of the child by the Agency, either on relinquishment or on abandonment, the child must be placed for examination by a team of Paediatricians of a Government Hospital or a Government recognised Hospital.
  - (e) An identification card shall be prepared with the photo of the child providing the name, date of birth, colour, weight, health condition and identification marks, preferably black moles on the body with identification card number, which shall be a permanent record to help the prospective parents to identify the child.

- (f) The agency, which is receiving the children and looking after them shall have no role to play in the process of adoption, except to act according to the lawful directions of the Committee which is appointed to oversee the process of adoption.

**Documents to be filed in Family Court**

73. The following documents are to be filed before the Family Court along with the petition for in-country or inter-country adoption:

- (1) Last medical report obtained from the team of Doctors from Government Hospital, as stated earlier.
- (2) The documents obtained from the biological parents or the person who has entrusted the child to the agency.
- (3) A certificate from the Secretary of VACA certifying that the procedure prescribed under the guidelines has been scrupulously followed.
- (4) A certificate from the Head of the Agency/Home/Organisation that they have fulfilled all the conditions on their part including showing of the children along with the identity card prepared for the child to the parents who visited the Home.
- (5) In case of rejection of the child by any prospective adoptive parent, their serial number in the list of prospective parents register required to be maintained by the VACA has to be mentioned.
- (6) The Family Court shall keep a check-list of the documents pointed out above or any other relevant information and check the documents with reference to that check list to satisfy that all the required documents have been filed into Court.
- (7) Letter of satisfaction from CARA about the efforts made by the agency to find Indian parents.
- (8) Proof of CARA scrutinising papers received with application.
- (9) Proof of CARA issued NOCs after application of mind and not mechanically on the basis of the certificate of clearance issued by VACA.
- (10) Proof of maintaining the registers of all prospective parents and the available children who are legally free for adoption,

- (11) Proof of efforts made by VACA to secure Indian parents.
  - (12) Proof of VACA co-ordinating with other VACAs in the State or other States.
  - (13) List of prospective parents.
  - (14) List of Indian parents informed about the availability of child.
  - (15) Proof of intimation to prospective parents.
  - (16) List of children available for adoption.
  - (17) Proof as to how many prospective Indian parents saw the girl, how many rejected her and what are the reasons for rejection by other prospective parents?
  - (18) Proof regarding the period of sickness.
  - (19) Data regarding the dates of visits of prospective parents.
  - (20) Reasons supporting certificate of clearance issued by VACA.
  - (21) Proof of offering the child to Indian families abroad or foreign parent of Indian origin.
  - (22) Proof of the agency in continuous touch with VACA appraising the development regarding the non-availability of the first three categories of prospective parents.
  - (23) Proof of VACA or CARA contacting VACAs of other State about the availability of first three categories of prospective parents.
74. Lastly, we make it clear that the Family Court is the final arbiter in the matter and it has a vital role to play in inter-country and in-country adoptions. Hence, before coming to a conclusion, it has to scrutinise the records carefully and satisfy whether the guidelines have been scrupulously followed or not and also whether it is desirable to order guardianship of the child to the applicants for adoption or not.

**Point No. 2 :**

75. In the light of the findings under Point No. 1, we do not find any ground to interfere with the order of the Family Court, Hyderabad in OP No. 604 of 2001. The appeals are accordingly dismissed. No costs.

77. If the concerned authorities satisfy that the guidelines are being scrupulously followed, and if they decide to give the child in inter-country adoption, it is for the petitioners to make another application before the Family Court and it is for the Family Court to pass appropriate orders on such application for guardianship to P.2 and P.3 of the minor girl.

## IN THE HIGH COURT OF MADRAS

**S. Banu vs. Raghupathy, Principal Thriuvalluvar Gurukulam School and Ors.**

Decided on 19.06.2007

**Hon'ble Judges:**

P.K. Misra and R. Banumathi, JJ.

1. The petitioner has filed this HCP to produce the Petitioner's minor children Muthukumar and Muthulakshmi and hand over custody to the petitioner.
2. The petitioner is a Muslim widow and during 1985, she married one Solai, a cycle rickshaw man and they had three children. During 1991, Petitioner's husband Solai, while removing a block in the drainage system, got drowned and died. The petitioner was impoverished, unable to feed and maintain the children. With the help of one Hussain, Assistant Engineer, Metro Water [MMWSSB], petitioner handed over custody of all three children with the first respondent in Thiruvallur Gurukulam, Saidapet, run by the first respondent.
4. According to the petitioner, during 1998, she retrieved her eldest son.
6. It came to be known that the minors were given in adoption to foreigners - Kenneth Porter and Vija Kuainis of USA. G.W.O.P. No. 22/1983 filed by their Power of Attorney - Sr. Rita Thyveetil on the file of the Principal District Court was ordered and the said adoptive parents were "permitted to take the children out of India to USA through their Power of Attorney, on condition". In GWOP, surrender document, said to have been executed by the first respondent, was produced as Ex.A-1. Other documents like child study report and other relevant documents were produced.
7. **Contention of Parties:** Petitioner's case is that she never signed the Surrender Deed and was all along under the impression that the children were in the hostel. The adoption was carried out through Sisters of the Cross Society for Education and Development [SOC SEAD] who had licence, as the fourth respondent Madras Social Service Guild [MASOS] did not have the licence. Counsel for the petitioner has submitted that on account of questionable activities of MASOS Guild, its licence was under suspension from 1999 to



2001 and having regard to the conduct of MASOS Guild, suitable direction is to be given for production of the children.

12. Domestic and inter-country adoption have been the subject matter of innumerable directions by the Apex Court in public interest litigation mainly at the instance of Lakshmi Kant Pande. Those are cases where foundlings, orphans or children born to unwed mothers are given to the custody of guardians through the process of Court under the provisions of Guardians and Wards Act, 1890, for their fostering by those guardians/adoptive parents.
14. In order to facilitate the implementation of the norms in terms of Supreme Court's direction in Lakshmi Kant Pandey's case, Central Adoption Resource Agency [CARA], was formed and it published Guidelines for Adoption from India, 2006. The said guidelines govern the procedure of inter-country adoption and has mandated strict procedural safeguards in case of all inter country adoption such as Home Study Report of the foreign prospective adoptive parents, undertaking from the enlisted agency/central authority sponsoring cases of foreign parents and follow up reports for a period of two years or until such time as the legal adoption is completed and citizenship is acquired in the receiving country.
15. In the matter of adoption in India, CARA issues 'No Objection Certificate' based on the documents which are both child and prospective adoptive parents related. CARA examines documents such as Child Study Reports, Surrender Deeds, in case of surrendered children or abandonment certificate declaring a child free for adoption by Child Welfare Committee [earlier it was Juvenile Justice Board], issues such as priority to domestic adoption, Home Study Report of the Prospective Adoptive Parents, undertaking from the foreign enlisted agency/central authority to take responsibility of the child in case of disruption and regular process reports etc. The Home Study of the foreign prospective adoptive parents include a number of documents supporting the eligibility of the parents for adopting a child from India.
16. Under these guidelines, every State has Voluntary Coordinating Agency [VCA] to coordinate and oversee adoptions. In some states, VCA is a non-governmental organisation and in some other States, the Department of Woman and Child Development/Social Welfare Department is VCA. Several guidelines have been issued from time to time.

17. In this case, the prospective adoptive parents -Kenneth Porter and Vija Kuainis represented by their Power of Attorney - Sr. Rita Thyveetil - Coordinator [SOC3EAD] have filed GWOP No. 22/1993 seeking permission of the Court for inter-country adoption. In consideration of the documents, Principal District Court, Trichy has allowed the Petition permitting the petitioners to take the children -minors Muthulakshmi and Muthukumar out of India to USA through their Power of Attorney, on condition that 'the children should be brought up by them as their own and quarterly progress report is to be submitted to the Court'. It is stated that there had been compliance of norms and procedure. But the Petition pleads ignorance of the said GWOP and she denies genuineness of the alleged surrender deed.
18. Since criminal case is registered in Cr.No. 832/2006 and investigation is under progress, we do not propose to go deep into the matter, lest it would amount to expressing our views on the merits, which might affect the ongoing investigation and rival contentions of parties. In such view of the matter, we direct the Central Crime Branch to proceed with the investigation in a fair and impartial manner and file the final report and keep the petitioner informed of the further progress of the investigation. The petitioner is at liberty to seek appropriate remedy against the first Respondent before the appropriate forum, if she is so advised.
19. Keeping in view the guidelines laid by the Supreme Court, in Lakshmi Kant Pandey's case, we deem it fit to issue the following directions:
  - 1) The Central and State Government shall ensure strict compliance of the directions given by the Supreme Court in various cases by ensuring and monitoring at various levels of inter-country and intra-country adoption;
  - 2) While permitting any organisation to keep a child or to give him or her in adoption, the credentials of the organisation are to be monitored/scrutinised.
  - 3) In cases of complaints, the District Social Welfare Officer shall hold public hearing into complaints and conduct enquiry; and in cases of questionable documents relating to adoption, direct the parties to approach the Police, if needed, to seek assistance from Legal Services Authority of the concerned District.

- 4) When prima facie case is made out raising doubts as to genuineness of adoption and documents, the District Social Welfare Officer himself shall refer to matter to the police for investigation.
  - 5) When Adoption O.P. is filed in District other than the District where the child was surrendered by the biological parents, granting permission for adoption and allowing Guardian OP is not to be automatic. In such cases, OP is filed in District Court. The District Judge shall enquire the background of the child given in adoption and the reason for filing Guardian O.P. in different District. In such cases, the District Judge shall address the District Social Welfare Officer/Licensing Agency of the District, in which the child was surrendered to the agency authorised to give in adoption and the District Judge shall call upon the District Social Welfare Officer to send a report as to the background of the child given in adoption and the reason for filing Guardian OP in a different District.
  - 6) The Courts shall strictly ensure follow up progress of the children by directing filing of Quarterly Progress. In case of non-compliance, issue notice to the parties and inquire and the Court shall satisfy about the proper fostering of the child.
20. With the above directions and observations, the HCP Ls disposed of.
- (USA) and to adopt her as per the laws prevailing in USA.

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**PART V**  
**JUDGEMENTS ON EXPLOITATIVE**  
**LABOUR**

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## IN THE SUPREME COURT OF INDIA

### Public Union for Civil Liberties vs. State of Tamil Nadu and Others

(2004)12SCC381, 2004(5)SCALE890

Decided On: 05.05.2004

#### Hon'ble Judges:

S. Rajendra Babu, C.J. and G.P. Mathur, J.

#### JUDGEMENT

- 1 The plight of migrant bonded laborers from Tamilnadu, who were being subjected to exploitation in Madhya Pradesh, was originally brought to the notice of this Court through this petition. Later the scope of this petition was expanded so as to cover the problems relating to the bonded laborers in all States and Union Territories in the country. This Court vide Order dated 11-5-1997 asked the National Human Rights Commission (NHRC) to take over the monitoring of the implementation of the directions of this Court and that of the provisions of the Bonded Labour System (Abolition) Act, 1976 (the Act). It is brought to our notice that the NHRC has been interacting with the Ministry of Labour and with Special Rapporteurs, with the State Governments to evolve suitable measures to solve the problem of bonded labour. In the meantime the NHRC constituted a Group of Experts to closely examine the matter and to prepare a report on the status, suggest methods of improving the existing schemes, suggest recommendations to effectively implement the laws for abolition of bonded labor system and other connected matters. An Action-taken-Report filed by the NHRC was considered by this Court on 19-1-2001.
- 2 On 6-6-2001 the Report of Expert Group was submitted to this Court. First part of this Report contains a status report on the work relating to the abolition of the bonded labour system in the various States. Then the report detailed the position of the various existing schemes and made several recommendations to improve the present works relating to the abolition of bonded labour system. They also made considered proposals to amend the Act so as to make the Act more effective. The Report correctly pointed out that the implementation of the Act encompasses three functions, namely, identification, release and rehabilitation of bonded labour.

They also suggested involving NGOs in the endeavors to abolish bonded labour. As per directions of this Court, State Governments, Union Territories and learned *Amicus Curiae* submitted their responses to the report of Expert Group. In his response dated 5-9-2002, learned *Amicus Curiae* made two important suggestions. Firstly to organise Model Workshop in an appropriate district in any State involving the District Magistrate and other statutory authorities/committees not only to sensitise them in respect of their duties under the Act but also to help them in achieving the objectives of the statute in full measure and secondly, to establish a Model Rehabilitation Centre. In its Report dated 27-3-2003, the NHRC agrees with the suggestions made by learned *Amicus Curiae*.

- 3 The Union of India, in response to the report of the learned *Amicus Curiae* submitted that the central issue in solving bonded labour system is the rehabilitation of released bonded laborers. They also detailed the various schemes and financial assistance packages that are made available from the Union coffers. It is also submitted that the Ministry of Labour in consultation with the NHRC is preparing a detail manual for identification, release and rehabilitation of the bonded laborers, particularly in planning and executing the suitable rehabilitation package for the released bonded laborers. Therefore, they submitted that any specific rehabilitation package couldn't be considered ideal for all the released bonded laborers who are required to be rehabilitated at various places. In response to the NHRC Report dated 27-3-2003, the Union submitted that in any case rehabilitation center is established, sufficient land area would have to be provided at a particular place by the State Government concerned; which would be tremendous task for the State government in the present socio-economic conditions. In this context, the Union made clear their preference to the existing centrally sponsored scheme, wherein a freed bonded labour is rehabilitated on land based basis, non-land basis and skilled/craft based basis depending upon the choice of bonded labour and his/her inclination and past experience. It is also submitted that the Ministry of Labour release grants to the State governments for rehabilitation of bonded labour on receipt of complete proposals from the State Government concerned. Under the modified Centrally Sponsored Scheme for rehabilitation of bonded labor effective from May 2000 the rehabilitation assistance

to the extent of Rs. 20,000/- per bonded labour is provided for his/her rehabilitation. The Central and State governments on 50:50 bases share the expenditure. In case of North-Eastern States and Sikkim 100% rehabilitation grants are provided by the Central Government. The migrant bonded laborers, as per guidelines, are to be rehabilitated at the place of his/her choice. And under this scheme, the State Governments shall provide Rs. 1000/- as substance allowance to a bonded labour immediately on his/her identification.

- 4 After going through the detailed Report of the Expert Group, responses to it by the Governments and that of the learned Amicus Curie, the Report of the NHRC and the various Affidavits on record, we could easily arrive at the conclusion that the major issue that is to be solved is the aspects relating to rehabilitation of bonded labors. Once the bonded labors are identified and released, they have to be rehabilitated forthwith. It is a sad reality that the rehabilitation and related aspects of bonded labors are not given adequate consideration till now. If we are now concentrating our attention to identification and release of bonded labors, they will languish in streets, if there are no well chalked out corresponding plans for rehabilitation. Hence, in our considered opinion the primary direction shall be aimed at evolving and implementing rehabilitation plans.
- 5 In modern days Civil Society is playing a greater role in nation building exercise. The commendable roles played by NGOs in very many situations strengthen the confidence of general public in NGOs. Always the State may not be in a position to reach out to the needy. As we have experienced in the past, Civil Society could efficiently fill up this gap. Now it is time for more interaction between Civil Society and State machinery in implementing social service schemes. The services of philanthropic organisations or NGOs could very well be utilised for rehabilitating released bonded labors. State could give necessary financial assistance under proper supervision.
- 6 Considering the vitality of rehabilitation issue in the endeavors to abolish bonded labors, at this stage, we are issuing the following directions.
  1. All States and Union Territories must submit their status report in the form prescribed by NHRC in every six months.



2. All the State Governments and Union Territories shall constitute Vigilance Committees at the District and Sub-Divisional levels in accordance with Section 13 of the Act, within a period of six months from today.
3. All the State Governments and Union Territories shall make proper arrangements for rehabilitating released bonded labors. Such rehabilitation could be on land-based basis or non-land basis or skilled/craft based basis depending upon the choice of bonded labour and his/her inclination and past experience. If the States are not in a position to make arrangements for such rehabilitation, then it shall identify two philanthropic organisations or NGOs with proven track record and good reputation with basic facilities for rehabilitating released bonded labors within a period of six months.
4. The State Governments and Union Territories shall chalk out a detailed plan for rehabilitating released bonded labors either by itself or with the involvement of such organisations or NGOs within a period of six months.
5. The Union and State Governments shall submit a plan within a period of six months for sharing the money under the modified Centrally Sponsored Scheme, in the case where the States wish to involve such organisations or NGOs.
6. The State Governments and Union Territories shall make arrangements to sensitise the District Magistrate and other statutory authorities/committees in respect of their duties under the Act.
7. The Union and State governments are directed to file Affidavits delineating the above aspects within a period of six months. All other aspects pointed out by the NHRC and other directions suggested to be issued by the learned *Amicus Curie* would be considered thereafter.
8. Before parting with, it is necessary to place on record that this Court is beholden to the learned *Amicus Curiae* Mr. A K Ganguly (Senior Advocate) for the services rendered by him.

**IN THE SUPREME COURT OF INDIA**

**People's Union for Civil Liberties (PUCL) vs.  
Union of India (UOI) and Others**

(1998)8SCC485

Decided On: 26.03.1996

**Hon'ble Judges:**

Kuldip Singh and Faizan Uddin, JJ.

**JUDGEMENT**

- 1 This public interest petition under Article 32 of the Constitution of India is based on the report given by a non-governmental organisation called "Campaign against Child Labour". According to the said report, one Rajput used to travel to Madurai in Tamil Nadu for the purpose of procuring child labour by paying a paltry sum ranging between Rs 500 to Rs 1500 to the poor parents. The children aged below 15 years so procured were forced into bonded labour. It was further stated in the report that one of the boys, viz., Shiva Murugan, aged about 8 years was beaten to death by the said Rajput. As mentioned in this Court's order dated 18-3-1996, Rajput has already been convicted for murder by the trial court. The other four boys, viz., Raja Murugan (aged 8 years), Rajesh (aged 13 years), Muniyandi (aged 15 years) and Mukesh (aged 16 years) were not traceable after the occurrence, resulting in the death of Shiva Murugan. Under the directions of this Court, three boys, viz., Rajesh, Muniyandi and Mukesh have been traced by the Maharashtra Police. The fourth boy, Raja Murugan, who is the real brother of late Shiva Murugan is still untraced. As noticed by this Court, the Maharashtra Police is still making efforts to trace Raja Murugan.
- 2 Mr Rajinder Sachar, learned counsel appearing for the petitioner, states that the parents of these boys are entitled to compensation. In support of his contention Mr Sachar relies on Nilabati Behera vs. State of Orissa.....
- 3 ...Keeping in view the facts and circumstances of this case, we direct the State of Maharashtra to pay a sum of Rs. 2,00,000 (two lakhs) to Raja Murugan for himself and also for the death of his brother Shiva Murugan. Since Raja Murugan (a minor) is an orphan, the amount be deposited with the District Magistrate of the area

where Raja Murugan lives. The District Magistrate shall deposit the amount in a scheduled bank. The total income so earned shall be divided into 12 months and be given to Raja Murugan every month till he attains majority when he shall be entitled to receive the principal amount. This amount of Rs. 2,00,000 shall be paid by the State of Maharashtra.

- 4 So far as the other three boys Rajesh, Muniyandi and Mukesh are concerned, we direct that they be given Rs 75,000 each as compensation which shall be given by the State of Tamil Nadu within two months. The amount shall be deposited with the District Magistrate concerned who shall deposit the same in a scheduled bank. Monthly interest be paid to the parents till the children attain majority when they shall be entitled to the principal amount.

**IN THE SUPREME COURT OF INDIA****Neeraja Chaudhary vs. State of M.P.**

AIR1984SC1099, (1984)3SCC243

Decided On: 08.05.1984

**Hon'ble Judges:**

A.N.Sen and P.N. Bhagwati, JJ.

**JUDGEMENT**

- 1 This is yet another case which illustrates forcibly what we have said on many an occasion that it is not enough merely to identify and release bonded labourers but it is equally, perhaps more, important that after identification and release, they must be rehabilitated, because without rehabilitation, they would be driven by poverty, helplessness and despair into serfdom once again. Poverty and destitution are almost perennial features of Indian rural life for large numbers of unfortunate ill-starred humans in this country and it would be nothing short of cruelty and heartlessness to identify and release bonded labourers merely to throw them at the mercy of the existing social and economic system which denies to them even the basic necessities of life such as food, shelter and clothing. It is obvious that poverty is a curse inflicted on large masses of people by our malfunctioning socio-economic structure and it has the disastrous effect of corroding the soul arid sapping the moral fibre of a human being by robbing him of all basic human dignity and destroying in him the higher values and finer susceptibilities which go to make up this wonderful creation of God upon earth, namely, man. It does not mean mere inability to buy the basic necessities of life but it goes much deeper; it deprives a man of all opportunities of education and advancement and increases a thousand fold his vulnerability to misfortunes which come to him all too often and which he is not able to withstand on account of lack of social and material resources We, who have not experienced poverty and hunger, want and destitution, talk platitudinously of freedom and liberty but these words have no meaning for a person who has not even a square meal per day, hardly a roof over his head and scarcely one piece of cloth to cover his shame. What use are 'identification' and 'release' to bonded labourers if after attaining their so-called freedom from bondage to a master they are consigned to a life of another bondage, namely, bondage to

hunger and starvation where they have' nothing to hope for-not even anything to die for-and they do not know whether they will be able to secure even a morsel of food to fill the hungry stomachs of their starving children. What would they prize more: freedom and liberty with hunger and destitution staring them in the face or some food to satisfy their hunger and the hunger of their near and dear ones, even at the cost of freedom and liberty ? The. answer is obvious. It is therefore imperative that neither the Government nor the Court should be content with merely securing identification and release of bonded labourers but every effort must be made by them to see that the freed bonded labourers are properly and suitably rehabilitated after identification and release.

- 2 This issue of rehabilitation of freed bonded labourers arises squarely in the present writ petition. The writ petition is based upon a letter dated 20th September, 1982 addressed to one of the Judges of this Court by the petitioner who is Civil Rights Correspondent of Statesman a leading news paper in the country. This letter was directed to be treated as a writ petition but for the sake of completeness, before notice was issued to the respondent, Mr. Govind Mukhoty, learned advocate who was good enough to accede to the request of the Court to appear on behalf of the petitioner, filed a regular writ petition in substitution of this letter and it is that writ petition which is now being disposed of by us. The petitioner averred in the writ petition that about 135 bonded labourers who were working in the stone quarries in Faridabad had been released from bondage by an order made by this Court in the first week of March, 1982 since they were found to be bonded labourers within the meaning of the Bonded Labour System (Abolition) Act, 1976 and on release, they had been brought back to their respective villages in Bilaspur District of the State of Madhya Pradesh with a promise of rehabilitation by the Chief Minister of that State. But, said the petitioner, when she visited three villages, namely, Kunda, Pandharia and Bhairavapura in Mungeli Taluk of Bilaspur District in September 1982 with a view to ascertaining whether or not the process of rehabilitation as promised by the Chief Minister had commenced, she found that most of the released bonded labourers who belonged to these three villages had not yet been rehabilitated though about six months had passed since their release and they were living almost on the verge of starvation. ...It seems that once these freed bonded labourers

were brought back to their villages, the administration of the State Government thought they had discharged their duty and then they conveniently forgot about the existence of these unfortunate specimen of humanity. The fate which befell these released bonded labourers after their repatriation to their respective villages is perhaps sympto-mate of what is happening to bonded labourers in other parts of the country. In the first place, very little attention is paid towards identification and release of bonded labourers and even if they are freed, there is complete neglect of rehabilitation programme for them with the result that from slavery they go back to starvation. ... The petitioner urged in the writ petition that it was the obligation of the State Government to ensure rehabilitation of freed bonded labourers under the provisions of the Bonded Labour System (Abolition) Act, 1976 and its failure to provide such rehabilitation assistance amounted to violation of the fundamental right of the freed bonded labourers under Article 21 of the Constitution. The petitioner therefore prayed for a direction to the State Government to take steps for the economic and social rehabilitation of the freed bonded labourers who were released as a result of the order made by this Court in the first week of March, 1982 and who were residing in various villages in Bilaspur District.

- 3 .... The State Government pointed out that "very often vested interests veil successfully the status of bonded labourers and thus obstruct the process of identification; the labourers themselves are not educated enough to come forward and lodge a complaint: they appear to be reconciled themselves to their fate" and that is why there is a wide gap between legal discharge of bonded labourers and their factual liberation. The State Government observed that all District Magistrates in the State were conferred powers under Section 10 of the Act and powers of Judicial Magistrate 1st Class for the trial of offences under Section 21 of the Act were also conferred on all District Magistrates and Sub-Divisional Magistrates and repeated instructions were issued to the District Magistrates to identify bonded labourers. The State Government also pointed out that Vigilance Committees had been constituted by it in all the 44 districts of the State as required by Section 13 of the Act. The State Government also set out the composition of the Vigilance Committee for the Bilaspur District as also of the Vigilance Committees for the sub-divisions of Bilaspur, Jangjir, Katghora, Sakti and Mungeli. ...It is significant to note that apart from the present writ petition, several

other cases have come before this Court from Madhya Pradesh by way of public interest litigation initiated by social action groups engaged in the task of identification, release and rehabilitation of bonded labourers and the reports of the Commissioners, appointed by this Court in some of those cases have clearly shown that there is a sizable number of bonded labourers in the State who have yet to be identified, released and rehabilitated. But the absurdly insignificant figures of bonded labourers identified and released by the State administration so far are clearly indicative of the indifference and inadequacy of the State Administration in securing identification, release and rehabilitation of bonded labourers within the State. Perhaps this indifference and inadequacy of the State Administration arises from the fact that the State Government is not willing to admit the existence of bonded labour within its territory lest it might affect its image and moreover the officers of the State Administration seem to be taking the view that unless a workman is able to show that he is forced to provide labour to the employer in consideration of an advance or for any other economic consideration received by him, he cannot be regarded as a bonded labourer within the meaning of the definition of that term in the Bonded Labour System (Abolition) Act, 1956. But having regard to the decision of this Court in *Bandhua Mukti Morcha vs. Union of India and Ors.*, it is clear that this view on which the officers of the State Administration seem to be relying for the purpose of disputing the existence of bonded labour is erroneous. We have pointed out in our judgement in *Bandhua Mukti Morcha's* case that:

It would be cruel to insist that a bonded labourer in order to derive the benefits of this social welfare legislation, should have to go through a formal process of trial with the normal procedure for recording of evidence. That would be a totally futile process because it is obvious that a bonded labourer can never stand up to the rigidity and formalism of the legal process due to his poverty, illiteracy and social and economic backwardness and if such a procedure were required to be followed, the State Government might as well obliterate this Act from the statute book. It is now statistically established that most of bonded labourers are members of Scheduled Castes and Scheduled Tribes or other backward classes and ordinary course of human affairs would show, indeed judicial notice can be taken of it, that there would be no occasion for a labourer

to be placed in a situation where he is required to supply forced labour for no wage or for nominal wage, unless he has received some advance or other economic consideration from the employer and under the pretext of not having returned such advance or other economic consideration, he is required to render service to the employer or is deprived of his freedom of employment or of the right to move freely wherever he wants. Therefore, whenever it is shown that a labourer is made to provide forced labour, the Court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is therefore a bonded labourer. This presumption may be rebutted by the employer and also by the State Government if it so chooses but unless and until satisfactory material is produced for rebutting this presumption, the Court must proceed on the basis that the labourer is a bonded labourer entitled to the benefit of the provisions of the Act. The State Government cannot be permitted to repudiate its obligation to identify, release and rehabilitate the bonded labourers on the plea that though the concerned labourers may be providing forced labour, the State Government does not owe any obligation to them unless and until they show in an appropriate legal proceeding conducted according to the rules of adversary system of justice, that they are bonded labourers.

This is the test which has to be applied for the purpose of determining whether a workman is a bonded labourer or not and we would therefore direct the State Government to apply this test through out its territory for the purpose of ascertaining whether there are any bonded labourers or not and if so how large is their number. Whenever it is found that any workman is forced to provide labour for no remuneration or nominal remuneration, the presumption would be that he is a bonded labourer unless the employer or the State Government is in a position to prove otherwise by rebutting such presumption.

- 4 The State Government also pointed out in the affidavit of G.R. Mahajan that instructions had been issued to all the Collectors and Commissioners to give widest possible publicity to the evil of the bonded labour system and the cooperation of the members of the Legislative Assembly was also sought in this vital task of identification, release and rehabilitation of bonded labourers and



all the panchayats in the State were also asked to cooperate with the State Government in this behalf. ... What is really necessary is to involve social action groups operating at the grass root level in the task of identification and release of bonded labourers. ... It is only through social action groups working amongst the poor that we shall be able to discover the existence of bonded labour and we shall be able to identify and release them. There are fortunately in our country a large number of such dedicated social action groups- young men and women inspired by idealism and moved by a passionate and burning zeal to help their fellow beings-whose services can be utilised for identification, release and rehabilitation of bonded labourers. We would strongly urge upon the State Government to include the representatives of such social action groups in the vigilance committees and to give them full support and cooperation. These social action groups may appear to be unorthodox and unconventional and their actions may be marked by a sense of militancy, but they alone will be able to deliver the goods and it is high time that the State Government should start taking their assistance instead of looking at them askance and distrusting them. The vested interests would undoubtedly be against such social action groups which are trying to organise the poor and the oppressed and would try to attack and destroy such social action groups with all the resources at their disposal including filing of false cases and even physical assaults but the State administration should not allow itself to be dominated or influenced by the vested interests and under the guise of maintenance of law and order, harass and oppress the disadvantaged sections of the community whom such social action groups are trying to organise with a view to making them strong and self-reliant and capable of fighting for their rights through the process of law. We would therefore direct the State Government to include in the Vigilance Committee for Bilaspur District, as also in the Vigilance committees of the various sub-divisions in that district, representatives of one or more of the following social action groups which are operating in one or the other part of that district: ...

...We expect the State Government to carry out this direction within one month from today. We would also direct the State Government to take immediate action for identification and release of bonded labourers, whenever any representative of these social action groups, whether on the vigilance committee or not, points out

to the Collector District Magistrate or the Deputy Collector that there is existence of bonded labour at a particular place and whenever any officer of the District administration goes to such place for identification and release of bonded labour on the basis of the information given by such representative of the social action group, he shall take such representative with him and a copy of the report made by him shall be handed over immediately to such representative of the social action group. We may make it clear that this direction given by us should not be interpreted to mean that the representatives of only those social action groups which are mentioned by us should be taken on the vigilance committees, but it will be open to the State Government to include in the vigilance committees representatives of any other social action groups which the State Government may think fit, having regard to the nature and quality of the work done by them at the grass root level amongst the have-nots and the handicapped.

- 5 It appears that a review of the action taken by the State Government for the purpose of identification, release and rehabilitation of bonded labourers was undertaken in April, 1981 and a detailed survey was carried out in the districts of Satna, Panna, Bastar, Raigarh and Jabalpur. The learned Counsel appearing on behalf of the State Government has filed a summary of conclusions and recommendations of this review and this summary frankly and baldly exposes the inadequacies of the State administration in regard to the implementation of the programme of identification, release and rehabilitation of bonded labourers and makes constructive suggestions and recommendations for remedying the existing state of affairs. We hope and trust that these suggestions and recommendations will be immediately carried out by the State Government and the entire machinery for identification, release and rehabilitation of bonded labourers will be streamlined in the light of these suggestions and recommendations. We do not think that it would be right for us to discuss these suggestions and recommendations because they involve administrative policy making but there are a few observations we would like to make arising out of some of these suggestions and recommendations. One of the suggestions and recommendations made by the survey team is that: "the district and sub-divisional level vigilance committees should be, reorganised and activated and their meetings should be more frequent than now". This suggestion

or recommendation clearly supports what we have said in the preceding paragraphs of this judgement, namely, that the vigilance committees as they exist today are not effective and they need to be reorganised and activated. We have no doubt that the direction given by us to include representatives of social action groups will go a long way towards activating the functioning of the vigilance committees. It is also necessary that officers who are posted at different levels to deal with the problems of bonded labour including their identification, release and rehabilitation should be properly trained and sensitised so that they may feel a sense of involvement with the misery and suffering of the poor and they may carry out their functions with total dedication to the cause of removal of poverty and in a manner which will inspire the confidence of the weaker sections of the community including the bonded labour. Every officer who is placed in charge of identification, release and rehabilitation of bonded labour should be made fully conscious of his great responsibility and he should be imbued with a sense of purpose and dedication which are necessary if this important task is to be accomplished successfully. It is also essential that there should be constant check and supervision over the activities of the officers charged with the task of securing identification, release and rehabilitation of bonded labourers. We have fortunately in our country quite a large number of socially committed officers who, inspired by idealism with their enthusiasm undiminished minds untrammelled and hearts unpolluted by all kinds of pressures, are prepared to brave opposition and sometimes even danger, in order to help the deprived and vulnerable sections of the community. Such officers must be encouraged and their efforts appreciated so that they may become exemplary models for other officers to follow. The summary of conclusions and recommendations in paragraph 7 suggests that "an intensive survey of the area which has been traditionally prone to the system of debt bondage should be undertaken by the Revenue Department with the help of the available field agencies for the identification of bonded labourers". We would introduce a slight modification to this recommendation and we would suggest that an intensive survey of the areas which have been traditionally prone to the system of debt bondage should undoubtedly be undertaken but that should be done by the vigilance committees with the assistance of social action groups operating in such areas and that is perhaps what the

survey team had in mind when they said that the help of "available field agencies" should be taken by the Revenue Department. We find ourselves wholly in agreement with the suggestions and recommendations set out in paragraphs 9 to 17 of the summary of conclusions and recommendations. We have no doubt that if these suggestions and recommendations are sincerely and speedily implemented by the State Government, it would go a long way towards rehabilitation of the released bonded labourers. We have plenty of good schemes in our country but the real difficulty lies in securing their proper and effective implementation. The evaluation of the implementation of these schemes must be target-oriented and not expenditure-oriented. What is necessary is that the benefits of the expenditure must reach the masses and particularly the lowest amongst the low and the weakest among the weak, because they constitute the target groups sought to be benefited and if the benefits do not reach them, it is futile for any government to say that it has expended such large amount. We would therefore urge upon the State Government to immediately take up the implementation of the suggestions and recommendations made by the survey team in its report and inform the Court by an affidavit to be filed by a responsible officer on or before 31st July, 1984 as to what concrete steps have been taken towards implementation of these suggestions and recommendations and how many bonded labourers have been identified and freed and how many of them have been rehabilitated and in what manner. It is the plainest requirement of Articles 21 and 23 of the Constitution that bonded laborers must be identified and released and, on release, they must be suitably reha- bilitated. The Bonded Labour System (Abolition Act, 1976 has been enacted pursuant to the Directive principles of State Policy with a view to ensuring basic human dignity to the bonded labourers and any failure of action on the part of the State Government in implementing the provisions of this legislation would be the clearest violation of Article 21 apart from Article 23 of the Constitution.

- 6 It is obvious from the writ petition as also from the affidavits filed in these proceedings that the large majority of 135 bonded labourers released as a result of the order made by this Court in the first week of March 1982 have not yet been rehabilitated though more ; than 18 months have passed We wonder how these out-castes of humanity, forgotten by their fellow being and neglected, by

their government, must be eking out their daily existence: how they must be feeding the hungry bellies of their children and how they must be covering the shame of their wives. These unfortunate human beings for whom life is a long unceasing rigel with no resources except perhaps a forlorn hope, who cannot even cry for help because they know that it will be a cry in the wilderness which no one will hear and who drag on their earthly existence in the hope that one day death will relieve them from their misery and suffering, today ask the legislature, the executive and the judiciary, "What have you done for us; have we not a right to live with human dignity and share with all of you the fruits of freedom and development or are we consigned to a life of slavery and starvation where we see before our eyes the emaciated bodies of our children with hollow cheeks, sunken eyes and shrivelled bodies withering away and dying? We would therefore direct the State Government to provide rehabilitative assistance to these 135 freed bonded labourers within one month from today. They have waited too long; they cannot wait any longer. What kind of rehabilitative assistance should be provided and what would be appropriate for the family of a particular freed bonded labourer would have to be decided by the vigilance committee and such rehabilitative assistance shall be provided by the State Government in the presence of a representative of one of the social action groups to which we have specifically referred in the earlier part of this judgement. The Collector/District Magistrate Bilaspur will give sufficient notice to such representative so that he can remain present at the time when rehabilitative assistance is provided to these 135 freed bonded labourers. The State Government will file an affidavit of a responsible officer stating how and in what manner the State administration has provided rehabilitative assistance to these 135 freed bonded labourers and which representative of the social action groups present at the time when such rehabilitative assistance was given. Such affidavit shall be filed on or before 15th July, 1984.

- 7 The writ petition will be placed on board on 6th August, 1984 for consideration of the affidavits which may be filed by the State Government pursuant to the directions given by us in this judgement. The State Government will pay to the petitioner costs of the writ petition quantified at Rs. 5,000....

**Amarendra Nath Sen, J.**

- 8 I have had the benefit of reading the judgement of my learned brother Bhagvati, J. The facts have been set out in the judgement of my learned brother. Though I am in general agreement with the directions given and orders proposed by my learned brother. I wish to make my own observations.
- 10 It has to be appreciated that mere passing of welfare legislation for the upliftment of the downtrodden, the meek and the weak is by itself not sufficient, though undoubtedly the legislation is the first step in the right direction. What is really important is that every law enacted, particularly welfare legislation for the benefit of the weaker section of the people, must be implemented in the proper spirit for achieving the noble object for which such legislation is passed. Implementing the law has, necessarily to be effected through human agencies. Unfortunately, frailties of human nature and degeneration of human character often add to existing problems instead of solving them.
- 11 The provisions of the Bonded Labour System (Abolition) Act, 1976 must be implemented effectively and properly in terms of the provisions of the Act, if the desired objective which the Act seeks to achieve, is to be attained. The Legislature in its wisdom very aptly appreciated that mere release of the bonded labourers from bondage without making appropriate arrangements for his rehabilitation will serve no useful purpose and may even create a very real problem as to livelihood of the labourer so set free and accordingly the legislation made suitable provision for the rehabilitation of the bonded labourer. If any bonded labourer is only freed from his bondage and is set at liberty, he will in all probability have to slide back into bondage again to keep his body and soul together. Freedom from bondage without effective rehabilitation after such freedom will indeed be of no consequence and in the absence of proper arrangement for such rehabilitation being made, the entire purpose of the Act will be frustrated and the vice of the bonded labour system which the legislature thought it fit to abolish in the larger interest not only of our country, but also of humanity as a whole will continue to perpetuate its evil existence.
- 12 The real grievance of the Petitioner in this writ petition based on personal knowledge is with regard to non-implementation of the legislative provisions made for the rehabilitation of the

bonded labourers after they had been freed. A sad and woeful tale is narrated in the writ petition about the plight of the bonded labourers set free pursuant to the orders of this Court for not taking effective measures enjoined by law for their rehabilitation. It becomes the duty of the Court to see that the legislative provisions regarding their rehabilitation are properly implemented and these poor and miserable persons are allowed to enjoy the benefit which the law and the Constitution of the land afford to them.

- 13 With these observations, I express my agreement with the directions given and orders proposed by my learned brother in the judgement.

**IN THE HIGH COURT OF ANDHRA PRADESH AT HYDERABAD**

**Priyadarshini Jattu Workers Labour, Contract Co-operative  
Society rep. by its Secretary, G. Satyanarayana**

**vs. The Food Corporation of India rep. by its Chairman and  
Managing Director and Others**

1995(2)ALT107

Decided On: 21.03.1995

**Hon'ble Judges:**

K.M. Agarwal, Acting C.J.

**JUDGEMENT**

- 1 This writ petition is by a Labour Contract Co-operative Society for quashing a labour contract granted in favour of the 4th respondent, another Labour Contract Co-operative Society, by the Food Corporation of India.
- 2 It appears that the petitioner and the 4th respondent are registered as Labour Contract Societies under the provisions of the A.P. Co-operative Societies Act, 1964. It also appears that earlier the petitioner society was either functioning under the name and style of "Priyadarshini Jattu Cooli Samkshema Sangam, (in short, the "sister concern" of the petitioner), or was working in close collaboration with it. The Food Corporation of India has godowns at various places in the country for storing its foodgrains. One such godown is located at Dowlaiswaram in East Godavari District of Andhra Pradesh. For the purpose of handling and transporting foodgrains at its Dowlaiswaram godown, the Food Corporation of India was and is required to employ labourers. Instead of employing labourers directly, it appears that the Food Corporation of India invited tenders and on the basis of such tenders, it used to grant handling and transport contracts, (in short, "H&T Contract"), for its work at Dowlaiswaram godown. During the period between 14-4-1988 to 8-11-1990, the H&T Contract was given the petitioner's sister concern as its rate being 99.99 percent below the notified schedule of rates, (in short, the "BSR"). was the lowest. For the subsequent period between 9-11-1990 to 30-10-1992, the 4th respondent offered to do the work at 99.999 percent BSR, which was lowest, and accordingly obtained the H&T Contract for that period. For next period of 1992 to 1994, no tenders were



called, but the contract was awarded on nomination basis to the 4th respondent to do the work at the schedule of rates prescribed by the Food Corporation of India. This was challenged in W.P.No. 13673/1992., which was allowed on 1-4-1994 by a learned Single Judge of this Court. The judgement was affirmed in Writ Appeals, which were filed by the first and the 4th respondents separately. The Food Corporation of India, thereafter, invited tenders. In response to this invitation, the petitioner society submitted its tender and offered to undertake the work at the rate of 0.01 paise for every one lakh rupees worth work as per the notified schedule of rates. Though this rate was the lowest, the offer made by the 4th respondent to do the work at the notified schedule of rates was accepted after calling the parties for negotiation at Hyderabad on 16-7-1994. This contract was for the period between 17-7-1994 to 16-7-1996. Being aggrieved, the petitioner society has filed the present petition for quashing the H&T contract aforesaid in favour of the 4th respondent.

- 3 ... I am of the view that this petition has no substance and deserves to be dismissed
- 4 From the allegations made in the petition and the counter, it is painful to note that the wisdom shown during the course of granting contract for the period between 17-7-1994 to 16-7-1996 by the 1st respondent was not shown by it during the earlier periods of contract and that it took advantage of the unfair cut throat competition between the petitioner and the 4th respondent for obtaining the contracts during the various periods in the past. In fact it was guilty of practising and encouraging a system akin to bonded labour prohibited under the Bonded Labour System (Abolition) Act, 1976 by taking undue advantage of the unfair competition between the two societies and granting contracts on the basis of unconscionable bargains and at an unthinkable low and most unreasonable rate of remuneration for the work to be done, unmindful of the various decisions of the Supreme Court, such as People's Union for Democratic Rights vs. Union of India, Labourers, Salal Hydro Project vs. State of J and K, and Salal Hydro-Electric Project vs. State of J and K. The record of this writ petition would show that during the period between 14-4-1988 to 8-11-1990, the H&T Contract was given to the petitioner's sister concern at the rate of 99.99 percent below the notified SR. As a consequence, only a sum of Rs. 300/- was paid to the labourers

employed through the sister concern of the petitioner society for the entire work contract worth Rs. 30 lakhs as per the SR., which was also not very attractive or lucrative. Similarly for the subsequent period between 9-11-1990 to 30-10-1992, the contract was given to the 4th respondent at the rate of 99.999 percent BSR and the labourers employed to do the work through the 4th respondent were paid a sum of Rs. 30/- only for the entire contract work to the tune of Rs. 30 lakhs as per the SR. This is heart breaking and this Court cannot shut its eyes to such a case of blatant exploitation and refuse to grant such equitable and just relief to the sufferers on the ground that no such relief has been claimed in the petition by any of the parties to the petition.

- 7 On receipt of the said amounts, the Collector, East Godavari District shall first ascertain from the records of the petitioner and those of the respondents as to the:
  - (1) Names and addresses of the labourers who actually performed the work during the periods 14-4-1988 to 8-11-1990 and 9-11-1990 to 30-10-1992; and
  - (2) The volume of work done by each of them; and then after due identification of the person or persons claiming the amount, pay the amount due to them as per the volume of work done at the SR rate less the amount already paid to them, plus the interest that is worked out on the amount payable to them. All this be done as expeditiously as possible and after completion of the work, a report shall be submitted before this Court by the Collector, who shall be at liberty to seek any clarification or guidance or direction, in case any difficulty is felt in implementation of these directions.
- 8 It may be made clear that in case the labourer, who actually performed the work is not traceable, or is reported to be dead, the amount payable to him as per directions made in this petition, may be paid to his heirs and legal representatives after due verification and identification of the persons making such claims as heirs and legal representatives.
- 9 In the result, this petition fails and it is hereby dismissed, but without any order as to costs.

**IN THE SUPREME COURT OF INDIA**

**Bandhua Mukti Morcha vs. Union of India and Others**

(1991) 4 SCC 177

Decided on: 13-08-1991

**Hon'ble Judges:**

Ranganath Mishra, C.J. and M.M. Punchhi and S.C. Agarwal, J.J

**JUDGEMENT**

- 1 A letter addressed to this Court complaining about prevalence of bonded labour system in Cutton, Anangpur and Lakkarpur areas of Faridabad District in Haryana State wherein the stone quarries workers are living in the most inhuman conditions, was treated as a writ petition under Article 32 of the Constitution.
- 5 This Court dealt with various aspects of the problem; referred to available literature on material aspects; took in to account the information collected by Advocate-Commissioners and the report made by Dr. Patvardhan. The Court also took note of the position that the Presidential Ordinance of 1975 for abolition of bonded labour and the subsequent parliamentary legislation in 1976 were seeking to implement the mandate of Article 23 of the Constitution but while statutory provision had been made, taking in to account the fact that pernicious practice of bonded labour had prevailed in this country for centuries; the then current social atmosphere had been tolerating this practice without any serious objection; the concentration of wealth in the hands of a few and the majority being poor it became convenient for the owners of property and wealth to exploit the poor and in India a social change opposed to traditional methods was difficult to implement, the Court did not treat the writ petition as disposed of by its judgement and the application survived for further monitoring.
- 7 The proceeding thereafter continued with a view to fulfilling the fond hope and expectation of the Court.
- 8 Mr. Laxmidhar Misra, in due course, submitted his report in two parts- one dealing with the identification of the bonded labour and the second covering the enquiry into the implementation of 21 directives. The petitioner-Morcha came before the Court with a petition for contempt action alleging that the directions were not being implemented. ...

- 10 The bonded labourers are paid nominal wages and often their family members are not permitted to take remunerative jobs elsewhere without permission of the master. Normally, such permission is not granted and the impoverished condition is allowed to continue to the advantage of the creditor. The Constitution-fathers were aware of this prevailing inhuman practice and in Article 23 (1) provided:
- “23(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.”
- 11 ...It is perhaps not necessary to delve into the philosophy involved in the matter as the three Judge bench has gone into it in the judgement of December 1983, and what remains for consideration at this stage is more or less a clear review of the enforcement of the directives and assessment of the outcome for achieving the statutory purpose and the Constitutional goal and for the fulfilment of hopes and expectations of this Court in that regard and if it is necessary to take further action and if so, what such action should be. ...
- 27 The State of Haryana, we must say, has not taken our intervention in the proper spirit and has failed to exercise appropriate control though some eight years back this Court had in clear terms laid down the guidelines and had called upon the public authority to take charge of the situation and provide adequate safeguards.
- 29 The workmen are engaged almost on full time basis. As report indicates bulk of the workmen are not prepared to return to their States. What is necessary, therefore, is provision of a permanent base for residence at or near the work site. This would necessitate reasonable housing, supply of water, a reasonable provision store at hand, schooling facility, facility of a hospital, recreational facilities and attention to the law and order problem. Perhaps near the area a police station or an outpost could be located. If the workers were insufficient in number, a doctor could be taken as a visitor to the area at frequent intervals and instead of a regular school one single teacher could be provided to look after the health of the people.
- 30 Court's judgement to regulate such matters has inherent limitation. These are not schemes which could be conveniently monitored by

a Court—far less can the apex Court keep track of the matter. Its Registry has congestion. To get attention for a matter of this type from the court is bound to take some time. Human problems in their normal way do not wait for a time schedule for attention. In such circumstances, it should be obligation of the State which on account of running stone quarries within its area must in various ways be getting benefits to look out these aspects. As a welfare state it is now the obligation of State of Haryana to cater these requirements of the area. Haryana as we find has substantial advances compared to many other States of the country and there is some amount of welcome consciousness in the administration of the State. We hope and trust that if a direction is issued to the Chief Secretary of the State to regulate these aspects reposing of trust by this Court would not turn out to be misplaced.

- 31 In these circumstances we call upon the State of Haryana to attend to the needs referred to above of the workmen in a well considered and systematic way. Since those workmen who will be working there have to be protected from vagaries of employment and the anxiety of the employer to draw work without adequate payments, the authorities of the State of Haryana must take care to protect the workmen from the hands of the employer by ensuring compliance with the laws and if there be any vacuum in the laws, the State of Haryana should rise to play the role of a welfare State and play it well. In fact there could be a special cess raised against the quarry activities to be specifically utilised by the way of return to the industry and there could be a special fund out of which all amenities referred to above could be provided. What is wanting is not power but the mind and alertness regarding one's duty.
- 32 If our directions are worked out there would really be no bonded condition and the workmen would be paid their due share against employment and with facilities ensured they can live well in the area.
- 33 At the point of enforcement of directions as indicated above if anyone turns out to be bonded and is freed and is also prepared to return to his State, the scheme framed by the Government of India would be applicable to such person.
- 35 We, therefore, dispose of this petition by directing that the State of Haryana shall now ensure that the people who have been identified numbering about 2000 are continued in work with the improved

conditions of service and facilities as referred to above and such of them who want to go back to their native areas be treated as released from bondage and appropriate action must be taken in accordance with Government of India's scheme forthwith. This shall be no order as to costs.

- 36 We had called upon the State of Haryana to deposit Rs. 20, 000 to meet the expenses of Committee appointed by us. The Registry will look in to the matter and on the basis of the statement furnished by the Committee put up a note within two weeks for giving direction regarding honorarium to be paid to the members of the Committee.

**IN THE SUPREME COURT OF INDIA**

**Bandhua Mukti Morcha vs. Union of India (UOI) and Others**

(1984)3SCC161, [1984]2SCR67,

Decided On: 16.12.1983

**Hon'ble Judges:**

Amarendra Nath Sen, P.N. Bhagwati and R.S. Pathak, JJ.

**JUDGEMENT**

- 1 The petitioner is an organisation dedicated to the cause of release of bonded labourers in the country. The system of bonded labour has been prevalent in various parts of the country since long prior to the attainment of political freedom and it constitutes an ugly and shameful feature of our national life. This system based on exploitation by a few socially and economically powerful persons trading on the misery and suffering of large numbers of men and holding them in bondage is a relic of a feudal hierarchical society which hypocritically proclaims the divinity of men but treats large masses of people belonging to the lower rungs of the social ladder or economically impoverished segments of society as dirt and chattel. This system under which one person can be bonded to provide labour to another for years and years until an alleged debt is supposed to be wiped out which never seems to happen during the life time of the bonded labourer, is totally incompatible with the new egalitarian socio-economic order which we have promised to build and it is not only an affront to basic human dignity but also constitutes gross and revolting violation of constitutional values....
- 3 This pernicious practice of bonded labour existed in many States and obviously with the ushering in of independence it could not be allowed to continue to blight the national life any longer and hence, when we framed our Constitution, we enacted Article 23 of the Constitution which prohibits "traffic in human beings and begar and other similar forms of forced labour" practised by any one. The system of bonded labour therefore stood prohibited by Article 23 and there could have been no more solemn and effective prohibition than the one enacted in the Constitution in Article 23. But, it appears that though the Constitution was enacted as far back as 26th January, 1950 and many years passed since then, no serious effort was made to give effect to Article 23 and to stamp

out the shocking practice of to bonded labour. It was only in 1976 that Parliament enacted the Banded Labour System (Abolition) Act, 1976 providing for the abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people....

- 5 We also find that in some cases the State Governments in order to shirk their obligation, take shelter under the plea that there may be some forced labour in their State but that is not bonded labour. ... But we do not wish to anticipate the discussion in regard to this argument and at the present stage we content ourselves by merely observing that it is unfortunate that any State Government should take up the plea that persons who are forced to provided labour may be forced labourers but unless it is shown by them by proper evidence tested by cross-examination that they are forced to provide labour against a bonded debt, they cannot be said to be bonded labourers and the State Government cannot be held to be under any obligation to rehabilitate them.
- 13 Before we proceed to consider the merits of the controversy between the parties in all its various aspects it will be convenient at this stage to dispose of a few preliminary objections urged on behalf of the respondents. The learned Additional Solicitor General appearing on behalf of the State of Harynana as also Mr. Phadke on behalf of one of the mine lessees contended that even if what is alleged by the petitioner in his letter which has been treated as a writ petition, is true, it cannot support a writ petition under Article 32 of the Constitution, because no fundamental right of the petitioner or of the workmen on whose behalf the writ petition has been filed, can be said to have been infringed. This contention is, in our opinion, futile and it is indeed surprising that the State Government should have raised it in answer to the writ petition. ... We have on more occasions thin one said that public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature time of our Constitution. The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and



exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements. When the Court entertains public interest litigation, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the constitutional objectives.

- 14 Moreover, when a complaint is made on behalf of workmen that they are held in bondage and are working and living in miserable conditions without any proper or adequate shelter over their heads, without any protection against sun and rain, without two square meals per day and with only dirty water from a nullah to drink, it is difficult to appreciate how such a complaint can be thrown out on the ground that it is not violative of the fundamental right of the workmen. It is the fundamental right of every one in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullen's case, to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Since the Directive Principles of State Policy contained in Clauses

(e) and (f) of Article 39, Article 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21, more so in the context of Article 256 which provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State....

- 15 ...It was only in the year 1981 in the Judges Appointment and Transfer Case that this Court for the first time took the view that where a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the court for relief under Article 32 and a fortiori, also under Article 226, so that the fundamental rights may become meaningful not only for the rich and the well-to-do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress. This view which we took in the Judges Appointment and Transfer Case is clearly within the terms of Article 32 if only we look at the language of this Article uninfluenced and uninhibited by any pre-conceptions and prejudices or any pre-conceived notions....
- 16 While interpreting Article 32, it must be borne in mind that our approach must be guided not by any verbal or formalistic canons of construction but by the paramount object and purpose for which this Article has been enacted as a Fundamental Right in the Constitution and its interpretation must receive illumination from the trinity of provisions which permeate and energise the entire Constitution namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy....

- 20 We may point out that what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Article 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide terras as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Article 226. In fact, the jurisdiction of the High Courts under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights.
- 35 The first question that arises in regard to the implementation of the Bonded Labour System (Abolition) Act 1976 is that of identification of bonded labour...
- 48 We accordingly allow this writ petition and issue the above directions to the Central Government and the State of Haryana and the various authorities mentioned in the preceding paragraphs of this judgement so that these poor unfortunate workmen who lead a miserable existence in small hovels, exposed to the vagaries of weather, drinking foul water, breathing heavily dust-laden polluted air and breaking and blasting stone all their life, may one day be able to realise that freedom is not only the monopoly of a few but belongs to them all and that they are also equally entitled along with others to participate in the fruits of freedom and development. These directions may be summarised as follows.
- (1) The Government of Haryana will, without any delay and at any rate withihn six weeks from today, constitute Vigilance Committee in each sub-division of a district in compliance with the reuquirements of Section 13 of the Bonded Labour System (Abolition) Act 1976 keeping in view the guidelines given by us in this judgement.
  - (2) The Government of Haryana will instruct the district magistrates to take up the work of identification of bonded labour as one of their top priority tasks and to map out areas of concentration of bonded labour which are mostly to be found in stone quarries and brick kilns and assign task forces for identification and

- release of bonded labour and periodically hold labour camps in these areas with a view to educating the labourers inter alia with the assistance of the National Labour Institute.
- (3) The State Government as also the Vigilance Committees and the district magistrates will take the assistance of nonpolitical social action groups and voluntary agencies for the purpose of ensuring implementation of the provisions of the Bonded Labour System (Abolition) Act, 1976.
  - (4) The Government of Haryana will draw up within a period of three months from today a scheme or programme for rehabilitation of the freed bonded labourers in the light of the guidelines set out by the Secretary to the Government of India, Ministry of Labour in his letter dated 2nd September 1982 and implement such scheme or programme to the extent found necessary.
  - (5) The Central Government and the Government of Haryana will take all necessary steps for the purpose of, ensuring that minimum wages are paid to the workmen employed in the stone quarries and stone crushers in accordance with the principles laid down in this judgement and this direction shall be carried out within the shortest possible time so that within six weeks from today, the workmen start actually receiving in their hands a wage not less than the minimum wage.
  - (6) If payment of wages is made on truck basis, the Central Government will direct the appropriate officer of the Central Enforcement Machinery or any other appropriate authority or officer to determine the measurement of each truck as to how many cubic ft. of stone it can contain and print or inscribe such measurement on the truck so that appropriate and adequate wage is received by the workmen for the work done by them and they are not cheated out of their legitimate wage.
  - (7) The Central Government will direct the inspecting officers of the Central Enforcement Machinery or any other appropriate inspecting officers to carry out surprise checks at least once in a week for the purpose of ensuring that the trucks are not loaded beyond their true measurement capacity and if it is found that the trucks are loaded in excess of the true measurement capacity, the inspecting officers carrying out such checks will immediately bring this fact to the notice of the appropriate authorities and

- necessary action shall be initiated against the defaulting mine owners and/or thekedars or jamadars.
- (8) The Central Government and the Government of Haryana will ensure that payment of wages is made directly to the workmen by the mine lessees and stone crusher owners or at any rate in the presence of a representative of the mine lessees or stone crusher owners and the inspecting officers of the Central Government as also of the Government of Haryana shall carry out periodic checks in order to ensure that the payment of the stipulated wage is made to the workmen.
  - (9) The Central Board of Workers Education will organise periodic camps near the sites of stone quarries and stone crushers in Faridabad district for the purpose of educating the workmen in the rights and benefits conferred upon them by social welfare and labour laws and the progress made shall be reported to this Court by the Central Board of Workers Education at least once in three months.
  - (10) The Central Government and the Government of Haryana will immediately take steps for the purpose of ensuring that the stone crusher owners do not continue to foul the air and they adopt either of two devices, namely, keeping a drum of water above the stone crushing machine with arrangement for continuous spraying of water upon it or installation of dust sucking machine and a compliance report in regard to this direction shall be made to this Court on or before 28th February, 1984.
  - (11) The Central Government and the Government of Haryana will immediately ensure that the mine lessees and stone crusher owners start supplying pure drinking water to the workmen on a scale of at least 2 litres for every workman by keeping suitable vessels in a shaded place at conveniently accessible points and such vessels shall be kept in clean and hygienic condition and shall be emptied, cleaned and refilled every day and the appropriate authorities of the Central Government and the Government of Haryana will supervise strictly the enforcement of this direction and initiate necessary action if there is any default.
  - (12) The Central Government and the Government of Haryana will ensure that minimum wage is paid to the women and/or

children who look after the vessels/in which pure drinking water is kept for the workmen.

- (13) The Central Government and the Government of Haryana will immediately direct the mine lessees and stone crusher owners to start obtaining drinking water from any unpolluted source or sources of supply and to transport it by tankers to the work site with sufficient frequency so as to be able to keep the vessels filled up for supply of clean drinking water to the workmen and the Chief Administrator, Faridabad Complex will set, up the points from where the mine lessees and stone crusher owners can, if necessary, obtain supply of potable water for being carried by tankers.
- (14) The Central Government and the State Government will ensure that conservancy facilities in the shape of latrines and urinals in accordance with the provisions contained in Section 20 of the Mines Act, 1950 and Rules 33 to 36 of the Mines Rules 1955 are provided at the latest by 15th February 1984.
- (15) The Central Government and the State Government will take steps to immediately ensure that appropriate and adequate medical and first aid facilities as required by Section 21 of the Mines Act 1952 and Rules 40 to 45A of the Mines Rules 1955 are provided to the workmen not later than 31st January 1984.
- (16) The Central Government and the Government of Haryana will ensure that every workmen who is required to carry out blasting with explosives is not only trained under the Mines Vocational Training Rules 1966 but also holds first aid qualification and carries a first aid outfit while on duty as required by Rule 45 of the Mines Rules 1955.
- (17) The Central Government and the State Government will immediately take steps to ensure that proper and adequate medical treatment is provided by the mine lessees and owners of stone crushers to the workmen employed by them as also to the members of their families free of cost and such medical assistance shall be made available to them without any cost of transportation or otherwise and the doctor's fees as also the cost of medicines prescribed by the doctors including hospitalisation charges, if any, shall also be reimbursed to them.

## TRAFFICKING AND THE LAW

- (18) The Central Government and the State Government will ensure that the provisions of the Maternity Benefit Act 1961, the Maternity Benefit (Mines and Circus) Rules 1963 and the Mines Creche Rules 1966 where applicable in any particular stone quarry or stone crusher are given effect to by the mine lessees and stone crusher owners.
- (19) As soon as any workman employed in a stone quarry or stone crusher receives injury or contracts disease in the course of his employment, the concerned mine lessee or stone crusher owner shall immediately report this fact to the Chief Inspector or Inspecting Officers of the Central Government and/or the State Government and such Inspecting Officers shall immediately provide legal assistance to the workman with a view to enabling him to file a claim for compensation before the appropriate court or authority and they shall also ensure that such claim is pursued vigorously and the amount of compensation awarded to the workman is secured to him.
- (20) The Inspecting Officers of the Central Government as also of the State Government will visit each stone quarry or stone crusher at least once in a fortnight and ascertain whether there is any workman who is injured or who is suffering from any disease or illness, and if so, they will immediately take the necessary steps for the purpose of providing medical and legal assistance.
- (21) If the Central Government and the Government of Haryana fail to ensure performance of any of the obligations set out in Clauses 11, 13, 14 and 15 by the mine lessees and stone crusher owners within the period specified in those respective clauses, such obligation or obligations to the extent to which they are not performed shall be carried out by the Central Government and the Government of Haryana.
- 49 We also appoint Shri Laxmi Dhar Misra, Joint Secretary in the Ministry of Labour, Government of India as a Commissioner for the purpose of carrying out the following assignment.
- (a) He will visit the stone quarries and stone crushers in Faridabad district and ascertain by enquiring from the labourers in each stone quarry or stone crusher in the manner set out by us whether any of them are being forced to provide labour and are bonded labourers and he will prepare in respect of each

stone quarry or stone crusher a statement showing the names and particulars of those who, according to the inquiry made by him, are bonded labourers and he will also ascertain from them whether they want to continue to work in the stone quarry or stone crusher or they want to go away and if he finds that they want to go away, he will furnish particulars in regard to them to the District Magistrate, Faridabad and the District Magistrate will, on receipt of the particulars from Shri Laxmi Dhar Misra, make necessary arrangements for releasing them and provide for their transportation back to their homes and for this purpose the State Government will make the requisite funds available to the District Magistrate.

- (b) He will also enquire from the mine lessees and owners of stone crushers as also from the thekedars and jamadars whether there are any advances made by them to the labourers working in the stone quarries or stone crushers and if so, whether there is any documentary evidence in support of the same and he will also ascertain what, according to the mine lessees and owners of stone crushers or the Jamadar or Thekedar, are the amounts of loans still remaining outstanding against such labourers.
- (c) He will also Ascertain by carrying out sample check whether the workmen employed in any particular stone quarry or stone crusher are actually in receipt of wage not less than the minimum wage and whether the directions given in this order in regard to computation and payment of minimum wage are being implemented by the authorities.
- (d) He will conduct an inquiry in each of the stone quarries and stone crushers in Faridabad District for the purpose of ascertaining whether there are any contract labourers or inter-State migrant workmen in any of these stone, quarries or stone crushers and if he finds as a result of his inquiry that the Contract Labour Act and/or the Inter-State Migrant Workmen Act is applicable, he will make a report to that effect to the Court.
- (e) He will ascertain whether the directions given by us in this judgement regarding effective arrangement for supply of pure drinking water have been carried out by the mine lessees and stone crusher owners and pure drinking water has been made available to the workmen in accordance with those directions.



- (f) He will also ascertain whether the mine lessees and owners of stone crushers in each of the stone quarries and stone crushers visited by him have complied with the directions given by us in this judgement regarding provision of conservancy facilities.
  - (g) He will also ascertain whether the directions given by us in this judgement in regard to provision of first aid facilities and proper and adequate medical treatment including hospitalisation to the workmen and the members of their families are being carried out by the mine lessees and stone crusher owners and the necessary first aid facilities and proper and adequate medical services including hospitalisation are provided to the workmen and the members of their families.
  - (h) He will also enquire whether the various other directions given by us in this judgement have been and are being carried out by the mine lessees and stone crusher owners.
- 50 Shri Laxmi Dhar Misra will carry out this assignment entrusted to him and make his report to the Court on or before 28th February 1984. It will be open to Shri Laxmi Dhar Misra to take the assistance of such other person or persons as he thinks fit including officers or employees in the Ministry of Labour or in the Ministry of Mines, who may be made available by the higher authorities. If Shri Laxmi Dhar Misra finds it necessary, he may request the Court to extend the time for submitting his report by addressing a letter to the Registry of the Court. The State of Haryana will deposit a sum of Rs. 5000 within two weeks from today for the purpose of meeting the costs and out of pocket expenses of Shri Laxmi Dhar Misra.
- 51 We have no doubt that if these directions given by us are honestly and sincerely carried out, it will be possible to improve the life conditions of these workmen and ensure social justice to them so that they may be able to breathe the fresh air of social and economic freedom. The Central Government and the State of Haryana will pay to the petitioner's advocate a sum of Rs. 5000 by way of costs. We are grateful to Mr. Govind Mukhoty for rendering valuable assistance to us in this case.

## IN THE HIGH COURT OF DELHI

**Bachpan Bachao Andolan vs. Union of India and Others**

Decided on 23.01.2009

**Hon'ble Judges:**

K.G. Balakrishnan, C.J. and Sanjiv Khanna, J.

1. In the status report it is stated that 23 minor girls, 4 minor boys and 9 major girls/women were rescued pursuant to search operations at Sheetal Enterprises, H-11, First Floor, Sakarpur, JJ Colony, New Delhi. In the status report it is stated that FIR No. 20/2009 under Section 406 of the Indian Penal Code has been recorded by the Police Station, Saraswati Vihar. It is also admitted that no one has been arrested.
2. Learned Counsel for the petitioner has drawn our attention to joint publication of the Standard Operating Procedures by Government of India and United Nations in respect of investigation of crimes for trafficking in forced labour. The status report does not reveal compliance with the guidelines mentioned therein. It appears that the police officers concerned have not investigated and proceeded further with reference to the guidelines. Learned Counsel for the petitioner has also drawn our attention to provisions of Sections 366A, 367, 370, 371, 372, 373 and 374 of the Indian Penal Code, 1860, Bonded Labour System Abolition Act, 1976, the Child Labour (Prohibition and Regulation) Act, 1986 and Sections 23 and 26 of the Juvenile Justice (Care and Protection of Children) Act, 2000. It is stated that all the aforesaid Acts and Provisions are also applicable and the investigations or proceedings have proceeded on a wrong basis, without noticing the offences committed under the said enactments/Sections.
3. Our attention has also been drawn to the complaint made by Mr. Hem Bahadur on the basis of which action was taken by Bachpan Bachao Andolan and Delhi Commission for Women. In the said complaint, it is mentioned that Mr. Hem Bahadur's sister, sister-in-law and two other friends were enticed to come to Delhi. It is further stated that Mr. Hem Bahadur has tried to get in touch with Mr. Ajay Thapa alias Ajay Singh on his mobile numbers to know the whereabouts of the said persons but Mr. Ajay Thapa avoided giving details and even gave wrong numbers.

4. Mr. Hem Bahadur, it is admitted by the learned Counsel appearing for Delhi Police, is missing since 15th January, 2009. Learned Counsel also admits that no effective steps have been taken to locate and find out whereabouts of Mr. Hem Bahadur. However, it is claimed that this is on account of non-availability of photograph and description of Mr. Hem Bahadur.
5. The approach and the explanation given by Delhi Police cannot be accepted. Serious allegations were made by Mr. Hem Bahadur in his complaint and it is the duty and responsibility of Delhi Police to further investigate and locate Mr. Hem Bahadur. Even with regard to the rescued children/women, the approach of Delhi Police has been completely lackadaisical. It is apparent that they have not realised the sensitivity and efforts which have to be made to stem crime relating to exploitation of children and females. Virtually no investigation has been done with reference to various provisions of the Indian Penal Code, 1960 and various other enactments mentioned above. The Standard Operating Procedures prescribed by the Government of India have been given complete go-bye. We are not satisfied with the status reports and steps taken by the Delhi Police.
6. We were inclined to summon Commissioner of Police, Delhi and ask him to personally give directions and oversee the investigation in the present case. However, learned Counsel for the Delhi Police has prayed for one week's time and states that effective and proper steps for investigation will be taken within this period while keeping in mind the Standing Operating Procedures. It is stated that the investigation will cover all aspects and provisions of Indian Penal Code and other enactments and action will be taken as per law.
7. In these circumstances, we are adjourning the matter to 28th January, 2009 at item No. 1 in the Supplementary List.

Delhi Police will file status report on the said date.

Copy of this order be given dasti to the learned Counsel for the parties under signature of the Court Master.

## IN THE HIGH COURT OF DELHI

**Bachpan Bachao & Ors. vs. Union of India & others  
And Shramjivee Mahila Samity vs. State & Others  
And Kalpana Pandi vs. State**

Decided on 24.12.2010

**Hon'ble Judges:**

A.K. Sikri and A. Bharihoke J,J.

1. In all these three writ petitions filed in public interest, a disturbing problem which our society faces, day in and day out, has been highlighted. This conundrum relates to child trafficking. It is this menace prevailing in our society, which has been raised in all these writ petitions, albeit from different perspective. However, the primary objective and aim of all these writ petitions remains the same, viz., how to eradicate, or at least reduce to significant level, this peril. In order to appreciate the issue, we shall take note of the facts which have led to the filing of these writ petitions.
2. The Respondent No. 4, viz., Sahyog Placement Sanstha is a placement agency, which makes arrangements for providing domestic helps to the residents of this city. Sometime in March, 1999, the Petitioner handed over her daughter to this Sanstha, whose sole proprietor is Sunita Sen, for placement of her daughter as domestic help in some residence. The reason was that the Petitioner had fallen serious sick for a long duration, which compelled her to stay at home, as she was not able to work because of the said sickness.
4. It is averred in the petition that in April 1999 when the Petitioner recovered from her illness, she was informed that her daughter Jharna was missing since 29.08.2000. The Petitioner had no other option left but to approach the police station and to seek help to trace her daughter. She lodged an FIR in the Vasant Kunj Police Station on 02.02.2001 under Section 363 of Indian Penal Code. However, case did not progress much due to non-appearance of the Respondent No. 4. On 23.05.2002, she filed the instant petition in the nature of habeas corpus seeking direction against the Respondent No. 4 to produce the Petitioner's daughter, Jharna forthwith.
6. The Court also deemed it proper to also treat this as public interest litigation. Based on the aspects highlighted in the order dated

04.10.2004 passed in this writ petition:

Two distinct issues arise for consideration in this writ petition. One of these relates to the tracing and production of the missing minor girl named Jharna Pandit. Reports submitted by the investigating agency from time to time show that steps to trace out the missing girl have been taken but without much success. We need only say that the investigating agency shall take effective steps in the matter and report the progress to this Court from time to time.

The second question that arises for consideration, relates to the functioning of different placement agencies working in the NCT of Delhi. It is pointed out by Ms. Arpana Bhatt that there are as many as 123 such agencies functioning in Delhi. These agencies apart from other placement work carried on by them engage themselves in placement of children in various establishments including as domestic help. There is, according to Ms. Bhatt, no statutory control over the functioning of these agencies. The result is that children who are either picked up from the streets or brought from various other States to Delhi are first placed as domestic help and later shifted to other more hazardous work including some who are pushed into prostitution. The absence of any regulatory control over the functioning of these agencies which are run on commercial lines for profit, according to the learned Counsel, defeats the very spirit of the Juvenile Justice (Care and Protection of Children) Act 2000. She submits that while Section 31 of the said Act vests the Juvenile Child Welfare Committees with extensive powers, the absence of appropriate rules and regulations for the exercise of that power has virtually rendered the said provision nugatory. She states that the Child welfare Committees functioning in Delhi have received a number of complaints regarding abuse of the children working as domestic helps in households.

In the circumstances, therefore, we direct that the Child Welfare Committee in Delhi shall, before the next date of hearing, submit to this Court a detailed report regarding the complaints received by them about child abuse, in case where children are placed with households to work as domestic servants/help, the nature of the allegation as also the action which the committees have taken on the same.

The Secretary, Social Welfare Department, Government of Delhi shall also remain present and indicate whether any rules have been

framed or can be framed in terms of Section 68 read with 31 of the Act aforementioned to regulate the exercise of the powers by the committees and in particular to regulate the functioning of the placement agencies dealing with domestic child labour.

7. Magnitude of the problem was taken note of in the orders of 25.10.2004 when the Chairman of Child Welfare Committee submitted their report in this behalf. We would be well-advised to reproduce that order as well:

The Chairman of the Child Welfare Committee stated that there were a large number of complaints suggesting abuse of domestic child labour. She has filed before us a list of such cases in which complaints of abuse and maltreatment were received by the Committee. She submits that the Committee is often handicapped in dealing with such complaints because of lack of particulars regarding the placement agency and the employers.

The Secretary, Social Welfare Department, Govt. of Delhi, on the other hand, submits that the question whether rules can and ought to be framed to regulate the functioning of the placement agencies is a matter that shall have to be examined in greater detail at the Government level, before any definite step is taken in these proceedings. These proceedings shall, therefore, stand adjourned to be posted again on 14th January, 2005, by which time the question whether rules can and ought to be framed under the under Sections 31 and 68 of the Juvenile Justice (Care and protection of Children) Act, 2000 shall be examined by the Government and a clearcut stand taken in that regard in an affidavit shall be filed in these proceedings.

Order be given dasti to both the parties.

8. Jharna was ultimately traced out and the custody was handed over to the Petitioner. Thereafter, this petition has proceeded to tackle the issues to regulate the functioning of the placement agencies especially who were dealing with domestic child labour and provides women and children as domestic help so that such incidents do not occur in future through the instrumentalities of these placement agencies.
9. The Petitioner in this writ petition as 'Bachpan Bachao', another N.G.O. In this public interest litigation, the problem which is highlighted is that several thousand minors are kidnapped and

trafficked from various states and brought to Delhi and sold for the purposes of prostitution, begging, drug peddling, slavery, forced labour including bondage, and for various other crimes and who are still stranded in various parts of Delhi against their wishes and are waiting to be rescued. Thus, prayer herein made to direct to take Respondents to take appropriate measures for the immediate rescue and release of all such minor children. Further, prayer is also made to the effect that directions are issued to the Respondent for the protection of fundamental rights of such children and for their proper rehabilitation, social reintegration and education who are released from various illegal placement agencies and other places in the NCT of Delhi. Direction is sought to the effect that the Respondent should formulate and to bring into immediate effect a specific and stringent law to deal with such illegal placement agencies.

10. Highlighting the problem, all these placement agencies and absence of law to regulate them, it is averred that according to a survey, only 173 placement agencies are running in districts which is not correct at all. In fact, about 2300 illegal placement agencies are running at present in the GNCT of Delhi and in Saraswati Vihar area.
11. Hembahadur had approached the office of Bachpan Bachao Andolan (BBA) and requested to help in the rescue of his sister and sister-in-law from Ajay Thapa placement agency. For the last one year, Hembahadur was unable to contact his sister and her friends. Ajay Thapa refused to provide him the contacts/addresses of his sister and other girls. This raised serious doubts in Hembahadur's mind that the girls had been sold by Ajay Thapa and he got very concerned for their welfare and under these circumstances, he came in contact with BBA activists and decided to take steps for finding and rescuing the girls.
12. The Petitioner approached the Delhi Commission for Women on 12.01.2009 and with its help, thereafter; a joint rescue operation was conducted on 13.01.2009. In the said operation, 35 girls and 03 boys were rescued from some of these placement agencies already named above. 23 out of 35 girls and three boys were below the age of 14. During the raid, a lot of objectionable material including pornographic C Ds, illicit literature, pregnancy test kits and contraceptives, etc. raising doubts about the real

purpose behind running of these placement agencies. It is in this backdrop that various prayers including those mentioned above have been made in this writ petition.

13. This writ petition is filed by Shramjeevi Mahila Samiti, which is an N.G.O. operating in Kolkata, West Bengal. Similar problem of trafficking, kidnapping, forced labour and bondage of 298 women and children is spelt out in this petition. The Petitioner has prepared a compilation of over 150 complaints made to them by the parents/relatives of the trafficked victims and craves leave to refer to and rely on the said compilation. Some of the persons who were earlier employed and who had managed to get back to West Bengal had also met the Petitioner's organisation and even complained that they were physically compelled to do forced labour. Some of them complained of sexual abuse by the employer. They complained that the placement agencies were not paying and not ensuring payment to the persons as promised.

**Re: The Problem and Concerns:**

16. It is in the aforesaid factual backdrop of all the three cases, the issue with which we are concerned relates to the forced child labour and regulation of placement agencies. Because of the commonalities of this issue in these three petitions were listed together from time to time and common orders were passed therein from a particular stage.
17. The Indian Constitution specifically bans the trafficking of persons. Article 23, in the Fundamental Rights, Part III of the Constitution, prohibits "traffic in human beings and other similar forms of forced labour". Though there is no concrete definition of trafficking, it could be said that trafficking necessarily involves movement/transportation, of a person by means of coercion or deceit, and consequent exploitation leading to commercialisation. The abusers, including the traffickers, the recruiters, the transporters, the sellers, the buyers, the end-users etc., exploit the vulnerability of the trafficked person. Trafficking shows phenomenal increase with globalisation. Increasing profit with little or no risk, organised activities, low priority in law enforcement etc., aggravate the situation. The two principal Indian laws that addresses the trafficking and prostitution in particular are the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) and the Immoral Traffic (Prevention) Act, 1986 (ITPA), colloquially called



PITA, and amendment to SITA. Neither law prohibits prostitution per se, but both forbids commercialised vice and soliciting.

18. India is also a signatory to international conventions such as the Convention on Rights of the Child (1989), Convention on Elimination of all forms of Discrimination Against Women (1979), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) and the latest South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002). A trafficked victim is therefore, a victim of multiplicity of crimes, and extreme form of abuse and violation of human rights. At present, the legal regime to trafficking of women and children for commercial sexual exploitation includes the following:
  - A) Indian Penal Code, 1960;
  - B) ITPA, 1956;
  - C) J.J. Act, 2000;
  - D) Special laws of various states;
  - E) Rulings of Supreme Court and High Court.
19. The Government had itself admitted the seriousness of the problem. The report prepared by Mr. Gopal Subramaniam, learned Solicitor General of India and submitted in Bachpan Bachao petition, it is stated that the trafficking in human beings is not a new phenomenon. Women, children and men have been captured, bought and sold in market places for decades. Estimates of the United Nations state that 1 to 4 million people are trafficked worldwide each year. Trafficking in women and children is an operation which is worth more than \$10 billion annually.

Trafficking is now defined as an organised crime against humanity. The definition of trafficking is significant:

... The recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation...

It is further submitted by the learned Solicitor General that children under 18 years of age cannot give a valid consent. It is further submitted that any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used. Three significant elements constitute trafficking:

- (a) The action involving recruitment and transportation;
- (b) The means employed such as force, coercion, fraud or deception including abuse of power and bribes; and
- (c) The preliminary purpose being of exploitation including prostitution, etc.

21. However, our focus has to be on the issue as to how to have proper control of administration over the placement agencies so that the exploitation of children is obliterated/ minimised to the possible extent, as that is the issue raised in these Petitioners are preferred.

**Re: Regulating the Placement Agencies:**

22. The main concern of all the counsel in these writ petitions was that there was no comprehensive legislation regulating the placement agencies to take care of the menace. In the order dated 04.10.2004, this Court had highlighted two issues, which arise in these writ petitions, viz., tracing and production of children on the one hand and functioning of different placement agencies working in NCT of Delhi on the other hand. However, directions were given to the Government of NCT, Delhi by that order, to provide framework within which the placement agencies could be regulated and monitored.

23. Pursuant to the aforesaid direction, the State Government filed the affidavit contending that it was not possible to frame guidelines for monitoring the placement agencies. Instead, it was suggested that steps would be taken for making registration under the Delhi Shops and Establishment Act mandatory, whereby the placement agencies could also be regulated. The necessary amendment in the aforesaid Act has since been made. No doubt, that may be a big step for regulating the placement agencies, the contour of the problem could not be checked merely with these amendments. The counsel for the Petitioners impressed upon the Court that the Court should also pass certain guidelines as well. Before it could be done, counsel for the Petitioners were asked to prepare a comprehensive

note indicating the existing legislation or rules and in the absence of any legislation, to suggest the lines on which a fresh legislation can be enacted for this purpose. Order in this behalf was passed on 08.12.2006, which reads as under:

After hearing Learned Counsel for the parties, it appears that the Writ Petition has been filed only for registering, regulating, monitoring and supervising the working of Placement Agencies that provide employment to women and children as domestic help.

According to Learned Counsel for the Petitioner some steps need to be taken to ensure that some responsibility is placed upon the Placement Agencies and they should not be allowed to carry on their activities unchecked because several instances of abuse of women and children, who have been employed as domestic servants, have come to the notice to the Petitioner and others.

24. In response, Ms. Arpita Bhat, learned Counsel appearing for the Petitioner in WP(Crl.) No. 619 of 2002 brought to the notice of this Court the legal position contained in different statutes in the following manner:

**Registration:**

As far as registration is concerned, the proposal of the Government to register them under the Delhi Shops and Establishments Act and make the registration mandatory is acceptable. However, following the registration process, a mechanism to regulate the manner in which the agencies function has to be created. The Petitioner makes the following proposal.

Domestic workers who are being placed by the agencies can be classified as children and adults. Children will be between the age group of 14 and 18 years and the adults persons above 18 above.

**Children:**

There are various dealing with the rights and welfare of children including children who are working. Three legislations which can be mentioned in this context are:

- i. The Child Labour (prohibition and regulation) Act, 1986;
- ii. The Bonded Labour System (Abolition) Act, 1976;
- iii. The Juvenile Justice (care and protection of children) Act, 2000;

### **Child Labour (Prohibition and Regulation) Act, 1986.**

It has been seen that domestic labour is not given the status of labour by any legislation. The Child Labour (Prohibition and Regulation) Act, 1986, sought to address the problem of child labour in the Country. The Act has serious flaws. The act applies to children upto the age of 14 years. The act thereafter classifies work into two broad categories, hazardous and non-hazardous sectors. It is submitted that while all the hazardous industries as classified by the Act does fall within the hazardous industry, there are a large number of sectors which are left out. In fact, the ideal approach, if at all the classification was necessary, would have been to classify on the basis of processes rather than the end product. From October 10, 2006, domestic work has also been classified as falling under hazardous work. In any event, even though, children below the age of 14 are prohibited from being employed, there is very little that the Act does to enable implementation of this principle. Some State Governments, understanding that domestic work was in fact making the child more vulnerable, took some initiatives and had passed some local notifications and guidelines which had been in force before the notification of the Central Government banning child labour from domestic work came into force. These are:

#### **Tamil Nadu**

Amendment to Schedule under Tamil Nadu Manual workers (regulation and Employment and Conditions of Work Act) Under this particular Amendment of January 28, 2000 Employment in Domestic Works was added to the said Schedule of the Act.

#### **Karnataka Effective from 1st April, 2004.**

Amendment to the Minimum wages Act for the state of Karnataka, Stipulations have been laid out for the remuneration due to a domestic help based on the nature of the work as well as the number of hours put in.

Washing Utensils - 45 minutes - ` 150

Washing Utensils, clothes house keeping, taking care of children-8 Hours, ` 1600

There is also a notification issued by the Government of Karnataka banning employment of child domestics by Government employees.

Even though the law has come into force, there has not been any scheme or policy or guidelines which would indicate the manner in which children already in employment would be rescued and rehabilitated. Since “domestic work” has been now classified as hazardous industry by the Act, the regulation mechanisms within the Act would come into play and the inspectors appointed under the Act are under a mandate to enforce the same.

### **Juvenile Justice (Care and Protection of Children) Act, 2000**

Children are governed by the Juvenile Justice (care and protection of children) Act, 2000. The Juvenile Justice Act, which is supposed to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles has certain mandates.

25. By an amendment in 2006, working children are also included under the definition of children who are in need of care and protection. Children who are placed as domestic servants clearly fall under the definition of the child in need of care and protection. To address the need of children who are in need of care and protection, the Act has created a quasi judicial institution called the Child Welfare Committee.

Section 29 of the Act creates the child welfare committee. As per Section 31 of the Act, the Committee shall have the final authority to dispose the cases for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights.

The CWC therefore has the authority to look into cases of children who are vulnerable not just to provide them redressal in cases of abuse but to also ensure that they are protected, cared and rehabilitated if required. The CWCs have under them various fit institutions which are set up by the Non-Governmental organisations as well as institutions set up by the Government to ensure that children are provided safe shelter with food and other basic amenities.

The CWCs also have been taking action against individual employers who have been withholding wages, making children work in exploitative situation etc.

**Adults:**

With respect to adult women who are employed in various household, the regulating mechanism prescribed under the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 can be adapted. The Act is notified and implemented in the State of Delhi.

This Act is an act to regulate the employment of inter-state migrant workers. Under this Act, there is compulsory licensing of contractors. It applies to every contractor who employs or who employed five or more inter-state migrant workers on any day in the preceding twelve months. Contractor is defined under Section 2(b) of the Act.

26. While this Act has been made applicable primarily to workers in the formal sector, the definition of the contractor squarely covers the manner in which placement agencies function and in the absence of a direct legislation to deal with placement agencies for the domestic help, the mechanisms within the act can be used. These mechanisms include licensing, grant, revocation, suspension and amendment of licenses, specifies duties of the contractor, recommends filing of reports which includes list of persons employed through the contractor with details of their wages, levies responsibility on the contractor to ensure that timely payments are made. A combined reading of the aforesaid legislations will empower the Government to:
- (a) Register the placement agencies both under the Shops and Establishments Act as and when registration becomes mandatory and under the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 with immediate effect;
  - (b) Direct the licensing authorities under the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 to grant licenses to the placement agencies as "contractor" for a specified period of time and make them furnish records as per the requirements under the Act;
  - (c) Direct the inspectors appointed under the Child Labour (Prohibition and regulation) Act, 1986 to ensure that children

below 14 are not employed as domestic help and regulate the conditions of employment of children in the age group of 14-18;

- (d) Direct the Licensing authority under the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 to supply a copy of their records to the Child Welfare Committees who in turn will ensure that children who are placed by these contractors are cared for properly;
- (e) Ensure that the Child Welfare Committees are enabled by framing model rules with respect to working children and their rehabilitation needs;
- (f) Direct that children below 14 who are rescued are either repatriated, re-integrated or rehabilitated by the intervention of the Child Welfare Committee;
- (g) In cases of abuse which are covered by the Penal Code, these agencies either collectively or individually help prosecute the perpetrator.

27. The above legislations can be used to register the agencies and monitor them to ensure that domestic workers are provided with protection as per guidelines, which have been placed on record by the Petitioner following discussions with the Government.

31. After highlighting the problem of trafficking of children and women and the magnitude thereof, the learned Solicitor General has suggested that every State Government must have a set of guidelines of NGO's which want to assist in inquiries/fact-finding and rescue operations. These suggestions given in the said Report are as under:-

12. Every state government must have a set of guidelines for NGO's which want to assist in inquiries/fact finding and rescue operations. It is submitted that the guidelines published in Bernard Boetoen's "An NGO's PRACTICAL GUIDE IN THE FIGHT AGAINST CHILD TRAFFICKING" are significant and should be adopted as valuable guidelines.

- a) Evaluation of existing or potential risks for the child involved, the NGO undertaking enquiry/investigation/fact-finding/rescue and, for eventual partners (persons, association etc) is important. Wrong information may be sent out to divert

- attention from a real case of trafficking. There is also a risk for those engaged in investigations and rescue operations of being trapped into false accusation;
- b) Never simulate being the trafficker alone, in order to establish proof (it can happen that the representative of an NGO judges that she/he can establish proof by playing the role of a client interested in purchasing children. This can easily turn against her/him and she/he may be obliged to prove at a later stage that she/he was in fact playing a role);
  - c). Operate in a group of at least two or more persons if there is a plan to follow the traffickers or trace a deal as part of the preliminary enquiry if possible, identify people or groups who can be potential partners in fact-finding/investigation/rescuing the child or, in facilitating and participating in legal action for protecting the child and prosecuting the offender;
  - d) Where accessibility to the child, her/his family/relatives/friends, people in neighborhood is possible, use non-threatening, non-intrusive questions with great care and sensitivity to seek any information;
  - e) Evaluate the risk of further victimisation of the child and evolve ways and means to become a companion and confidante for the victimised child;
  - f) Maintain the confidentiality of the child, avoid taking pictures, videos, tape recording etc and under no circumstances should this be breached as it could endanger the child's life;
  - g) Be prepared to help the child in terms of immediate removal from victimisation and ensuring trauma counseling;
  - h) Reliability of the information received and the fact of trafficking must be confirmed by reaffirming the address/name/identity of person(s) involved (the child, the alleged offender(s), child's family surrounding in which the child is confined or kept etc.). It does not imply imputing any conclusion or judgement on the case;
  - i) Be as precise as possible in relation to the elements that constitute a case of trafficking: on the description of the location, the dates, the time, the numbers, the nationality and the description of the persons present, their presumed age,



their clothes, the vehicles used for transporting the victims, the length of the trips (night, day etc...); the brutality suffered, the food and drinks given, the financial transactions etc.;

- j) Put everything into writing, and indicate what is verified and what is assumed, what is direct testimony and what is indirect testimony through a third party, what are rumors etc. This will help analyse the information gathered, Assessee areas/issues on which more information is required and devise ways of doing so. Written observation can go a long way in conducting further inquiry and investigation. Even while assisting in the prosecution of offenders as a witness, the written observations prove a great help. Never forget that at a later date the investigator will be called in the judicial process as a witness, and the information will be submitted for cross-examination by the counsel for the defence;
- k) Keep the witnesses and victims anonymous in the first written report. Only deliver the names when submitting to the police or the CWC or at the judicial stage;
- l) Be ready to pursue the case (complaint/FIR/evidence/cross-examination/psycho-legal support to the victim/rehabilitation and reintegration of the victim).

32. Thereafter the learned Solicitor General has suggested certain guidelines which police must follow in this behalf. Following suggestions are mooted in this Court, which are as under:-

13. The police must follow certain guidelines as well. It is submitted that the following guidelines should be mandated:-

- i. Care must be taken to ensure the confidentiality of the child and due protection must be given to her/him as a witness;
- ii. The detailed interview of the victim should be done preferably by crisis intervention centres/members of the Child Welfare Committee under the Juvenile Justice Act. There should be adequate breaks and intervals during the interview with a child victim:
- iii. If the police employ a child friendly approach to the entire investigation, the possibility of getting all relevant information gets higher. This can be done by having a supportive environment for the child at the police station wherein attention is paid to his needs. This can be done at the police station itself

or at any other place co-managed by police and any NGO/CBO. Support persons for the child should be contacted and in their absence, any civil society group working with/for children or members of CWC (whoever the child feels comfortable with) could be asked to the present;

- iv. Due care must be maintained to attend to issues like interpreters, translators, record maintaining personnel, audio-video recording possibilities etc.;
- v. As far as possible, the same investigation officer must follow up the case from investigation stage to the trial stage;
- vi. There should be provision of food and water as well as toilet facilities for the child in the police station and the hospital;
- vii. No child should be kept in a Police Station;
- viii. Where a special juvenile police unit or a police officer has been designated to deal with crimes against children and crimes committed by children, cases relating to children must be reported by such officer to the Juvenile Justice Board or the child welfare committee or the child line or an NGO as the case may be.

34. Notwithstanding various laws and benevolent/welfare schemes, the reasons because of which the problem persists in is alarming magnitude as highlighted by the Ministry of Women and Child Development report which covers the following areas:

**Lack of prevention**

- Poor planning and coordination
- Services are negligible relative to the needs
- Poor infrastructure
- Inadequate human resources
- Serious service gaps

35. The learned Solicitor General has conceded that the above needs to be addressed by the interventional order of this Court in exercise of its extra-ordinary jurisdiction under the Constitution of India. In fact, directions of the following nature are solicited:

70. The above needs to be addressed by interventional orders of this Court in the exercise of its extraordinary jurisdiction under

the Constitution. Points of implementation must be identified. Each state government must identify an officer who is responsible for implementation of schemes in relation to children. The Integrated Child Protection Scheme is presently in place. The guiding principles are neatly formulated in this scheme. These must be implemented. The adoption programme will be governed by the following guiding principles:-

- i) Best interest of the child is paramount;
- ii) Institutionalisation (e.g. placement into residential care) of the child should be for the shortest possible period of time;
- iii) All attempts should be made to find a suitable Indian family within the district, state or country;
- iv) The child shall be offered for inter-country adoption only after all possibilities for national adoption, or other forms of family based placement alternatives such as placement with relatives (kinship care), sponsorship and foster care arrangements have been exhausted;
- v) All institutions should disclose details about children in their care and make sure that those free for adoption are filed and recorded with the State Adoption Resource Agency (SARA) and CARA, with all supporting documentation of authorisation of such adoption from CWC;
- vi) Inter-state coordination to match the list of Prospective Adoptive Parents (PA Ps) with that of available children should be done by SARAs;
- vii) No birth mother/parent(s) should be forced/coerced to give up their child for monetary or any other consideration; be for
- viii) Adoption process from the beginning to end shall be completed in the shortest possible time;
- ix) Monitoring, regulating and promoting the concept and practice of ethical adoptions in the country should be ensured;
- x) Agencies involved in the adoption process should perform their duties in a transparent manner, following rules of good governance and adhering to the professional and ethical code of conduct. Those agencies shall be reporting to and will be subject to rigorous auditing and supervision by responsible state bodies.

72. The ICPS programmes are now brought under one umbrella and are as follows:

- a) Care, support and rehabilitation services through child-line;
- b) Open shelters for children in need in urban/semi urban areas;
- c) Family based non-institutional care through sponsorship, foster care, adoption and aftercare.

75. In view of the directions suggested, the Child Welfare Committee must directly come under the supervision of the District Judge/Judge of the High Court, it is submitted that the above implementation must also be overseen by a Court-monitored mechanism.

76. There must be an annual report by CARA. The said report must be scrutinised by a secretary in charge of family and social welfare.

84. It is submitted that a direction be issued that all the Central Government/State Governments/Union Territories will cooperate to bring into effect the direction suggested above.

36. Since the Respondent/Government itself had volunteered and exhorted this Court to issue directions of the nature aforesaid by conceding that this Court has power to issue such directions in exercise of its extraordinary power under Article 226 of the Constitution, we hereby direct the Government of NCT of Delhi as well as Government of India to take steps in the manner suggested above treating the same as directions of this Court given in this order.
37. In addition, based on the suggestions given by the learned Counsel for the Petitioners in all these writ petition, we hereby give the following directions summarised as under:
  - (i) There is no comprehensive legislation to take care of the problem and multiple statutes with multiple authorities - for lack of coordination and disconnect among them - are not able to tackle the issue effectively. Therefore, there is a need to study this aspect, viz., feasibility of having a legislation to regulate employment of problem of children and adult women, who are working as domestic helps. Emphasis should be laid on the regulation of placement of agencies who provide such helps. We are making these observations also for the reason that the existing laws do not provide an effective

speedy remedial which could ensure that women and children are able to;

- (a) Seek recovery and wages,
- (b) Ensure freedom of movement,
- (c) Access shelter option in case of abuse before being able to go home.

Feasibility of having control of SD Ms of the areas on these placement agencies should also be worked out.

- (ii) Till that is achieved, which is allowing term measure, immediate concerned Respondent authority to ensure as to how various enforcement agencies of different statutes are able to work in a coordinated and cooperative manner. Necessary guidelines should be issued or rules framed in this behalf. If possible, single window enforcement agency be created so that the the NGO on behalf of such victims are able to approach the said agencies instead of knocking the doors of different authorities.
- (iii) For more effective implementation of the Juvenile Justice (Care and Protection of Children) Act 2000 and Delhi Commission for Women Act, following directions are issued:
  - (a) Labour Department will register all placement agencies. The registration process will be within a finite period of time. Failure to register within that prescribed time should invite penal action which can be prescribed by this Court.
  - (b) The registration process should not only be for agencies located in Delhi but also for all the agencies, who are placing women and children in homes located in Delhi. This suggestion is made in view of the apprehension expressed during discussions with the Labour Department that as soon stringent laws are brought into effect in Delhi, the agencies may shift out to the NCR region.
  - (c) The registration information should require:
    - 1) Details of the agencies;
    - 2) Number of persons, who are employed through the agencies, their names, ages and their addresses;
    - 3) Details of salaries fixed for each person;
    - 4) Addresses of the employers;

- 5) Period of employment;
- 6) Nature of work;
- 7) Details of the Commissions received from the employers.

(d) The information should be available for access to the Child Welfare Committee as well as the Delhi Commission for Women. During the discussions, the Labour Department had indicated that the information would be put up on the website. Till such time, the information should not be put up on the website, the records may be made available by the labour Department to the Commission and the Committee.

38. Various suggestions given by the Petitioner in W.P. (CrI.) No. 619 of 2002 and to take such remedial steps, which are necessary for implementation thereof, should be taken in consideration as stated by the Petitioner & as stated in paragraph 38 onwards herein be treated as the direction of this Court. We also direct the Respondent authorities to consider the following suggestions at the earliest:

**Duties of the Commission and the Committee:**

- a) The Committee and the Commission will have a duty to go through the records provided by the Labour Department.
- b) The Committee and the Commission will verify the information and the cases where information is found to be inadequate, seek further information from the placement agencies after duly summoning them. The Committee shall be authorised to sue the services of 'Childline', a service set up by the Ministry of Women and Child Development, Union of India and managed by NG Os to verify the information in appropriate cases. The Commission shall identify agencies who would assist them in verifying information with respect to adult women.
- c) The Committee and the Commission shall entertain complaints made by the domestic worker herself/himself or through her/his guardian, NG Os managing 'childline' services, the employer or the police in appropriate cases.
- d) The Committee or the Commission shall decide the complaints made within a period of 30 days.

### **Adjudication of the Complaints:**

The Committee and the Commission may hear the following types of cases:

- a) Withholding of agreed wages;
- b) Harassment including harassment by employer at the hands of the placement agencies;
- c) Harassment and/abuse by placement agency proprietor/staff at their premises or at work place;
- d) Non-compliance of the agreed terms;
- e) Abusive working conditions which is beyond the physical capacity of the child in cases where persons between the ages 14 and 18 are employed.
- f) Long hours of work;
- g) Lack of basic facilities including medical care and food.

### **Powers of the Committee/Commission:**

- (a) A committee and the commission will have powers to summon the placement agencies or the employer as the case may be on a complaint made by the domestic worker or her guardian or any person employing her;
- (b) Direct payment of wages as per agreed terms and in appropriate cases impose fines;
- (c) Direct payment of compensation in cases where severe injuries are caused to the domestic worker during the course of the work;
- (d) Direct medical assistance;
- (e) Direct the placement agency to comply with the agreement with the employer or return the commission where the terms are not complies with;
- (f) Impose fines on the placement agencies where it is found that terms of the agreement are not followed;
- (g) Direct legal aid to the child/woman where a criminal offence has happened;
- (h) Direct employers to inform the local police or the Committee/ Commission in cases where the domestic worker is missing within 24 hours;

(i) In cases where a domestic worker has been placed in a home against her wishes, enable her to leave her employment and direct the agency to return the commission paid by the employer back to the employer.

39. The Petitioner in W.P. (Crl.) No. 879 of 2007 has referred to Police Circular issued by DCP, Headquarters, New Delhi. This Circular requires the Delhi Police to:

- a) regulate the functioning of placement agencies;
- b) to ensure proper screening of domestic workers being recruited by placement agencies by maintaining the register of all such agencies;
- c) Ensure that the agencies enroll applicants on the basis of formal applications containing full details including the photographs and contact addresses of the applicants, the details of previous employers, etc.
- d) Verification of domestic workers is to be done by the Police.

The DCP has filed the response wherein it is stated that the matter was examined in detail and the guidelines stated in the Circular cannot be implemented as Delhi Police is already too overburdened with the law and order, security, inquiries and investigations, etc. It is also mentioned that to keep a check on the maintenance of registers, etc. of the placement agencies would not be feasible in the current scenario of heightened security concern. It is stated that the Circular is merely an executive instruction and non-compliance thereof cannot entail any penal consequence on the placement agencies. We are of the opinion that once such a circular is issued, it does not behove Delhi Police now to wriggle out of that on the pretext that this was for internal instructions and thereby refusing to adhere to the same. We, therefore, direct that the administration at the highest level in Delhi Police shall reconsider the feasibility of implementation of the instructions contained in the said.

42. These writ petitions are disposed of in the aforesaid terms. However, if any clarification for further consequential directions is needed, the Petitioners are given liberty to approach this Court by means of Miscellaneous applications in these writ petitions.



**IN THE HIGH COURT OF DELHI**

**Court of its own motion vs. Govt of NCT of Delhi**

**And**

**Save the Childhood Foundation vs. UOI and Others**

**And**

**Q.I.C & A.C. vs. Ministry of Labour & Employment & Anr**

**And**

**All India Bhrashtachar Virodhi Morcha (Regd.) vs. Karol Bagh**

**Bangiya Swaran Shilpi Samiti (Regd.) & Others**

Decided on 15.07.2009

**Hon'ble Judges:**

Manmohan, J.

3. To eliminate the menace of child labour and to effectuate the mandate of Articles 23, 24, 39, 45 and 47 of the Constitution, Supreme Court had given a large number of mandatory directions in "M.C. Mehta v. State of Tamil Nadu reported in AIR 1997 SC 699". One of the important directions was to direct an employer to pay a compensation of Rs.20,000/- for having employed a child below the age of 14 years in hazardous work in contravention of Child Labour (Prohibition & Regulation) Act, 1986 (hereinafter referred to as 'CLPRA, 1986'). The appropriate Government was also directed to contribute a grant/deposit of Rs.5,000/- for each such child employed in a hazardous job. The said sum of Rs.25,000/- was to be deposited in a fund to be known as Child Labour Rehabilitation-cum- Welfare Fund and the income from such corpus was to be used for rehabilitation of the rescued child.
4. As the constitutional mandate and statutory provisions with regard to children were not being vigorously implemented and there was lack of coordination between different agencies of the Government of NCT of Delhi and other authorities, this Court, vide a detailed order dated 24th September, 2008 directed the National Commission for Protection of Child Rights (hereinafter referred to as „National Commission), to formulate a detailed Action Plan for strict enforcement and implementation of CLPRA, 1986 and other related legislations. The National Commission was also directed to suggest measures for timely recovery and proper utilisation of

funds collected under the Supreme Courts direction in the aforesaid M.C. Mehta's case.

6. According to the National Commission, the child labour profile in Delhi is of two types namely, out-of-school children living with their parents in Delhi and migrant children from other states who have left their family behind.
7. The Action Plan for Total Abolition of Child Labour is based on two strategies. The first strategy is an 'Area Based Approach' for elimination of child labour, wherein all children in the age group of 6 to 14 years would be covered whether they are in school or out-of-school. The National Commission has proposed that this approach be initiated as a Pilot Project in North-West District of Delhi.
8. The second strategy is an approach to be adopted in the context of migrant child labour. It involves a process of identification, rescue, repatriation and rehabilitation of child labour. This strategy is proposed to be implemented as a Pilot Project in South Delhi District.
9. It is pertinent to mention that both the strategies in essence implement CLPRA, 1986, Delhi Shops and Establishment Act, 1954, Juvenile Justice (Care and Protection of Children ) Act, 2000 and the Bonded Labour System (Abolition ) Act, 1976.
10. One of the objectives of the Area Based Approach is to mobilise and build consensus on the issue of total abolition of child labour through universalisation of elementary education. The plan attains to mobilise and build consensus by holding public meetings, rallies and by involving Municipal Councilors, RWAs etc.
11. The Area Based Approach also aims to enroll all children in the age group of 6 to 14 years in schools and to withdraw them from work, while at the same time ensuring their retention in schools. This approach also seeks to integrate older children withdrawn from work in classes according to their age through programmes of various courses and accelerated learning. This objective is sought to be achieved by setting up Transitional Education Centres or Non-Residential Bridge Course Centres or Residential Bridge Course Camps as well as by holding Short Term Camps. This approach also aims to build local institutions for protection of Child Rights by forming Committees and Forums of Liberation of Child Labour

(Youth and Teachers Wings) as well as strengthening of Vidyalaya Kalyan Samitis and by implementing training and retention programmes on issues relating to Child Labour and Children Rights to Education along with tasks and roles of specific stakeholders.

12. The Strategy for Unaccompanied Migrant Child Labourers in Delhi is based on “Protocol on Prevention, Rescue, Repatriation and Rehabilitation of Trafficked and Migrant Child Labour” issued by Ministry of Labour and Employment, Government of India, 2008. According to the Action Plan, trafficked and migrant child labourers are primarily engaged in prohibited occupations such as zari, bulb manufacturing, auto workshop units and domestic household etc.
13. This strategy contemplates constitution of a Steering Committee on Child Labour at the State level and District Level Task Force on Child Labour at District Level.
14. The Delhi Action Plan provides for a detailed procedure to be adopted at the pre-rescue and actual rescue stage. The pre-rescue plan deals with as to how information is to be collected, verified and as to the composition of the rescue team as well as what training is to be imparted in advance to the members of the rescue team. The pre-rescue plan provides for prior preparation of residential centres through RBC, JJ Homes, NGO Shelter for accommodating the child labour proposed to be rescued.
15. The Delhi Action Plan provides a detailed procedure for interim care and protection of the rescued children. It provides for immediate medical examination of the children and as to how investigation is to be conducted and charge sheet is to be prepared.
16. The strategy for Unaccompanied Migrant Children also provides for assessment and verification of Child’s background and intra state as well as inter state repatriation.
17. The Action Plan provides for detailed procedure for rehabilitation and social integration of the child labour as well as training and capacity building of duty bearers.
18. In a bid to ensure proper coordination amongst different agencies of the Government of NCT of Delhi, the Action Plan defines the role and responsibilities of various departments/authorities involved in the process in the following consolidated manner:

“7.7. The Responsibilities of the Respective Departments

### 7.7.1. Delhi Police

The concerned Deputy Commissioner of Police should:

- a. Make the necessary arrangements of police force for raids as per the demand and requirement of Action Force;
- b. Personally participate in the raids conducted by the Action Force;
- c. Should take charge of the child labour liberated by the Action Force;
- d. Should take steps to arrest the owners/employers of the child labour as per provision of Indian Penal Code Sec. 331, 370, 374 and 34 as well as provisions of Sec. 23, 24, 26 of Child Justice (Care and Protection) Act. They should register the crime and take all the necessary future steps to conduct further criminal proceedings;
- e. Should treat the liberated child labour with respect and honour and hand them over to children's home in the charge of officers of Women and Child Welfare Department;
- f. Put forward the cases of child labour as per Section 32 with the help of Action Force in front of Child Welfare Committee. As per the decision of the Child Welfare Committee, the children should be handed over to their parents through JAPU if the children are from other states.

### 7.7.2. Department of Labour, GNCTD:

- a) To keep the areas in their jurisdiction where the child labour is likely to be hired under continuous active surveillance.
- b) In case the child labour is found to be employed and if their number is high, then immediate action should be taken within 24 hours after contacting the District Collector and police officers by carrying out a raid through Action Force. If the number of child labour is less, then immediate action should be taken to liberate them on the very day with the help of departmental colleagues and police.
- c) To keep track of the planning and conduct of every child labour rescue operation. It should be ensured

that adequate number of officers and shop inspectors are present during the raid. There should be active participation in the liberation of child labour. Necessary action should be carried out against the employer of the child labourer as per the provisions of Section 3 of Child Labour (Prohibition and Regulation) Act, 1986; if this is applicable. If Section 3 of the Act is not applicable then action should be taken under provisions of Section 7, 8, 9, 11, 12 and 13.

- d) Even if the job carried out by the child worker does not fall under the dangerous job category, the child labourer should be liberated from the clutches of unscrupulous employers and handed over to the police with a view to eradicate the undesirable practice of child labour and bringing these children under the mainstream of education.
- e) To document all details of the liberated child worker by obtaining details from him in an affectionate manner and furnishing a copy to the police department. A complaint against the employer of the child labourer should be lodged (with the help of Task Force, if necessary) with the police and his statement should be recorded as a matter of formality and duty.
- f) While obtaining information from the child labourer, if it is found that the employer had paid any money as financial assistance, loan advance etc. to the parents, then immediate report should be made to the District Collector for declaring the child labourer as 'forced' labourer and a copy should be endorsed to the Government through the Commissioner.
- g) Due care of the liberated child labourers should be taken till they are sent to the Children's Home and it should be seen that they are provided with proper food, water and other facilities in time.
- h) As per the definition specified in Section 2(K) of the Juvenile Justice (Care and Protection of Children) Act 2000, the individual who is below 18 years of age should be considered as a child. Therefore in the course of raid, if child workers above 14 years of age are found, then

they should also be liberated from the clutches of the employer(s) and handed over to the police.

- i) A sum of Rs. 20,000/- (Rupees Twenty Thousand) should be recovered from the employer of child labourer subjected to legal action vide Section 3 of Child Labour (Prohibition & Regulation) Act 1986 as per the directives issued by the Hon'ble Supreme Court in the M.C. Mehta case, 1996 and credited to the District Child Labour Welfare Fund of the District to which the child originally belongs.
- j) To designate nodal officers at senior level to be part of the District Level Child Labour Task Force (districtwise) and also for the rescue team.
- k) To strengthen the intelligence network through the Community Workers of the Labour Department on the status of out-of- school children, places of work involving children and their employers/contractors/middlemen, etc.
- l) Necessary legal action should also be taken against the employers of child labourers under the following legislations and corresponding Rules (wherever applicable):
  - i. Delhi Shops and Establishment Act, 1954
  - ii. Minimum Wages Act, 1948
  - iii. Motor Transport Workers Act, 1961
  - iv. Factory Act, 1948
  - v. Interstate Migrant Workmen (Regulation of Employment and Condition of Services) Act, 1979. vi. Contract Labour (Regulation & Abolition) Act, 1970.

#### 7.7.3. Women and Child Welfare Department, GNCTD

- a) Generation of awareness among masses against the practice of child labour. Steps should be taken for the rehabilitation of local child labourers with the help of Deputy Commissioner (DC) and voluntary organisations, if the child labourer happens to be from the local area.
- b) Take charge of child labourers liberated by the Action Force and see that they are provided adequate food, clothing and shelter. Due care should be taken about their safety.

- c) If the child worker happens to be a local person, she/he should be inducted in the mainstream of education with the help of education officer. If possible, he/she should be provided job oriented technical education.
- d) The Superintendent of the Children Home to which the liberated Child Labourers have been placed should arrange for the interaction/taking of statements by the concerned Child Welfare Committee.
- e) Information about instructions of the Child Welfare Committee should be independently submitted to the DC and Labour Commissioner every month.
- f) DWCD, GNCTD should designate nodal officers at senior level who can be part of the District Child Labour Task Force for every district.
- g) Issue letters to the respective CWCs to nominate a member who can be part of the District Child Labour Task Force. Such member of the CWC can be a link between the CWC WP(C) No. 9767/09, WP(CrI)2069/05, W.P.(C) Nos.15090/06, 4125/07, 4161/08 page 11 of 20 and District Child Labour Task Force for all practical purposes, including, attending the pre-rescue planning meeting of the Task Force, issuing Orders for the interim care and custody of the rescued child reports (SIR), verification/identification of their families and their ultimate repatriations/follow-up. The CWC Member will get the inquiry done and Social Investigation Report prepared under JJ Act in a child friendly manner at the camp/home/hostel/RBC where the children have been lodged.
- h) To keep the Homes ready for the reception and suitable accommodation of the rescued child labours.

#### 7.7.4. Education Department, GNCTD

- a) In order to absorb the liberated child labourer into mainstream of education without any discrimination, (sex/ caste etc.) they should be offered free and compulsory education and should be compelled to receive it.
- b) Various schemes sponsored by the Central and State Governments should be implemented for this purpose.

- c) During their educational period, they should get the benefit of free meals scheme of the State Government.
- d) The Department will set up initially 250 Alternative Innovate Education Centres (AIEC)/NRBCs in the areas of child labour concentration and/or in the areas having large number of out-of-school children. The Department would also ensure that all the children at NRBCs/RBCs are given free mid day meal (as assured by the Department, vide UEE Mission letter no. 39, dated 11.4.2009).
- e) Care should be taken to see that the child labourer develops liking for the education.
- f) The education officer and Principal of the school should be held responsible for the dropouts among the child labourers receiving education.
- g) Parents of child labourer should be counseled to stress the importance of education among the labourers.
- h) Monitoring of academically weaker children in schools will be done with the involvement of CRC and NGOs for (as assured by the Department, vide UEE Mission letter no. 39, dated 11.4.2009) preventing dropouts.
- i) The concerned District Urban Resource Centre Coordinator (DURCC) will send a monthly report to the Dy. Commissioner of the District with a copy of the same to the SPD (SSA) and Director (Education), GNCTD about the following:
  - i. School wise and class wise attendance and drop-outs corresponding to the number of children enrolled;
  - ii. Number of out-of-school children in the district (school wise and class wise) along with the list;
  - iii. The efforts made for awareness/sensitisation/ educational counseling of children and their parents.

Such reports should be examined in the following meeting of the district level Task Force and of the state level Steering Committee as well as at the highest level in the Education Department of GNCTD for remedial measures.



- i) Department will ensure that all its schools have adequate number of teachers in proportion to children in each class (subject specific, wherever applicable) and they are maintaining punctuality. It should also introduce a system of incentive/reward for its schools which maintains higher enrolment/retention of out-of-school children and prevent dropouts as well as a system of disincentives for those who consistently fail to identify, enroll and retain the out-of-school children.

#### 7.7.5. Health Department, GNCTD

- a) After receiving information about the raid of Action Force through Labour Officer/Police Officer, complete medical examination of liberated child labourers should be carried out.
- b) Immediate medical treatment should be initiated, if required.
- c) Clear certificate of age (issued by medical officers not below the rank of Government Assistant Surgeon) of the liberated child labourer should be furnished immediately to the investigating police officer or Government labour officer as per their demand.
- d) Expenses incurred towards the treatment and issuance of medical certificate should be met by the DC from the District Child Welfare Fund and should be recovered from the employer of the child labourer and reimbursed to the District Child Welfare Fund after recovery.

#### 7.7.6. Municipal Corporation of Delhi (MCD)

- a) Under its Slum Development Programme, the MCD should enhance the standard of living of all children living in the slums within its jurisdiction and particularly ensuring effective access to free health check up and medical care, quality education, recreation, vocational training and community life.
- b) MCD Schools should provide free and compulsory education to all rescued child labourers belong to Delhi irrespective of their age (by arranging accelerated learning for the older children through NRBCs wherever necessary

for mainstreaming them to age appropriate classes) without any discrimination (sex/caste etc.). They should be mentoring the non-formal education programmes run by NGOs in various slums with a view to bringing all out-of-school children in the area into the fold of mainstream education.

- c) The Headmasters and the teachers of the MCD schools will hold a monthly meeting of the parents for sensitising/counselling them about importance of the education. Experts/communities leaders would be invited to such meetings.
- d) MCD will also have sensitisation/counselling programmes for the slum-dwellers in general about the importance of education for their children and the facilities available for the same as well as the long-term evil impacts of child labour through meetings, prabhat ferries, documentary films, etc. in the colonies.
- e) The MCD should ensure that all its schools have adequate number of teachers in proportion to children in each class (subject specific, wherever applicable) and such teachers are maintaining punctuality. It should also introduce a system of incentive/reward for its schools which maintains higher enrolment/retention of out-of-school children and prevent dropouts as well as a system of disincentives for those who consistently fail to identify, enroll and retain the out-of-school children.
- f) The Education Department of MCD will obtain the list of children who are not attending schools and will instruct the Principal of the concerned school(s) to bring such children back to school.
- g) The concerned Zonal Dy. Education officer (DEO) will send a monthly report to the Dy. Commissioner of the District with a copy of the same to the Labour Commissioner and the Education Department of MCD about the school wise and class wise attendance and drop-outs corresponding to the number of children admitted. The report should also include the efforts made for sensitisation/educational counseling of children and their parents. Such reports

should be examined in the following meeting of the district level Task Force and of the state level Steering Committee as well as in the Education Department of MCD for remedial measures.

- h) The Zonal Deputy Education Officer (DEO) will be responsible as the Nodal Officer on behalf of MCD on various matters relating to the pre-rescue planning, rescue and post-rescue rehabilitation/education in the concerned MCD area(s).

#### 7.7.7. Deputy Commissioner of the District concerned

- a) To ensure that no incidence of child labour in any form is found within his/her jurisdiction.
- b) To get the meeting of the District level Task Force on Child Labour on monthly basis and to preside over the same.
- c) To forward a copy of the monthly meetings of the District level Task Force on Child Labour, detailed report of the review meeting should be sent to the Government of NCT of Delhi through Labour Commissioner.
- d) To get a list of all voluntary organisations dealing with the problems of child labour prepared with areas of their expertise and to ensure that such list is updated on regular basis. Along with these organisations, public awareness drives should be arranged. Public opinion should be generated to stress that education is the right of every child and is a first step towards progress.
- e) To get constantly updated about the raids, rescues and rehabilitations of child labourers in the district and to extend all necessary support to the rescue team.
- f) To ensure that all necessary actions are taken within his competence under the Bonded Labour System (Abolition) Act and Rules, 1976 as well as under the 'Centrally Sponsored Plan Scheme for Rehabilitation of Bonded Labour', if the facts and circumstances in which child labourers are found lead to the presumption that they are forced labourers/bonded labourers.
- g) To also ensure that Rs.20,000/- per child labourer is recovered from his/her employer and credited along with

Rs.5000/- to the District Child Labour Welfare Fund, as per the direction of the Hon'ble Supreme Court of India in the case of M.C. Mehta, 1996.

- h) To furnish a utilisation certificate to the Government through the Labour Commissioner about the funds stated above on half yearly basis, before 30 September and 31 March every year.
- i) Guidance may be sought (wherever necessary) from the Labour Commissioner with regard to the utilisation of collected funds. As far as possible, the amount collected should be utilised for the rehabilitation of the child labourers for whom the amount is collected.
- j) As per the judgement of the Supreme Court cited above, adult unemployed member of the family of the child labourer should be provided employment there in his place and the child should be directed to receive education.
- k) In case the child has taken up the job due to economic condition of the family, adequate efforts should be made to provide all benefits to the family under all relevant developmental and social security schemes of the Government.

7.8. The above roles and responsibilities of concerned departments /authorities of Government of NCT of Delhi will be required for implementing both Strategy - I (Social Mobilisation for Total Abolition of Child Labour) and Strategy - II (Pre-rescue, Actual-rescue, Interim care, Enforcement of Laws, Repatriation and Rehabilitation of Child Labour)."

19. Subsequent to the filing of the aforesaid Action Plan, the Labour Department of Government of NCT of Delhi has raised some issues. According to the Labour Department, CLPRA, 1986 prohibits employment of children only in certain scheduled occupations and processes. Consequently, according to the Labour Department, child workers employed in non-hazardous jobs cannot be rescued. The Labour Department has further urged that in the Action Plan it has been stipulated that all children between the age of 14 to 18 years have to be liberated and handed over to the police, even though CLPRA, 1986, defines child as a person who has not completed 14 years of age.

20. On a perusal of CLPRA, 1986, we are of the view that under the said Act, only child workers employed in scheduled occupation and processes can be liberated and children employed above the age of 14 years cannot be rescued.
21. However, in our view, the Juvenile Justice (Care and Protection of Children) Act, 2000, would apply to children between the age of 14 and 18 years as well as to those children employed below the age of 14 years in non-scheduled occupation and processes. Consequently, the said children would be governed by the Juvenile Justice (Care and Protection of Children) Act, 2000 as well as Bonded Labour System (Abolition) Act, 1976, if applicable and not by CLPRA, 1986, as stipulated in the Delhi Action Plan prepared by the National Commission.
22. Moreover, at the request of Labour Department, we direct that the responsibility of lodging a police complaint against an employer employing child labour would lie with the Delhi Police and not the Labour Department as directed in the Delhi Action Plan. We further clarify that the authority to take action under the Bonded Labour System Abolition Act, 1976, would be the Deputy Commissioner of District concerned and not the Labour Department. Accordingly, paras (e) and (f) of para 7.7.2 of the Delhi Action Plan are amended.
23. It is further clarified that the recovery of fine of Rs.20,000/- as stipulated by the Supreme Court in M.C. Mehta's case will not have to await a conviction order of the offending employer. The said amount would be recovered as arrears of land revenue and the said amount would be utilised for the educational needs of the rescued child even if the child has subsequently crossed the age of 14 years.
24. The Deputy Director, Child Welfare, has also filed a Status Report stating that considering the capacity and existing strength of NGOs and Government run institutions in Delhi, the department would be able to accommodate only about 500 additional children every month, since the restoration efforts take about 30 to 40 days time. The said Status Report, however, states that all efforts would be made to motivate NGOs to enhance their capacity to accommodate more children and to register more Children Homes.

25. Keeping in view the aforesaid infrastructural limitation, we direct the labour department to begin implementing the Delhi Action Plan by accommodating for the time being about 500 children every month.
26. Moreover, being cognisant of the fact that ground level reality may be different from the one projected in the Action Plan, we grant liberty to the above-mentioned authorities to seek clarification or amendment of the Action Plan from this Court.
27. To conclude, we would only quote what Dr. Dorothy I. Height, a social activist, has said, "we have got to work to save our children and do it with full respect for the fact that if we do not, no one else is going to do it."
28. Consequently, we accept the Delhi Action Plan which provides a detailed procedure for interim care and protection of the rescued children to be followed by Labour Department as prepared by the National Commission with the modifications mentioned hereinabove in paras 20 to 26 and we further direct all the authorities concerned to immediately implement the same. The Government of NCT of Delhi through the Labour Department is directed to file its First Taken Report to this Court after six months. For this purpose, list the present batch of matters on 13th January, 2010.



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**PART VI**  
**JUDGEMENTS ON MARRIAGE**

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## IN THE HIGH COURT OF MADHYA PRADESH

## Nihal Singh vs. Ram Bai

AIR1987MP126

Decided On: 03.10.1986

**Hon'ble Judges:**

T.N. Singh, J.

**JUDGEMENT**

- 2 ....Plaintiffs case was that she was Dangi by caste and had a son named Laxman who could not be married at an early age according to custom prevalent among people of Dangi caste. Because her son, who was aged 24 years, had lost all hopes of marriage, she contracted with the defendant to arrange a Dangi woman for her son who could be kept by him as his mistress. The defendant was paid Rs. 4,000/- for a woman whom he sent to plaintiffs house representing that she was a Dangi woman. For hardly 20 days, the woman had lived with her son when she got a message from the defendant that a warrant had been issued against the woman from the Court and she should, therefore, be sent back to the village. Thus, she, went back, not to return ever thereafter. Later when it was discovered that the woman was a Bedhni (dancing girl), plaintiff asked the defendant to refund the amount, when he refused to do. Defendant denied all allegations and also pleaded that the contract was void and was unenforceable; and that the suit was not maintainable.
- 3 Two Courts below concurrently held that the defendant had obtained Rs. 4,000/-from the plaintiff fraudulently on the condition of supplying a Dangi woman for her son. But invoking Section 65 of the Act, the Court of appeal below affirmed trial Court's decree, albeit relying on the decisions reported in P. R. Srinivasa Aiyar, AIR 1918 Mad 444, Alsidas Pannalal, AIR 1944 Nag 159 and Bhan Singh, AIR 1933 Lah 849 (2) to which I shall advert in due course.
- 4 ... Section 65 of the Contract Act, because judicial opinion on the interpretation of the provision is equivocal and not unanimous :
- "65. Obligation of person who has received advantage under void agreement, or contract that becomes void — when an agreement is discovered to be void, or when a contract becomes void, any

person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

- 9 ...Whether or not the fact that a contract was void ab initio was known to both parties, if they were both at fault and if their conduct was repugnant to such public policy as was statutorily or constitutionally entrenched in the legal system it would not be open to any one of them to derive any benefit from the transaction, vitated by the immoral or unconstitutional conduct. This position obtains in law, according to me, despite what is contemplated under Section 65 which merely deals with contractual obligations of parties in terms of the Contract Act because of the undiminished currency in India of the Common Law maxims by virtue of Article 372 of the Constitution. Indeed, Section 65 does not evidently embrace within its fold the question of tortious or criminal liability or violation of a constitutional injunction. Obviously, because, Section 23 of the Act speaks only of “unlawful objects and consideration of an agreement and contemplates further that it would be competent for a Court to regard as not “immoral”, or “opposed to public policy” any object or consideration of an agreement. The “void agreement” contemplated under Section 65 is evidently one to which are attracted the provisions only of Section 24 et. al.
- 10 However, what I regard to be of paramount consideration in this case is that supreme primacy must be attached to the constitutional prohibition contained in Article 23 which prohibits “traffic in human beings” and indeed also of Article 21 which secures dignified existence to a human being. I would also notice that Article 51(c) authorises me to construe any statutory provision not only in consonance with the constitutional provisions, but also with “international law”. The Fundamental Duties of a citizen inscribed in Clause (e) of Article 51 A, which obligates a citizen to “renounce practices derogatory to the dignity of women”, must have supreme relevance to the instant lis, indicative as it evidently is of an unconstitutional conduct of a citizen. Let it be also noted that Article 1 of the Universal Declaration of Human Rights, 1948, ensures “dignity” to all human beings and Article 4. additionally prohibits slavery, servitude as also slave-trade. The International Covenant on Civil and Political Rights, 1966, to which India has acceded, also envisages under Article 8 that “no one shall be held

in slavery; and slavery and slave-trade in any of their forms shall be prohibited". While under Article 3 of the Covenant is envisaged undertaking of each State party "to ensure the equal right of man and woman to the enjoyment of all civil and political rights set forth in the covenant". In the context and setting of the national and international constitutional provision, I would like to construe Section 65 to be applicable to only limited cases, such cases as do not come within the mischief of the prohibition earlier stated to be regarded as a- constitutional imperative.

- 11 The term "traffic" is said to mean "to trade, to buy and sell" etc. (see — Shorter Oxford English Dictionary, 3rd Edition —p. 2226). In Black's Law Dictionary, the word "traffic" is said to mean "commerce; trade; sale or exchange of merchandise; bills, money, and the like". Thus, sale of any human being, man or woman, would definitely be "traffic" in human beings which is constitutionally prohibited vide Article 23. Though such a transaction, when it takes place in respect of a woman, is unfortunately not illegal in terms of the Immoral Traffic Act, violation of constitutional injunction contemplated under Articles 21 and 23 would still be evident in such a case. Even if the transaction is sanctioned by a caste-custom, as is pleaded by the plaintiff in this case, nothing would insulate it against the constitutional injunction. To buy a woman to be kept as a mistress to evade the customary (though illegal) mandate of child marriage, is not constitutionally countenanced. Because, such a question would be ipso facto void on and after, promulgation of the Constitution in virtue of Article 13( 1), being derogatory to Articles 21 and 23.
- 12 It is not only that for the first time in Olga Tellis, AIR 1986 SC 180, that their Lordships of the Supreme Court held Article 21 to inhere the right to live with human dignity because very early, in Kharak Singh's case, AIR 1963 SC 1295, the Supreme Court accepted the meaning of the term "life" defined by Field, J. in Munn vs. Illinois, (1877) 94 US 113, attributing to the term the meaning that it was "something more than mere animal existence". In clear and categorical terms, a ringing declaration was made in Bandhua Mukti Morcha, AIR 1984 SC 802 that "Article 21 assures the right to live with human dignity, free from exploitation". In Sheela Barse, AIR 1983 SC 378, the right of woman prisoners in Police lock-up to legal aid to protect their limited freedom was secured by positive directions to uphold "human dignity" in terms of Article

23(1) as also indeed of Articles 14 and 39A of the Constitution. It was evidently meant to carry out the constitutional mandates that in 1978 the Child Marriage Restraint Act, 1929 was amended to enhance credibility of the measure. Unfortunately, though child marriage is punishable and it is visited with custodial penalty, the Act has overlooked customs and practices derogating from its aims and objects. A marriage between a man and a woman, when they are not adult and also when any one of them has not given consent to the wedlock, is void under the Hindu Marriage Act, 1955. Unfortunately, however, although Section 18 also punishes child marriage, it overlooks marriages fraudulently performed, a 'fake-marriage' and its like. Section 370, IPC has made punishable buying and selling any person as a "slave" and by Section 372 selling of a minor for "prostitution" is also made punishable. These provisions also, unfortunately, do not adequately meet the challenge posed by caste-custom or the like pleaded in this case by the plaintiff. True, it is for the Legislature to uptone, update and fortify the enacted law. But, this Court cannot shirk its constitutional duty of interpreting the statutory provision enacted in Section 65 in a manner that will prevent flouting of the constitutional injunctions, positives as also negatives.

- 16 Indeed, I am of the view that when a contract is in violation of any constitutional injunction enshrined in Part III, such a contract would not only be void ab initio in virtue of Article 13(2) of the Constitution but, the constitutional prohibition of Article 23, when it operates in any case, would act as a threshold bar to the transaction. Indeed because, such a contract would not only be unenforceable a suit based on such a contract, could not have been entertained by any Court of law acting under the Constitution which prohibits such a transaction from taking place. Because a Court set up under the Constitution cannot be party to violation of a constitutional injunction. If sale of a woman is considered "traffic in human beings", which is prohibited by Article 23 of the Constitution, I do not see how any action based on a contract, evidencing such a transaction, can at all be entertained. I have no doubt, therefore, that the instant suit was not maintainable and it ought to have been dismissed in limine, I have also no hesitation to say that it was not open to the plaintiff to invoke Section 65 of the Act and for the Court below to decree the suit on that basis. It is regrettable that dismissal of the suit may be a blessing for the defendant but that

is the price which must be paid for social reform constitutionally envisaged.

- 17 In the result, this appeal succeeds and is allowed; ...
- 18 A copy of this judgement shall be transmitted to the authorities undermentioned in order that the desirability of necessary reforms in the existing law at Union and State level may be considered. Measures may also be taken to enlighten public opinion and educate the rural-mass in the constitutional imperatives :
  1. Law Commission of India, New Delhi,
  2. Secretary, Law Department, Government of India, New Delhi,
  3. State Law Commission, Bhopal,
  4. Secretary, Law Department Government of Madhya Pradesh, Bhopal,
  5. Secretary, Legal Aid Board, Madhya Pradesh, Bhopal.

IN THE SUPREME COURT OF INDIA

Chandrika Prasad Yadav vs. State of Bihar and Others

(1991)4SCC177

Decided on 13.02.2009

**Hon'ble Judges:**

S.B. Sinha and Mukundakam Sharma, JJ.

2. Appellant herein filed a complaint before the Chief Judicial Magistrate (for short 'CJM'), Hajipur on 07.02.2008 under Section 366A, 380 read with Section 34 of Indian Penal Code (for short 'IPC') alleging that his daughter Ruchi Kumari (hereinafter referred to as 'victim') aged about 14 years of age had been enticed and thereafter kidnapped by one Sanjeev Kumar (hereinafter referred to as 'accused'), an Uncle of the victim aged about 20 years with the intention to marry her
4. Subsequently, the complainant-appellant filed an application for seeking custody of her minor daughter. However, the girl desired to go with her alleged accused husband who was arrested. The learned CJM vide order dated 07.03.2008 directed that the victim be sent to the Nari Suraksha Grih (Woman Protection Home), Patna for safety till the next date, as it was expected that by that time the medical report could also be received But the medical report was not produced in court and therefore the learned CJM extended the period of stay of victim at the Woman Protection Home.
5. Aggrieved by the aforesaid order of the learned CJM extending the period of stay of the victim at the women protection home and not granting her custody to the complainant-appellant, he filed a writ petition before the Patna High Court seeking issuance of the writ of Habeas Corpus. The Patna High Court dismissed the said writ petition by holding that since the daughter of the complainant is kept in a protection home pursuant to an order passed by the CJM, the writ of the aforesaid nature, as prayed for, is not maintainable and is also misconceived.
6. Being aggrieved by the aforesaid order the present appeal is contending that the custody of a minor girl could not have been denied to a natural guardian and that the ground stated in the

order of CJM to the effect that the medical report is awaited is also not a valid ground for denying custody of the minor girl to the appellant who is the natural guardian.

7. Notice was issued to the parties by this Court. On the day when the matter was listed before the court a statement was made by the learned Counsel appearing for the appellant that even the minor victim girl, namely, the daughter of the appellant has also now shown her willingness to go to her parents home from the Nari Suraksha Grih. Thereafter it transpired that the said victim girl, namely, Ruchi Kumari along with three other girls was missing from the said after care home.
10. The report of the Member Secretary of the State Legal Services Authority, which we have very carefully perused, depicts a miserable picture regarding the functioning and governance of the said women protection home. It is disclosed that registers were not properly maintained and that there is also no check on entry inside the said home. The report indicates that there is lack of sufficient security guards inside the said home and also lack of staff. The father of the victim girl, appellant herein also filed an additional affidavit stating that his daughter disappeared from the women care and protection home on 11.8.2008. He has made a grievance that the police officials at Patna were not interested to trace out the victim and rather they are pressurising him to withdraw the case. He had also complained of receiving threats from the police as also from the State.
11. When the matter was taken up in the court, counsel appearing for the appellant made an oral statement that the minor son of the appellant was picked up by the police and that he has not been released. It was stated that the police picked up his 16 years old son Mintu Kumar and thereafter his son had not returned. He has reported that the police was not interested in tracing out his daughter and rather they are trying to penalise him and his family for approaching the court of law.
12. Pursuant to the order of this Court a status report is filed by the police wherein it is stated that the police tried to contact the father and maternal uncle of Ruchi Kumari but they could not be located. It was also stated therein that the son of the appellant, namely, Mintu Kumar aged 19 years was taken to the police station Alamganj and was questioned about the where about of Ruchi Kumari and that



thereafter the said boy was examined and then sent back home. The allegation that the police is pressurising and using coercion on the appellant is denied in the said status report.

13. It transpires that due to the detailed investigation and raids made by the police at different places they were able to recover two girls namely Meera Kumari and Reena Kumari who had allegedly ran away with Ruchi Kumari. On questioning it was found out from them that they were helped in coming out from the protection home by the relatives of the appellant, namely, maternal uncle and other relatives of the appellant who came to protection home and took away all the four girls. Two of them except Ruchi Kumari and Meera Kumari were allowed to go to their respective homes
15. Having scrutinised all the records and having heard the learned Counsel appearing for the parties, we are distressed to find that a minor victim girl, who was sent to the protection home by a judicial officer for providing home and safety would be missing from the said home without the knowledge of the authority managing the said protection home. It is shocking that a home which is being run by the State Authority and named Suraksha Home has practically no security and that the inmates of the house either could be forcibly taken away or could run away from the said home easily and that also without the knowledge of the Authority. What is more astonishing is the fact that such incident is said to be a regular affair. It is unfortunate that although the police was informed immediately thereafter, the police did not even think it appropriate to swing into action immediately.
16. On perusing the records, we find that there is total lack of supervision and control in the management of the home and there is also lethargy and negligence on the part of the police authority, which is entrusted with the duty of providing security and safety and also maintaining law and order and also empowered to investigate into an offence brought to their notice. The State authority is duty bound to see that all its welfare measures are being carried out effectively and meaningfully but from the facts of the present case it appears that it has failed to discharge its responsibility.
17. Probably it is for such reasons that today these care and protection homes are becoming homes for trafficking of girls and women. It appears that the State Government is totally oblivious of its responsibilities regarding implementation of social welfare

programmes of providing secured homes to destitute women and also children in conflict with law.

18. Considering the gravity of the situation and the problem, we direct for conducting a proper and detailed inquiry into the whole episode and affair for we will like to be enlightened not only about the functioning, management and the security of Nari Suraksha Griha but also regarding where about of the concerned girl and how she could go missing from the state home and as to who is responsible in helping the girl to flee away, if it is so and consequential actions taken by the police. We request the Hon'ble Chairman, Bihar Human Rights Commission to cause such an inquiry and then submit a report to us preferably within six weeks from the date of communication of the order. In addition the Chief Secretary, Government of Bihar is also directed to submit a report within the said period with respect to the maintenance and governance of the said protection home specifically indicating the security measures and the steps being taken up in that regard. The report should also indicate the reasons behind the inability of the police to trace out the missing girl and also the status of the investigation. He shall also inform through the report if any action is taken or contemplated against any of the erring officer or employee.
19. We hope and expect that the report, as aforesaid, to be submitted by the Hon'ble Chairman and the Chief Secretary would be a comprehensive report. List after six weeks.

IN THE HIGH COURT OF DELHI

**Association for Social Justice & Research vs. Union of India and Others**

AIR1987MP126

Decided on 13.05.2010

**Hon'ble Judges:**

A.K. Sikri, A. Bharihoke, JJ.

1. The Association for Social Justice and Research, the petitioner herein has filed this petition for a direction in the nature of habeas corpus to trace minor child Chandni @ Chandrawati, daughter of Mr. Vijay Pal. It is stated that the said girl is only 11-12 years of age and at this tender age, her parents have married her for consideration to one Mr. Yashpal, resident of Viallage and Post – Baliana who is stated to be 40 years of age. It is further stated that on coming to know about this incident, several civil society groups came up to rescue the child, but failed to trace the girl. It is also alleged in the petition that the respondent No.13 has kept her in hiding.
3. The girl, Chandni was sent to a Children Home, "Nirmal Chhaya" from where she was produced in this Court on 11.05.2010. We took up the matter in Chamber and conversed with Chandni. She stated that she was 17 years of age and that she consented to the marriage with Yashpal without any pressure. She denied that she was sold by her father to Yashpal or any money was taken by her father in this behalf. Learned counsel for the State informed us that Chandni was got medically examined and as per the medical report, the age of Chandni was fixed between 16 to 18 years.
5. Yashpal has denied having given any money to Vijay Pal and Vijay Pal also denied having received any money from Yashpal. It was mentioned by Yashpal that having regard to the fact that he has two daughters of adolescent age, in order to ensure that they be brought up in a proper manner, he decided to marry again. Vijay Pal is a labourer, who states that his earning is about Rs.150 per day. He further stated that because of large family and meager income, he was not in a position to give any education to his children. In these circumstances, he decided to marry his eldest daughter, Chandni to Yashpal.

8. It cannot be disputed that the aforesaid marriage is in violation of provisions of the Prohibition of Child Marriage Act, 2006 inasmuch as Chandni is minor and in below the age of 18 years. At the same time, marriage is not void under civil law.
9. The purpose and rationale behind the Prohibition of Child Marriage Act, 2006 is that there should not be a marriage of a child at a tender age as he/she is neither psychologically nor physically fit to get married. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Some of the ill-effects of child marriage can be summarised as under:
  - (i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.
  - (ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.
  - (iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.
  - (iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.
  - (v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Early marriage has also been linked to wife abandonment and increased levels of divorce or separation and child brides also face the risk of being widowed by their husbands who are often considerably older. In these instances, the wife is likely to suffer additional discrimination as in many cultures divorced, abandoned or widowed women suffer a loss of status, and may be ostracised by society and denied property rights.

10. The Prohibition of Child Marriage Act has been enacted keeping in view the aforesaid considerations in mind.
11. In this backdrop, the dilemma of the Court is as to whom custody of Chandni be entrusted. There have been judgements of this Court handing over the custody of minor girl to the husband to whom with whom she is married. Some of these cases are: (i) Ravi Kumar Vs. The State & Anr. [2005 (124) DLT], (ii) Phoola Devi Vs. The State &

Ors. [2005 VIII AD Delhi 256], (iii) Manish Singh Vs. State Govt. of NCT & Ors. [2006 (1) CCC (HC) 208] and (iv) Sunil Kumar Vs. State NCT of Delhi & Anr. [2007 (2) LRC 56 (Del) (DB)]. The sum and substance of these authorities is that marriage solemnised in contravention of the age prescribed under Section 5(iii) of the Hindu Marriage Act, i.e., 21 years for male and 18 years for female are neither void nor voidable under Sections 11 and 12 of the Hindu Marriage Act. The only sanction prescribed against such marriages was noticed to be a punishment prescribed under Section 18 of the said Act, which was to the extent of 15 days and a fine of Rs.1,000/.

Furthermore, while permitting the minor girls to reside with their husbands, the Courts also noticed that these girls had come of age of discretion. In all these judgements, Prohibition of Child Marriage Act were not taken note of, which makes the contracting of a marriage by a boy above the age of 18 with a girl less than 18 as a cognisable and non-bailable offence. This aspect was taken note of by a Division Bench of this Court in Lajja Devi Vs. State (WP (Crl.) No.338 of 2008) and vide orders date 31.07.2008, the matter is referred to Full Bench. Operative part of that order reads as under:

“ ...

- (b) According to Section 2(a) of the Prohibition of Child Marriage Act, 2006, a “child” means a person who, if a male, has not completed twenty-one years of age, and if female, has not completed eighteen years of age.
- (c) Section 12(a) of the said Act makes the marriage of a minor girl who has been taken or enticed out of the keeping of the lawful guardian shall be null and void. The language of Section 12(a) of the said Act is mandatory in nature and does not admit of any reservation. Further it makes the marriage of a child, or a minor girl as null and void. That means the marriage itself is non-existent and the law does not recognise the same. Section 9 of the said Act provides for punishment for a male adult above 18 years of age contracting a child marriage punishable with rigorous imprisonment which may extend to two years or with fine which may extend to Rs. 1 lac or with both.

(d) The offence carries a punishable which may extend upto 2 years and, therefore, clearly the offence would be bailable and non-cognisable. Despite this, by virtue of the non-obstante clause of Section 15 of the Act, such offence is a cognisable and non bailable offence under Cr.P.C. This aspect of the matter has not been previously considered by the Court and accordingly quashing of FIR under Section 363 or in the instant case under Section 363 and 376 would not only be in contravention of law but also against the letter and spirit of the Act by observing that the girl has attained the age of discretion with the reference to Sections 5(iii), 11, 12 and 18 of the Hindu Marriage Act.

11. Accordingly, we are of the opinion that the following questions require to be considered by Larger Bench:
  - (1) Whether a marriage contracted by a boy with a female of less than 18 years and a male of less than 21 years could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?
  - (2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?
  - (3) If yes, can she be kept in the protective custody of the State?
  - (4) Whether the FIR under Section 363 IPC or even 376 IPC can be quashed on the basis of the statement of such a minor that she has contracted the marriage of her own?
  - (5) Whether there may be other presumptions also which may arise?"
12. The Full Bench has yet to answer the questions referred for consideration. In integerrum, the issue is as to what course of action to be adopted in the instant case. It hardly needs to emphasise that we are concerned with the welfare of girl, Chandni, who is minor. Having taken note of the provisions of the Prohibition of Child Marriage Act, 2006, the adverse effects of child marriage and also to the fact that the earlier judgements of this Court where custody of such minor girl was given to the husband are pending reconsideration before the Full Bench, we are of the view that custody of Chandni cannot be given to her husband at this stage.

13. After hearing the counsel for the parties on these aspects, we are of the opinion that in order to ensure that the interest of Chandni shall be duly protected, the following directions are needed to be passed:
  - a) Till Chandni attains the age of 18, she shall stay with her parents and not with Yashpal, her husband.
  - b) Yashpal shall not consummate the marriage. It would be responsibility of not only Yashpal, but the parents of Chandni shall also ensure this.
  - c) Gauna ceremony of Chandni shall be performed only after she attains the age of 18 years, i.e., not before 30.06.2011. Neither the parents of Chandni nor the husband, Yashpal will be allowed to perform the aforesaid Gauna ceremony without taking the option and consent of Chandni at that time. To put it otherwise, we may make it clear that it is the option of Chandni to accept this marriage or not. In case she does not accept this marriage, it shall be treated as null and void. This choice is given to Chandni under Section 3 of Prohibition of Child Marriage Act.
14. Vijay Pal, Yashpal as well as Premawati, mother of Yashpal have sworn the affidavits accepting the aforesaid terms, which are taken on record. All these persons shall remain bound by the undertaking given in the affidavits.
15. Writ petition is disposed of in the aforesaid terms. We make it clear that the affidavit filed by Yashpal, Vijay Pal as well as Premawati would be without prejudice to the rights and contentions of the parties.

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**PART VII**  
**INTERNATIONAL LAW**

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# Introduction: An Overview of International Trafficking Law

The phenomenon of globalisation has opened borders, and has resulted in increased trafficking in human beings throughout the world in recent years. The scope of the problem of international trafficking in human beings is extensive; human trafficking is one of the largest and fastest growing international criminal industries. Estimated to be a \$32 billion industry<sup>1</sup>, human trafficking is the second most lucrative international criminal activity, surpassed only by drug trafficking<sup>2</sup>. According to the United Nations Office on Drugs and Crime (UNODC), human beings are trafficked from 127 countries of origin to 137 destination countries.<sup>3</sup> The International Labour Organisation (ILO) estimates that 12.3 million individuals are currently engaged in forced labor, debt bondage, or sexual servitude.<sup>4</sup> Of these 12.3 million, an estimated 2.4 million were trafficked.<sup>5</sup> Moreover, approximately 27 million people are enslaved worldwide.<sup>6</sup> Of these 27 million slaves, approximately 15 to 20 million are bonded laborers in India, Pakistan, Bangladesh, and Nepal.<sup>7</sup>

The international community has recognised the growing threat posed by trafficking in human beings, and there are a number of international conventions and protocols prohibiting trafficking. These conventions and protocols take note of the human rights violations

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- 1 "A Global Alliance against Forced Labour." International Labour Conference, 93<sup>rd</sup> Session. International Labour Organisation (ILO). International Labour Office, Geneva. 2005.
  - 2 Haken, Jeremy. "Transnational Crime In The Developing World". Global Financial Integrity. [http://www.gfip.org/storage/gfip/documents/reports/transcrime/gfi\\_transnational\\_crime\\_web.pdf](http://www.gfip.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf). Retrieved June 25, 2011.
  - 3 Anti-Human Trafficking Unit, U.N. Office on Drugs and Crime, Trafficking in Persons: Global Patterns 17 (2006), available at <http://www.unodc.org/documents/lhuman-trafficking/HT-globalpatterns-en.pdf>
  - 4 Office to Monitor and Combat Trafficking in Persons, U.S. Dep't of State, Trafficking in Persons Report June 2008, at 7 (2008), available at <http://www.state.gov/documents/organisation/105501.pdf>
  - 5 Gergana Danailova-Trainor & Patrick Belser, Globalisation and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand (Int'l Labour Office, Working Paper No. 53, 2006) at 1, available at [http://www.ilo.org/wcmsp5/groups/public/ed\\_norm/declaration/documents/publication/wcms\\_081931.pdf](http://www.ilo.org/wcmsp5/groups/public/ed_norm/declaration/documents/publication/wcms_081931.pdf)
  - 6 Kevin Bales, Disposable People: New Slavery in the Global Economy. (Univ. of Cal. Press rev. ed. 2004) (1999), 8.
  - 7 Id. at 9

and abuses suffered by trafficking victims, and provide for measures to prevent trafficking, prosecute traffickers, and protect and rehabilitate victims.

The prohibition of slavery and the slave trade in the 1927 Convention on Slavery of the League of Nations<sup>8</sup> was the first modern international treaty to protect human rights. The 1933 International Convention for the Suppression of the Traffic in Women of Full Age is notable for the provisions that punish traffickers without regard to whether or not consent was given by the victim. The 1948 United Nations Universal Declaration of Human Rights<sup>9</sup> prohibited all forms of slavery, and the 1957 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery<sup>10</sup> extended the prohibition against slavery to apply to debt bondage, serfdom, servile forms of marriage, and the exploitation of children – practices held to be similar to slavery. Many aspects of slavery and servitude are similar to, and overlap with, human trafficking, including detention and/or sale of victims, degrading treatment, and absolute control over victims; however international norms prohibiting slavery have not included trafficking.<sup>11</sup>

The ILO Forced Labour Convention (Convention 29)<sup>12</sup> of 1930 was enacted to prevent compulsory labour “from developing into conditions analogous to slavery.”<sup>13</sup> The Convention defines forced labour as “work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” and does not include military service, civic obligations, work or service resulting from a conviction in a court of law, work or service exacted in cases of emergency, or minor community service.<sup>14</sup> This definition of forced labour continues to be the one generally accepted in the international community; however, no United Nations body has ever

8 *Convention on Slavery* League of Nations, March 9, 1927. Available at <http://www2.ohchr.org/english/law/slavery.htm>. Retrieved 29 July 2011.

9 *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Available at <http://www.un.org/en/documents/udhr/>. Retrieved July 29, 2011

10 Available at <http://www2.ohchr.org/english/law/slavetrade.htm>. Retrieved July 29, 2011

11 *Id.*

12 International Labour Organisation [ILO], *Abolition of Forced Labour Convention*, Convention 29, session 40 (January 17, 1959). Available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>. Retrieved July 29, 2011.

13 *Id.*

14 *Id.*

formally invoked this international prohibition on forced labour and compulsory labour with reference to human trafficking or commercial sexual exploitation.

In the early 20<sup>th</sup> century, the concern of the international community with trafficking was almost exclusively focused on the trafficking of white women for prostitution or commercial sexual exploitation, commonly called white slavery. In response to this concern, many international conventions addressing the trafficking in women and children were concluded, and in 1949, they were all incorporated into the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>15</sup> This Convention contains several provisions to protect victims of trafficking and to prosecute traffickers, including the requirement that state signatories punish any person who “procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person”, “exploits the prostitution of another person, even with the consent of that person”, runs a brothel or rents accommodations for the purpose of prostitution.<sup>16</sup> The Convention additionally requires state parties to abolish all regulations that subject prostitutes “to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.”<sup>17</sup> Despite these important provisions, the Convention has been criticised for its narrow focus on prostitution, including consensual prostitution, rather than trafficking, and for being ineffective due to a lack of implementation and supervision mechanisms. The Convention approaches organised prostitution as the sole impetus for human trafficking crimes, and assumes that trafficking can be addressed through eliminating prostitution. This narrow definition of “trafficking” as “trafficking for prostitution” excludes a vast number of trafficked women from the protection of the Convention. Due to lack of implementation and enforcement mechanisms, and to a failure to acknowledge and address the myriad of causes and types of human trafficking, the Convention has proven ineffective in both combating trafficking, and protecting the rights of trafficked women. No independent body has been established to monitor the implementation and enforcement of the treaty, though it is monitored by the secretariat of the Working Group

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15 *Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*, G.A. Res. 317 (IV) (July 25, 1951). Available at <http://www2.ohchr.org/english/law/trafficpersons.htm>. Retrieved July 29, 2011.

16 *Id.*

17 *Id.*

on Slavery at the Centre for Human Rights, in close co-operation with the Centre for Social Development and Humanitarian Affairs of the Department of International Economic and Social Affairs.

The prohibition of forced prostitution and the commercial sexual exploitation of women have been incorporated into other instruments, such as the Convention for the Elimination of Discrimination against Women (CEDAW).<sup>18</sup> Article 6 of the Convention requires state parties to take all appropriate measures, including passage of legislation, to suppress all forms of traffic in women.<sup>19</sup>

Trafficking in children has also been recognised as an extensive global problem, and in recognition of this, the Convention on the Rights of the Child<sup>20</sup> provides comprehensive measures for prevention and for rehabilitation of trafficked children. The Convention requires that member states act in the best interest of the child, which is a departure from the common law approach of treating children as chattels. Every member of the U.N. has ratified the convention, except for the United States and Somalia.<sup>21</sup> Additionally, the second optional protocol to the Convention added in 2000 prohibits the sale of children, child pornography, and child prostitution. The prohibition on trafficking and the exploitation of children has been reiterated and its scope expanded in the 1999 ILO Convention on the Worst Forms of Child Labour.<sup>22</sup>

The Protocol to Prevent, Suppress and Punish Trafficking in Persons<sup>23</sup>, Especially Women and Children (Palermo Protocol), supplementing the U.N. Convention against Transnational Organised Crime<sup>24</sup>, provides the definition of trafficking in human beings that has

18 *Convention for the Elimination of Discrimination against Women (CEDAW)* (September 3, 1981). Available at <http://www2.ohchr.org/english/law/cedaw.htm>. Retrieved July 29, 2011.

19 *Id.*

20 *Convention on the Rights of the Child*, G.A. Res. 44/25 (November 20, 1989). Available at <http://www2.ohchr.org/english/law/crc.htm>. Retrieved July 29, 2011.

21 *Id.*

22 International Labour Organisation [ILO], *Convention on the Worst Forms of Child Labour*, Convention 182, session 87 (June 1, 1999). Available at [http://www.ilocarib.org.tt/projects/cariblex/conventions\\_9.shtml](http://www.ilocarib.org.tt/projects/cariblex/conventions_9.shtml). Retrieved August 2, 2011

23 Office on Drugs and Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [Palermo Protocol]*, G.A. Res. 55/25, (November 15, 2000). Available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf). Retrieved August 2, 2011.

24 Office on Drugs and Crime, *Convention against Transnational Organised Crime*, G.A. Res. 55/25 (November 15, 2000). Available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. Retrieved August 2, 2011.

been accepted by the international community. The Protocol defines Trafficking in persons as:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion or abduction or fraud or deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purposes of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

The consent of a victim of trafficking in persons to the intended exploitation set forth [...] shall be irrelevant where any means set forth were used.

The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth [...] <sup>25</sup>

The Protocol requires ratifying states to prevent and combat human trafficking, especially women and children, and assist victims of trafficking while protecting their human rights. It obligates ratifying states to implement national trafficking legislation, and has a strong focus on the protection of the victims, by mandating that trafficked persons not be punished for any offences or activities related to their having been trafficked, such as prostitution and immigration violations. The Protocol also ensures that victims of trafficking are protected from deportation where there are reasonable grounds to suspect that the security of either the trafficked person or his/her family would be at risk, and suggests consideration of temporary or permanent residence in countries of transit or destination for trafficking victims, either in exchange for testimony against alleged traffickers, or on humanitarian grounds. <sup>26</sup>

With regard to trafficked children, the protocol prohibits the trafficking of children, defined as a person less than 18 years of age, for purposes of commercial sexual exploitation, exploitative labor practices

<sup>25</sup> Palermo Protocol, G.A. Res. 55/25, (November 15, 2000)

<sup>26</sup> Id.

or the removal of body parts. The Protocol additionally facilitates return and acceptance of children who have been victims of cross-border trafficking, and suspends parental rights of parents, caregivers or any other persons who have parental rights in respect of a child should they be found to have trafficked a child.<sup>27</sup>

The Protocol addresses the issue of punishment for trafficking crimes, and requires member states to levy proportional criminal penalties for persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by state officials. The Protocol additionally provides for the confiscation of the instruments and proceeds of trafficking and related offences to be used for the benefit of trafficked persons.<sup>28</sup>

The Palermo Protocol is the primary international instrument to combat human trafficking. It represents a significant development in the global battle against trafficking due to its emphasis on the need to develop national policies and programs that effectively prevent trafficking but do not inhibit labour migration. Its major limitation is that the sections addressing protection and support for victims are not binding on states that have ratified the Convention. In addition, the effectiveness of the protections offered depends on the willingness of concerned organisations and officials to refer persons they believe to be trafficked to the relevant agency for assistance, when often they are primarily concerned with victims' status as illegal immigrants.

The Protocol is significant for being the first international convention to consolidate all aspects of trafficking, sex, labor, organ theft, etc. into a single instrument. Trafficking is not limited to commercial sexual exploitation, but includes forced labor and other practices akin to slavery. Under this definition, laborers who travel for work and are deceived or coerced into working in conditions to which they did not consent, fall within the definition of a trafficked person. The Protocol also emphasises the vulnerability of women and children to trafficking for commercial sexual exploitation. It is notable for its focus on protection, not punishment, of victims of trafficking, and provides for special safeguards for trafficked children, including legal protection.<sup>29</sup> The definition of trafficking provided in the Protocol also includes the

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27 Id.

28 Id.

29 Id.

many stages of trafficking, criminalising not only the transportation of a person, but also their recruitment and receipt.

In comparison with the earlier Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, the Palermo Protocol takes cognisance of the importance of consent, and does not confine the definition of trafficking to prostitution alone. It combines traditional crime control measures for investigating and punishing offenders with measures to protect victims of trafficking. The only situation in which non-coerced movement is regarded as trafficking is in the case of an exploited minor.

The existing international law pertaining to trafficking provides limited, though crucial, protection to persons who have been trafficked or smuggled as migrant workers; however, the distinction between trafficking and migration for work is rarely made. Consequently, the rights of a trafficked person as a worker often go unarticulated and unprotected.<sup>30</sup> The International Convention for the Rights of All Migrant Workers and Members of their Families<sup>31</sup> provides many safeguards for the rights of migrant workers, but has been ratified by only 23 countries, and is thus not in effect.

There is a marked reluctance on the part of most states to enact legislation protecting anything but the basic human rights of migrants. Most governments have addressed the problem of the increased international demand for migrant workers and the rapid growth of trafficking in persons as a result, by imposing tighter immigration restrictions; this has served to increase the incidence of trafficking and smuggling, and has aggravated the problems faced by migrant workers. The violation of their human rights continues unabated. However, the international community has acknowledged that the issues of trafficking and migration are inter-related.

In 1996, ECPAT, UNICEF, and the NGO Group for the Convention on the Rights of the Child collaborated to organise the First World Congress against Commercial Sexual Exploitation of Children in Stockholm, Sweden. The Stockholm Agenda for Action, calling for action

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30 Dale Huntington, *Anti Trafficking Programmes in South Asia: Appropriate Activities, Indicators and Evaluation Methodologies*, UNIFEM, population Council, USAID, PATH at 6. Available at [http://www.popcouncil.org/pdfs/rr/anti\\_trafficking\\_asia.pdf](http://www.popcouncil.org/pdfs/rr/anti_trafficking_asia.pdf). Retrieved April 7, 2006.

31 *International Convention for the Rights of All Migrant Workers and Members of their Families*, G.A. Res. 45/158 (December 18, 1990)



against the commercial sexual exploitation of children, was signed by 122 states. The Agenda for Action calls on countries to develop National Plans of Action against Commercial Sexual Exploitation of Children, and to implement the Agenda for Action in six areas: coordination, cooperation, prevention, protection, recovery and reintegration, and child participation. The National Plans of Action provide governmental and childcare agencies an opportunity to cooperate in setting national policies to eliminate the sexual exploitation of children, and promote children's rights in their countries. The Second World Congress was hosted in Yokohama, Japan, in 2001. One-hundred fifty-nine countries reaffirmed their commitment to the Agenda for Action by adopting the Yokohama Global Commitment.

### **Regional Instruments against Trafficking**

South Asia has become a major source, destination, and transit point for trafficking victims.<sup>32</sup> Trafficking victims in South Asia, particularly women and children, are trafficked both within their own countries and across international borders.

In view of this alarming trend, there have been important steps taken at the regional level to address this issue in the past five years. At present, international conventions are invoked to protect the rights of trafficked persons within the region, especially women and children. Simultaneously, regional instruments like the Rawalpindi Resolution of 1996<sup>33</sup> and the South Asian Association for Regional Cooperation (SAARC) Convention on Prevention and Combating Trafficking in Women and Children<sup>34</sup> have been developed to specifically address the problem of trafficking. The focus of the Convention is the sexual exploitation of women and children.

The SAARC Convention is an important step forward in the international fight against human trafficking. It recognises the need for extraterritorial application of jurisdiction and extradition laws including a provision that the Convention be effective and that state parties to the

32 Sinha Indrani, *Trafficking and Children at Risk*. Sanlaap (January 2006). Available at [http://www.ashanet.org/focusgroups/sanctuary/articles/sanlaap\\_trafficking.doc](http://www.ashanet.org/focusgroups/sanctuary/articles/sanlaap_trafficking.doc). Retrieved April 8, 2006.

33 The Rawalpindi Resolution of 1996 calls for commitment from member states of SAARC on issues related to child trafficking in the region. Available at <http://www.ilo.org/public/english/region/asra/newdelhi/ipecc/responses/govtinit.htm>. Retrieved April 7, 2006.

34 SAARC, *South Asian Association for Region Cooperation [SAARC] Convention*, Summit 11 (January 5, 2002). Available at <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>. Retrieved August 2, 2011.

Convention shall be bound to prosecute or extradite offenders in the absence of extradition treaties between the concerned states.

Nonetheless, several pertinent issues have been overlooked by the Convention. The Convention has been strongly criticised for limiting its application to the commercial sexual exploitation of women and children, and for failing to address the broader spectrum of trafficking crimes. An instrument intended to combat trafficking, whether at the international, regional, or national level, must recognise that trafficking is not limited to prostitution of women and children. The Convention also does not clarify the rights of victims, or the recipient country's accountability for the rescue, rehabilitation, repatriation, and reintegration of trafficking victims. Destination countries must be held accountable for providing victims with mental health care, legal advice, and financial assistance and/or compensation. Immigration policies of member countries should be modified to allow a trafficking victim to initiate legal proceedings against traffickers in the country of residence. Additionally, legal assistance should be offered to the victim, even if s/he is unwilling to cooperate in legal proceedings against the trafficker. A glaring oversight is that pornography, a major reason for trafficking in South Asia, is not included in the Convention as an offence. The provisions of the Convention fail to adequately protect the rights of victims, such as the rights to confidentiality of records, to privacy, to identity protection, and to access to justice.

In Europe there is the Council of Europe Convention on Action against Trafficking in Human Beings. This Convention is a comprehensive treaty mainly focused on the protection of victims of trafficking and the safeguard of their rights. It also aims at preventing trafficking as well as prosecuting traffickers. The Convention applies to all forms of trafficking; whether national or transnational, whether or not related to organised crime. It applies whoever the victim: women, men or children and whatever the form of exploitation: sexual exploitation, forced labour or services, etc. It also provides for the setting up of an independent monitoring mechanism guaranteeing parties' compliance with its provisions.

This chapter gives an overview of the cases on trafficking from the European Court of Human Rights as well as cases from the US and the UK. In addition International law in this area has been described along with a summary of both US and UK legislation.

## International Legislation

### **The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Crime – UN anti-trafficking protocol (2005)**

This is one of two Palermo protocols, the other being the Convention Against Smuggling of Migrants by Land, Sea or Air. The US and UK are signatories and India signed and recently ratified this Protocol in May 2011.

It is the first Protocol to consolidate all aspects of trafficking – sex, labor, etc. – into one instrument. It defines Trafficking as “the transport of persons, by means of coercion, deception, or consent for the purpose of exploitation such as forced or consensual labor or prostitution”. It facilitates the return and acceptance of children who have been victims of cross-border trafficking and prohibits trafficking of children (which is defined as being a person under 18 years of age) for purposes of commercial sexual exploitation of children (CSEC), exploitative labor practices or the removal of body parts. It also suspends parental rights of parents, caregivers or any other persons who have parental rights in respect of a child should they be found to have trafficked a child.

It contains provisions to ensure that trafficked persons are not punished for any offences or activities related to their having been trafficked, such as prostitution and immigration violations. Victims of trafficking are protected from deportation or return where there are reasonable grounds to suspect that such return would represent a significant security risk to the trafficked person or their family. Temporary or permanent residence in countries of transit or destination for trafficking victims is considered in exchange for testimony against alleged traffickers, or on humanitarian and compassionate grounds. There are proportional criminal penalties for persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by state officials. The instruments and proceeds of trafficking and related offences are to be used for the benefit of trafficked persons. The Convention and the Protocol obligate ratifying states to introduce national trafficking legislation.

## Council of Europe Convention on Action against Trafficking in Human Beings

The EU framework of trafficking law is notable in that it separates trafficking into 3 distinct offences: the act of trafficking/transporting/harboring/receiving the person; the means to force the person to commit an offence; and the exploitative purpose of the trafficking. What also sets this apart is that the consent of the trafficked individual to the exploitation is irrelevant to the offence of the trafficker.

The UK has not adopted this framework domestically. While transferring a person might constitute trafficking, harboring and receiving a person is questionable without a separate trafficking offence. As shown by the UK judgements (described herein), consent of the trafficking victim to exploitation is also a significant factor in sentencing.

The Europe Convention established a Group of Experts on Action against Trafficking in Human Beings (GRETA) which monitors the implementation of the Convention through country reports. Additional protection is provided through the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. The main added value of the Europe Convention in relation to other international instruments is its Human Rights perspective and its focus on victim protection. Paragraph 5 of the Preamble states that the respect for the rights and protection of victims and the fight against trafficking in human beings must be the paramount objectives.

There are a number of articles that highlight how this objective is to met. Including, Article 5(2) which gives a specimen list of prevention policies and programmes which Parties must establish or support, in particular for persons vulnerable to trafficking and for relevant professionals. Under Article 5(3) Parties are to promote a human-rights-based approach. Here, the drafters took the view that it was essential that the policies and programmes referred to in paragraph 2 be based on gender mainstreaming and a child-rights approach to children. Article 5 Paragraph 4 places an obligation on Parties to take appropriate measures as necessary to enable people to emigrate and immigrate lawfully. It is essential that would-be immigrants have accurate information about legal opportunities for migration, employment conditions and their rights and duties. Article 5 Paragraph 5 requires that Parties take specific preventive measures with regard to children. The provision refers in particular to creating a “*protective environment*” for children so as to make them less vulnerable to trafficking and enable

them to grow up without harm and to lead decent lives. The concept of a *protective environment*, as promoted by UNICEF, has eight key components:

1. protecting children's rights from adverse attitudes, traditions, customs, behaviour and practices;
2. government commitment to and protection and realisation of children's rights;
3. open discussion of, and engagement with, child protection issues;
4. drawing up and enforcing protective legislation;
5. the capacity of those dealing and in contact with children, families and communities to protect children;
6. children's life skills, knowledge and participation;
7. putting in place a system for monitoring and reporting abuse cases;
8. programmes and services to enable child victims of trafficking to recover and reintegrate.

The Europe Convention also contains provisions to tackle the demand for human trafficking. Article 6 places a positive obligation on Parties to adopt and reinforce measures for discouraging demand whether as regards sexual exploitation or in respect of forced labour or services, slavery and practices similar to slavery, servitude and organ removal; it includes a list of such minimum measures. An essential one is research on best practices, methods and strategies for discouraging client demand effectively

Chapter III contains provisions to protect and assist victims of trafficking in human beings. Some of the provisions in this chapter apply to all victims (Articles 10, 11, 12, 15 and 16). Others apply specifically to victims unlawfully present in the receiving Party's territory (e.g. Articles 13 and 14) or victims in a legal situation but with a short-term residence permit. In addition, some provisions also apply to persons not yet formally identified as victims but whom there are reasonable grounds for believing to be victims (Article 10(2), Article 12(1) and (2) and Article 13).

Article 10, Paragraph 1 addresses the fact that national authorities are often insufficiently aware of the problem of trafficking in human beings. Victims frequently have their passports or identity documents taken away from them or destroyed by the traffickers. In such cases they

risk being treated primarily as illegal immigrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help. To avoid that, Article 10(1) requires that Parties provide their competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings and in identifying and helping victims, including children and that they ensure that those authorities cooperate with one other as well as with relevant support organisations

Paragraph 3 provides additional protection for children, and those for whom it is difficult to determine whether they are 18 or over or still a child. Paragraph 3 consequently requires Parties to presume that a victim is a child if there are reasons for believing that to be so and if there is uncertainty about their age. Until their age is verified, they must be given special protection measures, in accordance with their rights as defined, in particular, in the *United Nations Convention on the Rights of the Child*. Paragraph 4 provides for measures which must be taken by the Parties when they deal with cases of child victims of trafficking who are unaccompanied children. Hence, Parties must provide for the representation of the child by a legal guardian, organisation or authority which is responsible to act in the best interests of that child (a); take the necessary steps to establish his/her identity and nationality (b); and make every effort to locate his/her family when this is in the best interests of the child. The family of the child should be found only when this is in the best interests of the child given that sometimes it is his/her family who is at the source of his/her trafficking

Article 13 provides for a recovery and reflection period for victims of trafficking who are in a party's territory illegally or on a short-term visa; the Convention contains a provision requiring Parties to ensure that their domestic law for this period is at least 30 days.

Article 14 addresses residence permits. A residence permit should be provided in one of two situations, where the victim's stay is "necessary owing to their personal situation" or that it is necessary "for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings". The aim of these requirements is to allow Parties to choose between granting a residence permit in exchange for cooperation with the law-enforcement authorities and granting a residence permit on account of the victim's needs, or indeed to adopt both simultaneously; In the case of children, the child's best interests take precedence over the above two requirements: the Convention

provides that residence permits for child victims are to be “issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions” (Article 14(2)). The words “when legally necessary” have been introduced in order to take into account the fact that certain states do not require residence permits for children. The permit must also be renewable.

The personal situation requirement takes in a range of situations, depending on whether it is the victim’s safety, state of health, family situation or some other factor which has to be taken into account. The requirement of the cooperation with the competent authorities has been introduced in order to take into account that victims are deterred from contacting the national authorities by fear of being immediately sent back to their country of origin as illegal entrants to the country of exploitation.

Article 15 addresses compensation and legal redress; this article concerns access to information of victims, victims’ right to legal assistance, victims’ right to compensation and a guarantee of compensation

Article 16 sets out the rules regarding repatriation and return of victims. This has been reinforced by a number of ECHR cases, including *Soering v United Kingdom* (7 July 1989, series A No. 161), which found that “such a decision may give rise to an issue under article 3 and hence engage the responsibility of that State under the convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment”. The later case of *Cruz Varaz and others v Sweden* (20 March 1991, series A, No. 201) decided that above principles should also apply to deportation.

Article 17 concerns gender equality, the main aim being to draw the attention to the fact that women, according to existing data, are the main target group of trafficking in human beings and to the fact that women, who are susceptible to being victims, are often marginalised even before becoming victims of trafficking and find themselves victims of poverty and unemployment more often than men. Therefore, measures to protect and promote the rights of women victims of trafficking must take into account this double marginalisation, as women and as victims.

Chapter IV concerns substantive criminal law; the convention requires legislation making certain activities crimes such as trafficking, the use of a trafficking victims services and any behaviour related to

travel or identity documents used to facilitate trafficking. It also lists examples of aggravating circumstances in the determination of the penalty for trafficking crimes, these are:

- a) where the trafficking endangered the victim's life deliberately or by gross negligence
- b) where the offence was committed against a child – that is, for the purposes of the Convention, against a person aged under 18
- c) where the trafficking was committed by a public official in the performance of his or her duties
- d) where the offence involved a criminal organisation.

In addition, Chapter IV addresses the criminal non-liability of trafficking victims.

Article 30 addresses court proceedings in trafficking cases, and suggests the following provisions are complied with:

- a) No public hearings
- b) Audio visual technology – Use of audio and video technology for taking evidence and conducting hearings may, as far as possible, avoid repetition of hearings and of some face-to-face contact, thus making court proceedings less traumatic. In recent years a number of countries have developed the use of technology in court proceedings, if necessary adapting the procedural rules on taking evidence and hearing victims. This is particularly the case with victims of sexual assault. However, this step has not yet been taken in all Council of Europe member countries, in addition to which victims of trafficking are far from having the benefit of such protection measures, even in countries whose court system recognises the validity of these methods
- c) Recordings of testimonies
- d) Anonymous testimony

Chapter VII refers to other monitoring mechanisms such as the Group of Experts against trafficking in human beings (GRETA). This is a technical body, composed of independent and highly qualified experts in the area of Human Rights, assistance and protection to victims and the fight against trafficking in human beings, with the task of adopting a report and conclusions on each Party's implementation of the Convention. Article 37 addresses the Committee of Parties which



is composed of the representatives in the Committee of Ministers of the Parties to the Convention and of representatives of Parties non-members of the Council of Europe, which may adopt recommendations, on the basis of the report and conclusions of GRETA, addressed to a Party concerning the measures to be taken to follow up GRETA's conclusions.

### **Additional International Legislation**

- There are a number of South Asian Conventions on Trafficking, including the South Asian Regional Convention against Trafficking, the SAARC (South Asian Association for Regional Cooperation) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002 and the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare, 2002. These focus on trafficking in women and children for sexual exploitation.
- The International Labour Organisation (ILO) Convention 189 on Decent Work for Domestic Workers was backed by 83 percent of voters in Geneva on 16 June 2011. It was the first time that minimum employment standards had been established for an estimated 50 to 100 million domestic workers worldwide. This Convention ensures that domestic workers are no longer excluded from national employment law protections. Once ratified by individual countries, domestic workers will be legally entitled to weekly days off, limits to hours of work and a minimum wage. The countries that abstained from voting in favour of this Convention were the UK, Sudan, Malaysia, El Salvador, Panama, Singapore, Czech Republic and Thailand. Swaziland was the only government to vote against convention.
- The Blue Heart Campaign is the UN campaign to fight Human Trafficking, launched by UN Office of Drugs and Crimes (UNODC).
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women affirms, in the Preamble, that violence against women constitutes a violation of their human rights and fundamental freedoms. The definition of violence against women in Article 2 of this Convention includes trafficking as a form of violence against women.
- The European Union, in its Council Framework Decision on Combating Trafficking in Human Beings of 19 July 2002 states

that “trafficking in human beings comprises serious violations of fundamental human rights and human dignity...”(see para 3). The Treaty monitoring bodies of the United Nations, including the Human Rights Committee and the Committee on the Elimination of Discrimination against Women, have also identified trafficking in human beings as a violation of human rights.

- The Rome Statute of the International Criminal Court in Article 7 states that: “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (c) Enslavement; [...] which “means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.
- The horizontal application of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been the subject of debate over many years. However, the case law of the European Court of Human Rights contains clear indications in favour of the applicability of the ECHR to relations between private individuals in the sense that the Court has recognised the liability of contracting States for acts committed by individuals or group of individuals when these States failed to take appropriate measures of protection. For example:
  - *X and Y v. The Netherlands*, where the Court held that there was an obligation on the state to adopt criminal-law provisions to secure the effective protection of individuals. Culpable state failure to act on this could therefore give rise to violation of the ECHR
  - *Young, James and Webster v. The United Kingdom* - Culpable state failure to enact criminal legislation to protect individuals could give rise to violation of the ECHR

The ECHR also prohibits slavery, which is included in the definition of human trafficking and forced labour in its Article 4: “1. No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour [...]”.

- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

- International Convention on the Rights of the Child.

The Convention on the Rights of the Child is the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights. In 1989, world leaders decided that children needed a special convention just for them because people under 18 years old often need special care and protection that adults do not. The leaders also wanted to make sure that the world recognised that children have human rights too.

The Convention sets out these rights in 54 articles and two Optional Protocols. It spells out the basic human rights that children everywhere have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. Every right spelled out in the Convention is inherent to the human dignity and harmonious development of every child. The Convention protects children's rights by setting standards in health care; education; and legal, civil and social services.

- Slavery Convention, 1926.

With the 1926 Slavery Convention, concrete rules and articles were decided upon, and slavery and slave trade were banned.

Slavery was defined(Art.1) as: "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" and the slave trade was defined to include: "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."

- Convention Concerning Forced or Compulsory Labour. The convention defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. The

Convention was supplemented in 1957 by the Abolition of Forced Labour Convention.

- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.
- United Nations Convention against Transnational Organised Crime and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (also called "Trafficking Protocol"), 2000. This Protocol is the first global, legally binding convention to combat trafficking in 50 years. The purpose of the Protocol is to national cooperation in investigating and prosecuting cases of human trafficking.

# European Court of Human Rights Case Summaries

## **RANTSEV V. CYPRUS AND ANOTHER**

[2010]ECHR 25965/04

Decided on 07.01.2009

**Hon'ble Judges:** Judge Rozakis (President), Judges Kovler, Steiner, Spielmann, Jebens, Malinverni And Nicolaou, And S Nielsen (Section Registrar)

This is a landmark case that found that human trafficking falls within the scope of Article 4 of the ECHR (prohibition of slavery, servitude and forced labour). This case broadened the scope of Article 4 by emphasising the positive action states must take to prevent human trafficking. Under Article 4, states have a positive obligation to prevent trafficking and protect victims.

The facts of the case were that Oxana Rantseva, a Russian girl working at a Cabaret in Cyprus, died trying to escape the apartment in which she was being held. Her father brought the case against Cyprus and Russia, for the failure of both state authorities to investigate the possibility of trafficking. The ECHR found that Cyprus had violated Article 4 of the ECHR by failing its obligation to operate an effective administrative framework to prevent trafficking in general, and to take protective measures in the case of Ms Rantseva in particular. Russia had violated Article 4 by failing to investigate the alleged trafficking and its potential start in Russia. The Court found no Article 2 (right to life) violation.

## **SILIADIN V FRANCE**

[2005] 20 BHRC 654

Decided on 26.07.2005

**Hon'ble Judges:** Judges Cabral Barreto (President), Costa, Turmen, Jungwiert, Butkevych, Mularoni And Fura-Sandstrom

In this case, the ECHR defined the terms "slavery" and "forced labour" in Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The applicant was an alien who arrived in France at the age of sixteen, had worked for several years for the respondents carrying out household tasks and looking after their three, and subsequently four, children for seven days a week, from 7 am to 10 pm, without receiving any remuneration. She was obliged to follow instructions regarding her working hours and the work to be done, and was not free to come and go as she pleased. The Court unanimously held that there has been a violation of Article 4 of the Convention and went on to emphasise the positive obligations of member states of the convention to protect people from infringement of their human rights.

### X AND Y V. THE NETHERLANDS

Series A no. 91, paragraph 23

Decided on 26.03.1985

**Hon'ble Judges:** Mr. R. Ryssdal, President, Mr. G. Wiarda, Mr. B. Walsh, Sir Vincent Evans, Mr. C. Russo, Mr. R. Bernhardt, Mr. J. Gersing, and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar

The intellectually disabled daughter of X, was sexually assaulted in a privately run children's home. The public prosecutor did not open proceedings and X's appeal was rejected on the grounds that his complaint could not be regarded as a substitute for App2's complaint, which the girl, being over 16, should have lodged herself, even though the police had regarded her as incapable of doing so. The appellants alleged (among others) a violation of Art. 8.

The Court stated that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. The Court therefore held that there was an obligation on the state under ECHR to adopt criminal-law provisions to secure the effective protection of individuals. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Culpable state failure to act on this could therefore give rise to violation of the ECHR.

**YOUNG, JAMES AND WEBSTER V. THE UNITED KINGDOM**

Series A, no. 44, paragraph 49

Decided on 13.08.1991

**Hon'ble Judges:** Mr. G. WIARDA, President, Mr. R. RYSSDAL, Mr. M. ZEKIA, Mr. J. CREMONA, Mr. THÓR VILHJÁLMSSON, Mr. W. GANSHOF VAN DER MEERSCH, Mrs. BINDSCHEDLER-ROBERT, Mr. D. EVRIGENIS, Mr. G. LAGERGREN, Mr. L. LIESCH, Mr. F. GÖLCÜKLÜ, Mr. F. MATSCHER, Mr. J. PINHEIRO FARINHA, Mr. E. GARCIA DE ENTERRIA, Mr. L.-E. PETTITI, Mr. B. WALSH, Mr. M. SØRENSEN, Sir Vincent EVANS, Mr. R. MACDONALD, Mr. C. RUSSO, Mr. R. BERNHARDT, and also Mr. M.-A. EISSEN, Registrar, and Mr. H. PETZOLD, Deputy Registrar.

The three applicants had been employed by British Rail for a number of years when they were dismissed by their employer because they refused to join the designated trade union under a closed shop agreement concluded the previous year between their employer, British Rail, and three railway unions.

The Court found that this was a violation of article 11 (right to freedom of association) of the convention. The Court stopped affirming that there was a general negative right of association which was guaranteed on the same footing as the positive right. However it ruled that the UK legislation that allowed dismissal for refusal to join a trade union was in breach of Article 11 of the European Convention since that Article gave workers the freedom to choose whether to belong to a given trade union or not. It found that compulsion which "strike[s] at the very substance of the freedom," such as loss of livelihood for refusing to join a trade union, was incompatible with freedom of association.

Therefore culpable state failure to enact criminal legislation to protect individuals could give rise to violation of the ECHR.

# United Kingdom Legislation

## Smuggling Offences include:

- Assisting unlawful immigration to a Member State (facilitation) - s.25 Immigration Act 1971
- Facilitating entry by asylum-seekers to the UK for gain - s.25A Immigration Act 1971
- Assisting entry to the UK in breach of deportation or exclusion order - s.25B(1) Immigration Act 1971
- Assisting entry/ remaining of excluded person - s.25B(3) Immigration Act 1971

## Human Trafficking Offences

### *Immigration and Asylum Act 2002*

This was repealed by Sexual Offences Act 2003 (schedule 7) as of 1 May 2004 [SI 874 (2004)] and substituted by offences in sections 57, 58 and 59 Sexual Offences Act 2003, so it can only be used if the offence was committed after 10 February 2003 and before 1 May 2004.

An offence is committed under this act if a person:

- Arranges/facilitates arrival of person s/he intends to exercise control over prostitution or if s/he believes another person will exercise control over prostitution
- If a person does the same as (i) for travel within the UK
- If a person facilitates transport of a prostitute outside the UK

### *Sexual Offences Act 2003*

An offence is committed under s.57 if a person facilitates/arranges arrival of another person into the UK and intends anything with the respect to the other person that constitutes a relevant offence, regardless of whether or not that offence takes place in the UK, or believes that the other person will do something that will constitute a relevant offence, regardless of whether or in the offence takes place in the UK.

Under s.58 Sexual Offences Act 2003 an offence is committed if a person intentionally arranges/facilitates travel of another person



within the UK and intends anything with respect to the other person that constitutes a relevant offence, or believes that the other person will do something that will constitute a relevant offence, regardless of whether or not the offence takes place in the UK.

Trafficking out of the UK for sexual exploitation is also an offence under s.59 if a person intentionally arranges/facilitates departure from the UK of another person if s/he intends anything with respect to the other person that would constitute relevant offence.

*Asylum and Immigration (Treatment of Claimants etc) Act 2004*

Trafficking people for exploitation is an offence under s.4. Under s4(1) if a person intentionally arranges/facilitates the arrival or entry of another person into the UK and intends to exploit the person in the UK or elsewhere; or believes another person is likely to do so.

An offence is committed under s4(2) if a person arranges or facilitates travel within the UK of an individual in respect of whom he believes has been trafficked into the UK and he intends to exploit the person, or believes another person is likely to, whether in the UK or elsewhere

An offence is committed under s4(3) if a person arranges or facilitates the departure from the UK of an individual and he intends to exploit that person outside the UK, or believes another person is likely to, outside of the UK

S4(4) defines "exploited person" as:

- the victim of behavior contravening Article 4 of the ECHR (slavery or forced labor);
- a person who is encouraged, required or expected to do something which would mean an offence is committed under the Human Organ Transplants Act 1989;
- a person who is subjected to force, threats or deception designed to induce him: (1) to provide services of any kind; (2) to provide benefits of any kind; (3) to enable another person to acquire benefits of any kind.

The victim of someone who used or attempted to use him/her for purposes that fall within the 3 listed above under (iii), having been chosen for the purpose because:

- s/he is mentally or physically disabled or ill, s/he is young, or s/he has a familial relationship with the person, and
- a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose

## **Other Offences**

### *Conspiracy to traffic*

This offence may involve an act done by one or more of the parties, or an event, occurring in a place outside England and Wales. This situation is covered by section 1A of the Criminal Law Act 1977 which provides that where (a) that act or event would be an offence by the law of that place and (b) it would also be an offence here (but for the fact that it takes place outside the jurisdiction), then a person in England and Wales who becomes a party to the agreement or, being a party, does anything in pursuance of the agreement (even before its formation) can be charged with conspiracy contrary to section 1(1) of the Criminal Law Act 1977. The prior consent of the Attorney General is required to prosecute offences to which Section 1A applies.

# United Kingdom Case Summaries

## OOO V. COMMISSIONER OF POLICE OF THE METROPOLIS

2011 WL 1151802, [2011] EWHC 1246 (QB)

Decided on 20.05.2011

**Hon'ble Judges:** Mr Justice Wyn Williams

This is a UK case, in a UK court, but the issue addressed is the state's obligation under a European Human Rights Convention, and state actors' culpability for failing to uphold that obligation

The Claimants were four Nigerian girls who were brought to the UK illegally, and subjected to forced labor in the UK in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (the Court does not mention the Council of Europe Convention on Action against Trafficking in Human Beings). This is a suit against the Commissioner of Police for police failure to investigate claims made of ill treatment. Claimants argued that this failure to investigate their cases constitutes a violation of their rights under Articles 3 and 4 of the European Convention for the Protection for Human Rights and Fundamental Freedoms (ECHR).

The court determined that the scope of the duty of police in the UK includes investigating infringement of Convention articles 3 and 4. The Court ruled that that defendant and police had failed their obligation under Article 4 to investigate claims of violation of rights under the Convention. Court ruled that Article 4 of the Convention creates certain positive rights on the part of member states, to actively prevent and investigate infringement of Article 4 rights. If a credible report of infringement has been made, the police have a duty to investigate it on their own motion. The court also ruled that "investigate" entails promptness and expedience in the investigation. The court cited ECHR case *Rantsev v. Cyprus* in its decision, and adopted the scope of duty specified in *Rantsev* in the UK.

**R V PLAKICI**

[2005] 1 Cr.App.R.(S.) 19

Decided on 29.04.2004

**Hon'ble Judges:** Latham, L.J.; Cox, J.; Judge Peter Beaumont Q.C.

This was a serious case of trafficking, where the trafficker used significant force to coerce trafficking victims into prostitution. The defendant was convicted of trafficking women from Eastern Europe and of detaining them in a brothel to provide sexual services against their will. The offences were prior to the trafficking offences introduced in 2002 legislation; the defendant was charged with a range of offences including facilitating illegal entry, kidnapping, procuring a girl to have unlawful sex, living on prostitution, incitement to rape and false imprisonment. He was originally sentenced to 10 years imprisonment; on appeal, consecutive sentences totaling 23 years were imposed. The Court commented that it was important for courts dealing with such matters to send the message that human trafficking is despicable and will not be tolerated in a civilised society, and that lengthy sentences will be imposed on those involved.

The case is notable for the strict sentence of 23 years. (Cf *R v. Fernandez*, in which the convicted defendant received a sentence of only 4 years for exploiting consenting prostitutes.)

**R. V. MAKI**

[2004] EWCA Crim 1275, [2005] 1 Cr App R (S) 83,  
(Transcript: Smith Bernal)

Decided on 16.11.2005

**Hon'ble Judges:** Rose LJ (VP)

A 15-year-old Lithuanian girl was trafficked into the UK. She was promised a well paid job, but over the subsequent two months she was sold to multiple buyers, raped by numerous assailants, and forced into prostitution. The Defendant moved the girl to various locations and buyers, though he did not rape or prostitute her himself. Defendant appealed his sentence of 18 years imprisonment with a recommendation for deportation after he pled guilty to two counts of trafficking within the UK, and was convicted by a jury of trafficking into the UK for sexual exploitation and two counts of trafficking within the UK for sexual

exploitation. The appeal was dismissed; the court acknowledged that 18 years is severe, but stated that it is appropriately severe.

The court compared the case to Pakici, and considered the following factors in determining sentencing: number of victims trafficked, age of the victims trafficked, whether or not the prostitution or exploitation was consensual, and the length of time during which the defendant trafficked and/or exploited victims.

The court added additional jail time for several counts of immoral earnings contrary to § 30 of the Sexual Offences Act of 1956 and for incitement to rape. The court considered the cases of the seven women separately, and arrived at a sentence of 23 years imprisonment.

The case is notable because it was the first instance that the court considered human trafficking charges of this nature; the court ultimately imposed a severe sentence based on length of time during which the defendant was carrying out his activities, the number of victims, and the huge sum of money that the defendant had made by exploiting the trafficking victims.

**PO (NIGERIA) V. SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

[2011] All ER (D) 240 (Feb)

Decided on 22.02.2011

**Hon'ble Judges:** Maurice Kay, Carnwath and Thomas LJJ

This case concerned the determination of asylum for trafficking victims in the UK; PO was trafficked from Nigeria to the UK, where she was raped and forced into prostitution, after being tricked with promises of a job and financial security. When she escaped, she was arrested by the police, and she applied for asylum.

The tribunal and higher courts determined that PO's asylum case would be determined by "country guidance", which is a system for determining asylum cases that seeks to provide authoritative guidance on recurring 'country issues' encountered in asylum claims and that need to be considered by asylum decision makers. The tribunal determined that she was not at risk from gangs in Nigeria, so she should be able to secure shelter upon return, and her application for asylum was rejected. On appeal, the court determined that the Tribunal's analysis of PO's case was severely flawed, warranting a review of the country guidance system for determining asylum. The tribunal erred in placing an undue

burden on the trafficking victim to prove she would be at risk of gang violence upon her return, and it erred in its treatment of testimony presented by PO and other witnesses. The court held that CG system of determining asylum cases was not specific enough; that decisions were too lengthy and distract from clarity of exposition of the case; and that the head note of the cases often do not accurately summarise the facts of the case. On appeal, PO was granted leave to remain in the UK indefinitely. This case is notable for changing the basis on which asylum is granted to trafficking victims in the UK.

# United States of America Legislation

## **Victims of Trafficking and Violence Protection Act of 2000**

This Act is also called the Trafficking Victims Protection Act (TVPA). There was no legislation in the US prior to this act to protect victims of trafficking; the law focused on the country of origin rather than on the victims. This law provides rehabilitation to victims, and assistance including education, housing, and temporary residency in the U.S.

## **Trafficking Victims Protection Reauthorisation Act (TVPRA) 2003**

The TVPRA and the Trafficking Victims Protection Reauthorisation Act of 2005 allocated additional funds for the following fiscal years to combat human trafficking. The law expanded the private right of action to any violation under Chapter 77 of Title 18, including violations of Sections 1584 and 1590.

## **18 USCS § 241 – Conspiracy Against Rights**

In the case of *United States v. Fu Sheng Kuo*, 588 F.3d 729 (9th Cir. Haw. 2009) it was held that “If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured;

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.”

**18 USCS § 1591 – Sex Trafficking of Children or by Force, Fraud, or Coercion**

*The Alien Tort Statute (“ATS”), 28 U.S.C. § 1350*

“[...] the statute could provide jurisdiction over any tort claim by an alien that ‘rest[ed] on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognised.’” *Velez v. Sanchez*, 754 F. Supp. 2d 488, 496 (E.D.N.Y. 2010) quoting *Sosa v. Alvarez-Machain*, 542 U.S. at 725.

Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-19

Civil Rights Act of 1964, Title VII

13<sup>th</sup> Amendment of the Constitution – right to be free from involuntary servitude



# United States of America Case Summaries

## **ADHIKARI V. DAUD & PARTNERS**

2010 U.S. Dist. LEXIS 26240

Decided on 01.03.2010

**Hon'ble Judges:** Keith P. Ellison, United States District Judge.

The Defendant, a Jordanian Corporation Daoud & Partners was accused of human trafficking to procure fast and cheap labor in order to fulfill contracts with U.S. military bases in Iraq. The suit was brought by decedents' family members, after several workers were killed by Iraqi insurgents. The decedents were recruited by a company in Nepal, and promised jobs at luxury hotels, or at "American camps", leading them to believe they would be working in the U.S. Once transported to Jordan, they were kept captive in a dark room and only paid 1/3 of what they were promised. When they were transported to Iraq, they were done so in an unprotected caravan on a notoriously dangerous highway; one of the cars was captured by insurgents, and they were executed. The other car transported the workers to the American camp, where they experienced mortar fire and were not permitted to leave. The Claimants brought action under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595; the Racketeering Influenced and Corrupt Organisations Act ("RICO"), 18 U.S.C. § 1962(c), as well as conspiracy to violate the same; and the Alien Tort Statute ("ATS"), 28 U.S.C § 1350 (action for negligence was dismissed).

The court ruled that the TVPRA could be applied retroactively: "application of Section 1596 did not violate the Ex Post Facto Clause of the Constitution, because the law did nothing to alter the criminality of the act of trafficking, but only the way in which it was enforced and adjudicated".

**VALEZ V. SANCHEZ**

754 F. Supp. 2d 488 (E.D.N.Y. 2010)

Decided on 30.11.2010

**Hon'ble Judges:** Frederic Block, Senior United States District Judge.

A Woman alleged that her stepsisters trafficked her from Ecuador and forced her to work in her stepsister's home. She filed charges under the Alien Torts Statute ("ATS"), not under Trafficking Victims Protection Reauthorization Act ("TVPRA"). Even though TVPRA removed jurisdiction in trafficking and forced labor cases, the court ruled that it would treat aliens' claims under ATS as claims under (TVPRA), rather than dismiss claims for lack of jurisdiction, if underlying facts alleged and developed in discovery remained the same and permitted inference of jurisdiction under TVPRA, and there was no possible prejudice to either party.

**HERNANDEZ V. ATTISHA**

Dist. LEXIS 20235 (S.D. Cal. Mar. 4, 2010)

Decided on 04.03.2010

**Hon'ble Judges:** Irma E. Gonzalez, Chief Judge

This case concerned a Mexican citizen, induced by the defendants to come to the US to work as a domestic servant. The plaintiff was promised fair wages and legal status. The Plaintiff alleged that she was forced to work extreme hours, kept under constant control of the defendants, not permitted to leave, and was first denied a salary, then paid well below minimum wage. She has been certified by the U.S. Department of Health and Human Services as a victim of human trafficking.

The court held that after the 2008 amendments to the Trafficking Victims Protection Act, there can be a private right of action for trafficking with respect to peonage, slavery, involuntary servitude, forced labor, or trafficking of children; before the 2008 amendments, this cause of action required some state action

**UNITED STATES V. MAKA**

237 Fed. Appx. 225 (9th Cir. Haw. 2007)

Decided on 16.11.2005

**Hon'ble Judges:** Rose Lj V-P, Simon, Dobbs Dbe Jj

The Defendant was convicted for several counts of human trafficking, involuntary servitude, and alien smuggling and harboring. The court addressed the issue of whether counts of human trafficking are multiplicitous of involuntary servitude and alien smuggling; the court ruled that they are not, the three causes of action require separate and different proofs of fact, and a defendant can therefore be sued under all these causes of action without violating the Fifth Amendment.

**UNITED STATES V. FU SHENG KUO**

588 F.3d 729 (9th Cir. Haw. 2009)

Decided on 15.10.2009

**Hon'ble Judges:** Robert R. Beezer, Susan P. Graber, and Raymond C. Fisher, Circuit Judges. Opinion by Judge Graber.

Two women from China were forced into prostitution after being persuaded by the defendants to travel to American Samoa under the false pretense of employment in a grocery. The defendants were not convicted for trafficking, but rather for conspiracy against rights, namely the right to be free from bonded labor guaranteed by the 13<sup>th</sup> Amendment.

# Abbreviations

ITPA	Immoral Trafficking Prevention Act
CLPRA	Child Labour Prohibition and Regulation Act
JJA	Juvenile Justice Act
CRC	Convention on the Rights of the Child
CEDAW	Convention for the Elimination of Discrimination Against Women
SITA	Suppression of Immoral Traffic in women and Girls Act, 1956
SAARC	South Asian Association Regional Cooperation
DWCD	Department of Women and Child Development
HRLN	Human Rights Law Network
VCA	Voluntary Co-ordination Agency
CID	Criminal Investigation Department
CARA	Central Adoption Resource Agency
PUCL	People's Union For Civil Liberties
UOI	Union of India
NHRC	National Human Rights Commission
BSEHR	Bangladesh Society for the Enforcement of Human Rights
IMOs	International Matchmaking Organisations
INS	Immigration and Naturalisation Service
CWC	Child Welfare Committee
PIL	Public Interest Litigation

## TRAFFICKING AND THE LAW

SPOs	Special Police Officers
NCW	National Commission for women
IPC	Indian Penal Code
CBI	Central Bureau of Investigation
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
HRC	Human Rights Committee
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CRC	Convention of the Rights of the Child

**T**rafficking in human beings is considered a contemporary form of slavery. It is a growing phenomenon globally. In recent years it has become the third largest source of transnational illegal activities after arms and drugs. Historically, trafficking in human beings was associated with slavery and bonded or forced labour. With time, it almost become synonymous with prostitution of commercial sexual exploitation. It is, however, important to note that trafficking is not confined to the commercial sexual exploitation of women and children alone. It has a myriad of forms and the number of victims has been steadily on the rise over the past few decades. It takes place through and for marriage, sexual exploitation, begging, organ trading, military conflicts, drug peddling and smuggling, labour, adoption, entertainment and sports. While there is no precise date, estimates provide that approximately 800,000-900,000 persons are traded annually across national borders. Of these, 70 percent are women and 50 percent are children. The term trafficking needs to be understood along with its linkages, like to the exploitative slave-like conditions, where the victims of trafficking suffer untold exploitation and misery. The party that benefits from this entire exercise are the traffickers. They gain in terms of cash, labour or any other kind of service. This problem cannot be understood merely as the buying and selling of human beings but must be extended to include all processes that precede and follow such trade. Trafficking is a growing business within an organised crime set-up. This flourishes with due sanctions from state functionaries. In various instances of trafficking, the State personnel turn a blind eye and a deaf ear to these crimes, thus, silently abetting trafficking. If not indifferent of silently involved, the State personnel are largely insensitive towards the entire issue and end up victimising the victims of trafficking. In short, these so-called protectors, contribute actively and considerably to facilitate the process of de-humanisation. Despite trafficking being illegal worldwide, it takes place regularly violating national and international laws. It occurs within countries and across international borders, regions, and continents. It is a multidimensional complex issue encompassing a whole range of varied and complex economical, social and cultural factors, intertwined with each other.