

CHAPTER - VI

ROLE OF JUDICIARY IN PROTECTION OF WELFARE OF A CHILD: THE TRENDS AND RESPONSES

6.1 PRELUDE

The judiciary with its innovative and inspiring judgments has been a bedrock of social justice and would remain a myth if protection could not be provided to children, "The future of any nation". With a collage of constitutional and legislative provisions the judiciary took up cudgel against the exploitation of children and whenever called upon gave full protection to the rights of children in consonance with the international commitments which India has made.

But it should be remembered that in democratic form of government, judges do not have the last word, and in fact it is not appropriate that the authority of one organ of democracy should be absolute and final. The decision even of the apex court can be altered by popular judgment of the legislature if it is found to thwart legislative intent. Similarly court can void legislature if it is found to be inconsistent with the constitution. Thus there is, so to say, an understanding between each organ of democracy that its decision is not final and may not prevail. Of course there are those who like judges to believe that they alone are the true oracles of the law and are the only bulwarks against abuse of power by the other organs. Judges should guard against such flattery as it may tarnish the image of the judges and the judiciary. I would underline the fact that courts and legislatures are law makers of work on the legal fabric of our society and there respective roles should therefore be viewed as potentially a fruitful partnership. It is well known that the legislature often does not find sufficient time for a threadbare discussion before a bill is turned into enactment and therefore leaves gaps in the law which gaps have to be filled by the courts through the process of interpretation. In an over-growing and fast changing societal set-up, the burden

falls on the judiciary to mould the law to ensure its relevance in a changed scenario. Since amendment of the law may be a time-consuming process. There is therefore a partnership between the two organs, they are not at logger-heads, as few think.³³⁸

The constitution puts an obligation on every organ of the state, including the judiciary as shapers in a new social order in which justice-social, economic and political and equality of status and opportunity, prevail³³⁹ The final burden of interpreting these elastic provisions is upon the court³⁴⁰.

Courts are to contribute to laws growth without overstepping the boundaries of the system. In other words how to reconcile tradition and convenience or the claims of stability and those of change. "It is the duty of the judiciary to recognize the development of the action and to apply established principles of the positions which the nation on its progress from time to time assumes".

The role of judiciary in India has been quite significant in promoting the child welfare. Mr. Justice Suba Rao, the former Chief Justice of India, rightly remarked-"social tender plant should be properly nourished, as it has little chance of growing into strong and useful tree", so first priority is to the welfare of children.³⁴¹

It is in this spirit that the apex court has laid emphasis on the fact that the important task of social justice is to take care of child, for in them lies the hope of future.

In this Chapter an attempt has been made to assess the judicial response to the child welfare as an effective instrument to improve the status of children in accordance with the spirit of the constitution. The objective of the researcher is to examine that to what extent the judicial process had aided or impeded social

³³⁸ Justice A.N. Ahmadi, Dimensions of Judicial Activism.

³³⁹ The preamble of the constitution of India

³⁴⁰ Justice H.R.Khanna, Indian Express, July, 28, 1981.

³⁴¹ See, Suta Rao, Social Justice and law (1974) P. 110.

changes in relation to the status of children in India in the form of interpretation of legislations and judicial activism.

6.2 CHILD EDUCATION AND JUDICIARY

The right to education is necessary for the proper flowering of man, his mind and personalities. Hence right to education is one of the facts of right to personal liberty. Realizing this through number of cases legislature has made the right to education a fundamental right in 2002 by way of 86th amendment to the Constitution.

Universal free and compulsory education would have been become a reality in India by 1960. Article 45 of the Indian Constitution, before 86th Amendment to Article 21, said that State shall endeavour to provide within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of 14 years. But this constitutional obligation was from time to time and again and again deferred - first to 1970 then to 1980, 1990 and 2000. The 10th five year plan visualizes that India will achieve the Universal elementary Education by 2007. But till now it has not been achieved. The goal is still far away but not impossible to achieve.

Realising the government's sluggish attitude and delaying facts in implementing the constitutional commitment, the Supreme Court of India, in the Unnikrishnan Judgment way back in 1993, said "It is noteworthy that among the several articles in Part IV only Article 45 speaks of time, no other article does. Has it not significance?

To pressure the Government to perform this constitutional obligation, social action groups and academicians have been relentlessly struggling for several years. This campaign has got new momentum with the creation of the National Alliance for the Fundamental Right to Education (NAFRE) demanding to make free and compulsory education fundamental right.

This dream became reality in 2002 by way of 86th amendment to the constitution by inserting article 21A which provides for free and compulsory education for all children till the age of fourteen years. The leading cases which played the major role in converting this right into fundamental right, which was earlier the directive principle, are- *Mohini Jain V. U.O.I*³⁴². and *Unni Khrishnan V. U.O.I*³⁴³

The judicial mandate in number of cases clearly demonstrated that right to education is necessary for the proper flowering of man, his mind and personality. Hence the right to education is one of the facts of right to personal liberty.

In a famous case of *Vardhan Chandel V. University of Delhi*³⁴⁴ the court has held that education is a fundamental right under the constitution. The court observed that: "The law is, therefore, now settled that the expression of life and personal liberty in Article 21 of the constitution includes a variety of rights though they are not enumerated in part-III of the constitution, provided that they are necessary for the full development of the personality of the individual and can be included in the various aspects of the liberty of the individual. The right to education is therefore included in Article 21 of the constitution."

This right can be denied only by means of procedure established by the law as contemplated in the Article 21 of the constitution. The procedure should be just, fair and reasonable and the procedure is said to be just fair and reasonable when it passes a test under Article 14, 19 and 21.³⁴⁵

In *Bandhua Mukti Morcha Case*³⁴⁶ the court held that the right to life guaranteed by Article 21 does takes in educational facilities.

³⁴² AIR 1992 SC 1858

³⁴³ AIR 1993 SC 2178

³⁴⁴ AIR 1978, Delhi, P. 308

³⁴⁵ Maneka Ghandhi v/s. U.O.I, AIR 1978 SC 597

³⁴⁶ AIR 1984, SC 802

Similarly the Andhra Pradesh High Court in its momentous decision in *Murali Krishna Public School Case*³⁴⁷ pronounced that : "Right to education to Dalits is a fundamental right and it is the mandatory duty of the state to provide adequate opportunities to advance educational interest by establishing schools". The decision of Andhra Pradesh High Court in the instance case has paved the way for better educational opportunities for Dalits children.

In *Mohini Jain's Case*³⁴⁸ The Supreme Court, held that right to education is unenumerated right which is concomitant to fundamental rights. Considering the matter in the context of the Preamble and the Directive principles, the Court held that without education the fundamental freedoms in Article 19 cannot be fully enjoyed nor can the dignity of the individual under Article 21 be assured.

Another significant aspect of the issue which was focused by the court was that: "The preamble also assures the dignity of the individual which he can get enforced, if needed, through the court of law. So also is the objective of the Directive Principles in Part IV of the Constitution."

The Court observed that:

"Dignity of a man is inviolable. It is the duty of the State to respect and protect the same. It is primary education which brings forth the dignity of man. The framers of the Constitution were aware that more than seventy percent of the people, to whom they have given the Constitution of India were illiterate. They were also hopeful that with in a period of ten years illiteracy would be wiped off from the country. It was with that hope that Articles 41 and 45 were brought in Part IV of the Constitution. An individual cannot be assured of human dignity unless his personality is developed and only way to do that is to educate him".

The Court went on to add:

³⁴⁷ See. AIR 1968, A.P. 204

³⁴⁸ AIR 1992 SC 1858

“Right to life is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to that full range of conduct which the individual is free to pursue. The right to education directly flows from the right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied with the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens. The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individual dignity. ‘The right to education’ is therefore concomitant to the fundamental rights enshrined under Part III of the Constitution and the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of its citizen.”

Speaking through Justice Kuldeep Singh, Supreme Court held that right to education was part of the fundamental rights to life and personal liberty guaranteed under Article 21.

Further the court said that with the observation that without education being provided to the citizen of this country, the objectives set forth in the preamble to the constitution cannot be achieved. The constitution would fail. We do not think that the importance of education could have been better emphasized than in the above words. The importance of education was emphasized in the 'Neetishaktam' by Bhartruhari (first century B.C.) in the following words:-

“Translation:

- Education in the special manifestation of men and fame;
- Education secures material pleasures, happiness and fame;
- Education is the teacher of the teacher;
- Education is God incarnate;
- Education secures honour at the hands of the state, not money.

➤ A man without education is equal to animal”.

In Unnikrishnan Case³⁴⁹ The Supreme Court had given right to education to the status of fundamental right. The contents and parameter of right to education till the Completion of 14 years is to be determined in the light of Article 41, 45 and 46. The citizens have Fundamental Right to education. The said right flows from Article 21, and is expressly given under Article 21. This right is, however, not an absolute right. In other words every child/ citizen of this country has a right to free education until he completes the age of 14 years. There after his right to education is subject to the limits of economic capacity and the development of the state. The right to education which is implicit in the right to life falls in part IV of constitution, so far as the right to education is concerned there are several Articles in part IV which expressly speaks of it. Like Articles 41, 45 and 46.

Articles 41, 45 & 46 are designed to achieve the goal as viewed by the preamble of our constitution i.e. a true democracy. A true democracy is one where education is universal, where people understand what is good for them and the nation knows how to govern themselves. Articles 21 and 41 means:-

- (a) Every Child/ citizen of this country has a right to free education until he completes the age of 14 years.
- (b) After a child/ citizen completes the age of 14 years, his right to education is subject to the limits of economic capacity and the development of the state.

Thus we have seen that judiciary with its forceful efforts have provided the right to education, the status of fundamental right. Considering such prolonged efforts of the judiciary the parliament has almost a decade after the Mohini Jains & Unnikrishnan case, has transformed the Right to Education as fundamental right in the form of Article 21 A. In general judiciary has always played a vital role in the areas where the legislators have failed to make the express provisions.

³⁴⁹ AIR 1993 SC 2178

In *M.C. METHA case*³⁵⁰ also known as carpet weaving industry case, the court has related the problem of child labor with economic necessity of the family of child worker, thus it obligated the State and employer to provide opportunity of education to children. In the actual terms of court " to provide compulsory education to all children either by the industries themselves or in coordination with it by the State Government to the children employed in the factory, mine or any other industry, organized or unorganized labor with such timings as is convenient to impart compulsory education, facilities for secondary vocational profession and higher education".

In *T.M.A. Pai Foundation v. State of Karnataka*³⁵¹, eleven judge bench held that, establishment and management of an educational institution has been held to be a part of fundamental right, being a right of occupation as envisaged under Article 19(1)(g) of the constitution. Thus education has not been treated as trade or business. A citizen cannot be deprived of the said right except in accordance with law. The requirement of law for the purpose of clause (c) of Articles 19 of the constitution can by no stretch of imagination be achieved by issuing a circular or an policy decision in terms of Article 162 of the constitution or otherwise. Such a clause, it is trite, must be one enacted by the legislature.

Another case, where the court got the opportunity to decide whether establishment of an educational institution is fundamental right, is *State of Bihar V. Uchh Vidya Shikshak Sangh*³⁵² Keeping in view the Article 21A³⁵³ of the constitution, State of Bihar issued the circular bearing no.115 dated 27-5-1981. Circular stated that states policy decision to establish project schools in the remaining four years of the sixth five year plan period ie from 1981-82 to 1984-85. Further it said that state should achieve the target of establishment of at least four High Schools, out of which one may be a Girl's High School in every block.

³⁵⁰ (1997)10 SCC 549

³⁵¹ AIR 2003 SC 355

³⁵² (2006)2 SCC 545

³⁵³ State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law determine.

The circular stated that, according to the information received, there were many blocks where less than four schools were functioning. The proposed number of schools which were to be opened was 650 during 1981-1985.

In this case SC observed that the scheme in question had the constitutional goal in mind. Imparting education is the primary duty of the state. Although establishment of High Schools may not be constitutional function in the sense that citizens of India above 14 years might not have any fundamental right in relation thereto but education as a part of human development, indisputably a human right. The framers while providing for the equality clause under the constitutional scheme had in their mind that women and children require special treatment and only in that view of the matter, protective discrimination and affirmative action were contemplated in terms of clause (3) of Article 15 of the constitution.

As I have already said above that judiciary is always active to pronounce on the matters where the legislators are silent. In the above two cases the Honorable Supreme Court has considered the construction of educational building as a Fundamental right covered under Article 19 (1) (c). The Researcher believes that once Article 21 A has come into existence, for the fulfillment of this particular right, the right to construct educational building should also be fundamental right.

Judiciary is always in favour of protecting the interest of children whether it relates to children as general or particular. Such one case in *Rohit Singhal and others V. Principal, Jawahar Navodaya Vidyalaya*³⁵⁴ where Supreme Court realizing the importance of children not only as future citizens but also the future of the earth directed that the appellants shall be taken up back as a regular students of Jawahar Navodaya Vidyalaya, Buklana Bulandshar, U.P. and allowed to prosecute their studies as regular students.

³⁵⁴ (2003)1 SCC 687

The fact of the case was that in U.P at Bulandshar JNV (Jawahar Navodaya Vidyalaya) system of studies was running. This institution used to absorb children from rural background belonging to weaker section of the society. Undoubtedly this requires the migration. Migration is aimed at achieving intermingling of young students of different geographical regions having different cultures and linguism. Thus it was an attempt towards national integrity and unity.

From such an institution Rohit Singhal and others (Appellant) were discharged on disciplinary grounds and were transferred to another branch of JNV at Periya, Kerela. Appellant sought readmission in the erstwhile branch which respondent refused to accept it on the ground that students were violent, undisciplined and their behaviour was unsatisfactory due to dialect and language problem.

Supreme Court held that, what is significant for the success of such ideological scheme is its management with care and caution. The teachers and managers associated with the scheme ought know that such attempt at blending of cultures and thereby achieving national integrity and unity is bound to have some initial inherent reluctance, more so, where children of tender age used to enjoying love and affection below the protective umbrella of parental care are made to move across the country such as from U.P. to Kerela in the present case. Care and caution is needed to see that tender feelings of innocent young children do not get hurt and do not get infuriated into emotional outburst which if takes place would not only be unfortunate but will also be counterproductive and destructive of the very purpose sought to be achieved. While the transfers should be motivated for assimilation of the new environment, the locals should also be motivated to accept them. A greater responsibility lies on the teachers of suitably moulding the pattern of emotional behaviour of the children sought to be brought together. Particular alteration needs to be devoted in the initial

period of children coming together. Children by their very nature soon give up the initial hesitation and mix up with those of their age group.

Children are not only the future citizens but also the future of the earth. Elders in general and parents and teachers in particular, owe a responsibility for taking care of the well being and welfare of children. The world shall be a better or worse place to live, according to how we treat the children today. Education is an investment made by the nation in its children for harvesting a future crop of responsible adults productive of a well functioning society. However children are vulnerable. They need to be valued nurtured, caressed and protected. Development of symbiotic relationship between children coming from different cultural backgrounds having different dialect, diet and desires- childlike and innocent- needs thoughtful approach, so as to reach the covered goal of an integrated nation.

Here the appellants were dealt with sympathy and the shown indulgence was found to be far from being penalized for the so called indiscipline which it appears is nothing but manifestation of maladjustment. Thus we have seen in the matter of child education, the judiciary is very sensitive. It had directed the educational institution that instead of removing his name from the school they should try to reform him.

The court in the case of *R.D. Upadhyaya V. State of A.P. & Others*³⁵⁵ had issued the directions for the development of children who are in jail with their mother and who are in jail either as under trial prisoner or convicts. Children in jail with their mother are forced to live in jail for none of their fault. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in absence of the mother.

³⁵⁵ AIR 2006 SC 1949

Court considering the report of National Institute of Criminology and Forensic Sciences found that rights viz, right to food, shelter, medical care, clothing, education e.t.c. are grossly neglected for these children, so it gave a detailed directions regarding , right to food, shelter, medical care, clothing, education and recreational facilities, these issues and other matter.

The court said that the child of female prisoners living in the jails shall be given proper educations and recreational opportunities and while their mothers are at work in jail, the children shall be kept in creches under the charge of a matron/ female warden. This facility will also be extended to children of wardens and other female prison staff. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.

Here the Court has realised that jail environment are not congenial to the development of the child and mother. By way of this case the court has given a detailed direction for the welfare of the children, including education, to jail authorities; where the children are forced to live with their mother in jail.

6.3 CHILD LABOR: HUMANISTIC APPROACH BY JUDICIARY

The abolition of the child labor is preceded by the introduction of compulsory education. "Compulsory education and child labor are interlinked". Article 24 of the constitution bars employment of child below the age of 14 years and Article 21A speaks of compulsory education of all children till the age of 14 years. Article 21A is complementary to Article 24 for if the child below the age of 14 years is not to be employed he must be kept occupied in some educational institution.³⁵⁶

The court in a series of cases has unequivocally declared that right to receive education by the child workers is an integral part of right of personal liberty

³⁵⁶ See, S. Roy, Constitution Rights of the child in India Social change; Sept 1990 vol. 20, No. 3 P.4

embodied in Article 21 of the constitution. In *M.C. Mehta's* case³⁵⁷ the court held that it is that special facilities which is necessary for providing the quality of life to children. This would require facility for education, scope for recreation and opportunity for socializations.

Peoples' union democratic Rights V. Union of India, Commonly known as *Asiad Case*³⁵⁸ is an epoch-making judgment of the Supreme Court of India which has not only made significant contribution towards labor laws, but also has displayed a creative attitude of judges to protect the interests of the child workers. The court has given a new dimension to several areas, such as locus standi, public interest litigation, enforcement of labor laws, minimum wages and employment of children.

The facts of the case was that peoples union for democratic rights addressed a letter to the Supreme Court annexing the report of social activists regarding the conditions under which the workers engaged in various Asiad projects were working. Pointed reference was made in that report that there was violation of Article 24 of the constitution and of the provisions of employment of children Act, 1938, viz, **children below the age of 14 years were employed in construction works of various projects**. With regard to the allegation of the provisions of employment of children Act, 1938, the Delhi administration and Delhi Development Authority took the stand that, the Act was not applicable in case of construction work, since construction industry was not covered in the schedule to the Act. Further they said that no complaint in regard to the violation of the provisions of that Act was at any stage received by them. The Supreme Court took cognizance of the child workers interest and observed³⁵⁹.

"Large number of men, women and children are today living at sub-human existence in conditions of abject poverty, utter grinding poverty has broken their

³⁵⁷ See *M.C. Mehta v. State of Tamilnadu and others*, AIR 1991 SC 417 at 418

³⁵⁸ AIR 1982 SC 1473

³⁵⁹ *ibid*

back and sapped with existing social and economic system". The Hon'ble Court endeavored to fight for the cause of these poor creatures and held:

"This is sad and deplorable omission which, we think, must be immediately set right by every state government by amending the schedules so as to include construction industry in it in exercise of the power conferred under Sec. 3(a) of the employment of children Act 1938. **We hope and trust that every state government will take necessary steps in this behalf without any undue delay because construction work is clearly on hazardous occupation and it is absolutely essential that the employment of child is under the age of 14 years must be prohibited in every type of construction work.** That would be in consonance with convention No. 59, adopted by the international labor organisation and ratified by India. But altogether from the requirement of convention No. 59, we have Article 24 of the constitution which provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Thus is a constitutional prohibition which, even if not followed up by appropriate legislation must operate propriety vigor and construction work being plainly and indubitably a hazardous employment, it is clear that by reason of this constitutional prohibition, no child below the age of 14 years can be allowed to be engaged in construction work. There can therefore, be no doubt that notwithstanding the absence of specification of construction industry in the scheduled to the employment of children Act, 1938, no child below the age of 14 years can be employed in construction work and the Union of India is and also every state Government must ensure that this constitutional mandate is not violated in any part of the country.

*Bandhua Mukti Morcha V. Union of India*³⁶⁰ is leading case on bonded child laborers. Here the petitioner is an organisation dedicated to the cause of release of bonded laborers in the country. This system of bonded laborer has been prevalent in various parts of the country since long prior to the attainment of

³⁶⁰ AIR1984 SC 802

political freedom. This system based on exploitation by a few socially and economically powerful persons trading on the mice and suffering of large numbers of men and holding them in bondage is a relic of a founded hierarchical society which hypocritically proclaims the divinity of man 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.

Under this system one person is bonded to provide labor to another for years and years until an alleged debt is supposed to be wiped out which never seems to happen during the lifetime of the bonded laborer, 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 constitution of values.

The petitioner made a survey of some of the **stone quarries in Faridabad district** and found that there were large number of labouers from Maharashtra, Madhya Pradesh, Uttar Pradesh and Rajasthan who were working in these stone quarries under 'inhuman and intolerable conditions' and many of whom were bonded laborers. The petitioner therefore addressed a letter to the Court on 25th Feb, 1982 pointing out that large no. of bonded laborers were languishing under abject conditions of bondage for about last ten years, besides this there are innumerable cases of fatal and serious injuries caused due to accidents while working in the mines, while dynamiting the rocks or while crushing the stones.

The petitioner in the end prayed that a writ be issued for proper implementation of relevant provisions of the condition and statutes with a view to ending the misery, suffering and helplessness of these victims of most inhuman exploitation.

The letter was considered as the writ petition and the court held that whenever it is shown that a laborer is made to provide forced labor, the court would raise 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 laborer. 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 laborer is a bonded laborer entitled to the benefit of the provisions of the Act. **It directed that the bonded laborers must be identified and released from the shackles of bondage so that they can assimilate themselves in the main stream of civilized human society and realize the dignity, beauty and worth of human existence. It emphasized that rehabilitation of released bonded (child) labor is necessary** because they would prefer slavery to hunger, a world of bondage and security (illusory) as against a world of freedom and starvation. For this purpose court also directed the state Govt. to evolve effective programmes.

It further said that the process of identification and release of bonded laborers is a process of discovery and transformation of non-beings into human beings and what it involves is eloquently described in the beautiful lines of Rabindra Nath Tagore in "Kadi and Konal".

Into the mouth of these,

Dumb, pale and meak.

We have to infuse the language of the soul,

Into the hearts of these,

weary and worn, dry and forlorn,

We have to minstrel the language of humanity.

Court once again in laborers working on *Salal Hydro Project V. Jammu & Kashmir*,³⁶¹ held that construction work is hazardous employment attracting Article 24 of the Constitution which states that no child below the age of 14 years can be allowed to be employed in it.

The Court further held that:

³⁶¹ AIR 1987 SC 177

"We are aware that the problem of child labor is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed in order to be able to make two ends meet. The possibility of augmenting their meager income through employment of children is very often the reason why parents do not send their children to schools and there are large dropouts from the schools. **This is an economic problem and it cannot be solved merely by legislation so long as there is poverty and destitution in the country.** It will be difficult to eradicate child labor. But even so an attempt has been made to reduce , if not eliminated the incidence of child labor because it is absolutely essential that a child should be to receive proper education with a view to equipping itself to become a useful member of society and to play a constructive role in the socio-economic development of the country. We must concede that having regard to the prevailing socio-economic condition it is not possible to prohibit child labor altogether and, infact, any such move may not be socially or economically acceptable to large masses of people. That is why Article 24 limits the prohibition against the employment of child-labor only to factories, mines or other hazardous employments. Clearly, construction work is a hazardous employment and no child below the age of 14 years can, therefore, allowed to be employed in construction work by reason of the prohibition enacted in Article 24 and this Government would do well to pursued workmen to send their children to a nearby school and arrange not only for the school fees be paid out but also provide fees for charges, books and other facilities such as transportation."

*In M.C. Mehta V. State of Tamil Nadu*³⁶² The SC found that in Sivakasi, as on December 31, 1985, there were 221 registered match factories employing 27,338 workmen, of whom 2941 were children. The court then noted that the manufacturing progress of matches and fireworks (for the manufacture of which Sivakasi is a traditional centre) is hazardous giving rise to accidents including fatal cases. So, keeping in view the provisions contained in Article 39(f) and 45 of

³⁶² AIR 1991 SC 419

the constitution it gave certain directions as to how the quality of life of children employed in the factories could be improved. The Court also felt the need of constituting a committee to oversee the directions given.

This matter was brought before the Apex court through the public interest litigation under Article 32 of the constitution. The petitioner told the court about the plight of children employed in match factories, Sivakasi in Kamraj District of Tamil Nadu State and how the constitutional right of these children guaranteed by Article 24 was being grossly violated. They also requested the court to issue appropriate directions to the Governments to take steps to abolish child labor.

The Ranganath Misra, C.J. & M.H. Kania, Justice, observed: "We are of the view that employment of children within the match factories directly connected with the manufacturing process upto final production of match sticks or fireworks should not at all be permitted. Article 39(f) of the constitution provides that the state should direct its policy towards securing that children are given opportunities and facilities to develop in healthy manner and in conditions of freedom and dignity and prevention of exploitation against moral and materials abandonment. The Court further observed:

"The spirit of the constitution perhaps is that children should not be employed in factories as childhood, in the formative period".

As regard to the welfare of child labor court opined that compulsory insurance scheme should be provided for both adult and children employees taking into consideration the hazardous nature of employment. **The state of Tamil Nadu shall ensure that every employee working in these match factories is insured for a sum of Rs. 50,000** and the insurance corporation, if contacted should come forward with to notable group insurance scheme to cover the employees in the match factories of Sivakasi area.



*M.C. Mehta V state of Tamilnadu*³⁶³ was initially disposed off by Supreme Court in 1991. Where seeing the intolerable situation of the children employed in the match factory of Sivakasi, Public Spirited lawyer, Shri M.C. Mehta, thought it necessary to invoke this courts power under Article.32, as the fundamental right of the children guaranteed by Article 24 was being grossly violated. It has been held that in view of Article 39 (f) the employment of children with in the match factories directly connected with the manufacturing process of matches and fireworks cannot be allowed as it is hazardous. Children can, however, be employed in the process of packing but it should be done in area away from the place of manufacturing to avoid exposure to accidents

In the present case suo-moto cognizance was taken up by Kuldeep singh, B.L. Hansaria and S.B. Majumdar, JJ when news about an “unfortunate accident” in one of the Sivakasi, cracker factories was published. At the direction of the Court, Tamilnadu Government filed a detailed Counter stating, inter alia, the number of persons to die was 39. It gave certain directions regarding the payment of compensation and thought that an advocate committee should visit that area and make a comprehensive report relating to the various aspects of the matter as mentioned in the order of August 14, 1991. The committee consisted of (1) Shri R.K. Jain, a Senior Advocate (2) MS Indira Jaisingh, another Senior Advocate, and (3) Shri K.C. Dua, Advocate.

The recommendations of the committee was appreciated by the Court and was put on records which are as follows:-

- a. Children should not be employed in fire works factories.
- b. The children employed in the match factories for packing purposes must work in a separate premises for packing.
- c. Working hours for children should not be more than six hours.
- d. Transport facility to children from workplace to home.

³⁶³ AIR 1997 SC 699

- e. Facility for recreation, socialization and education should be provided either in the factory or closed to the factory.
- f. Basic diet to the children should be provided.
- g. Piece rate wages should be abolished and payment should be made on monthly wages.
- h. All the workers working in the industry should be brought under the Insurance School.
- i. Welfare fund for children should be created in which employer and the state Government should make the contribution.
- j. National Commission children's Welfare should be set up to prepare a scheme for child labor abolition in phased manner.

Considering the recommendations the Supreme Court ordered the employer to pay the compensation of Rs.20,000 to each child employed in violation of the Act, which sum could be deposited in a fund to be known as child labor, rehabilitation-cum welfare fund.

Supreme Court also directed the legislative intendment behind Article 24 of the constitution. Such implementation would require very large number of child labor to give up their jobs to large number of adults. So the Supreme Court said that Government should see that either one member of the child labor gets the job in lieu of child or a sum of Rs.25,000 (20000 compensation and Rs.5000 for inability of providing job in lieu of child) in the child labor rehabilitation-cum-welfare fund. In case of getting employment, an adult/ guardian shall have to withdraw his child from the job. Even if no employment would be provided, the parent/ guardian shall have to see that his child is spared from the requirement to do the job, as an alternative source of income would have become available to him. The employment given or payment made would cease to be operative if the child would not be sent by the guardian or parent for education. The Supreme Court did not stop here it directed the state Government to make a aforesaid child labor survey within a period of six months. And for the survey the industries to identified are as below:-

1. The match industry in Sivakasi, Tamilnadu
2. The diamond polishing industry in Surat, Gujarat
3. The precious stone polishing industry in Jaipur , Rajasthan
4. The glass industry in Firozabad, Uttarpradesh
5. The brass-ware industry in Moradabad, Uttarpradesh
6. The hand made carpet industry in Mirzapur, Bhadoi, Uttarpradesh
7. The lock making industry in Aligargh, Uttarpradesh
8. The slate industry in Markarpur, Andhrapradesh
9. The slate industry in Mandsaur, Madhyapradesh

Lastly the Supreme Court casted the responsibility on the secretary to the minister of Labor Government of India to appraise the court with in one year for the compliance of aforesaid order.

In the series of *Bandhua mukti Morcha case*³⁶⁴ in the year 1997 a Public interest litigation was filed **alleging employment of children aged below 14 in carpet Industry in the state of U.P.** Reports of commissioner/ committee appointed by the Supreme Court confirmed forced employment of a large number of children mostly belonging to SCs, STs are brought from Bihar, in carpet weaving centres in the State. It was held by the Court that the State is obliged to render socio-economic justice to the child and provide facilities and opportunities for proper development of his personality.

It was observed by the Court that:

“The child of today cannot develop to be a responsible and productive member of tomorrow’s society unless an environment which is conducive to his social and physical health is assured to him. Neglecting children means loss to society as a whole. If children are deprived of their childhood- socially, economically, physically and mentally- the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order,

³⁶⁴ (1997)10 SCC 549

social stability and good citizenry. Their deprivation has a deleterious effect on the efficacy of democracy and the rule of law. **Their employment – either forced or voluntary- is occasioned due to economic necessity; exploitation of their childhood due to poverty,** in particular, the poor and the deprived sectors of society, is determined to democracy and social stability, unity and integrity of the nation”

The Court opined that various welfare enactments made by the Parliament and the appropriate State legislatures are only on paper and illusory unless they are effectively implemented and the right to life of the child driven to labor is made a reality. Pragmatic, realistic and constructive steps and actions are required to be taken to enable children belonging to weaker sections of the society to enjoy their childhood and develop their personality. Child labor, therefore, must be eradicated through well planned and focused poverty alleviation, programmes and through imposition of trade sanctions in employment of children, etc. **Total banishment of employment may drive children into destitution and other mischievous environments, making them vagrants, hardened criminals and prone to social risks, etc. Therefore while exploitation of the child must be progressively banned, other simultaneous alternatives to the child should be evolved** including providing education, health care, nutrition food, shelter and other means of livelihood with self-respect and dignity of person. Immediate ban of child labor would be both unrealistic and counterproductive. Ban on employment of children must begin from the most hazardous and intolerable activities like slavery, bonded labor, trafficking, prostitution, pornography, dangerous forms of labor and the like.

The Court further held that:

“A direction needs to be given that the Government of India should hold a meeting of the Ministers concerned of the respective State Governments and their principal secretaries holding departments concerned to evolve the principles of policies for progressive elimination of employment of children below the age of 14 years in employments governed by the respective

enactments to evolve such steps consistent with the scheme laid down in *M.C. METHA's case*³⁶⁵ to provide,

1. Compulsory education to all children either by the industries themselves or in coordination with it by the State Government to the children employed in the factory, mine or any other industry, organized or unorganized labor with such timings as is convenient to impart compulsory education, facilities for secondary vocational profession and higher education;
2. Apart from education, periodical health check up; nutrient food etc;

It was further stated that, "periodical reports of the progress made in that behalf be submitted to the Registry of the Supreme Court."

Thus the court maintained that the child labor is an economic problem. Poor parents seek to augment their meager income through employment of children. So, a total prohibition of child labor in any form may not be socially feasible to the prevailing socio-economic environment. Article 24 therefore, puts only a practical restriction on child labor. The court further observed that so long as there is poverty and destitution in this country, it will be difficult to eradicate child labor.

6.4 SEXUAL EXPLOITATION AND THE JUDICIARY

6.4.1 CHILD TRAFFICKING

Forced prostitution, child trafficking and abuse are real and sad facts of life and society. In the present world scenario traffic in persons and the exploitation through the prostitution of others remain rife in various parts of the world and are acquiring new forms and being pursued on an industrial scale to a dangerous extent.

³⁶⁵ AIR 1997 SC 699

Children from poor backgrounds are the key target groups, Ethnic minorities, SCs, OBCs, indigenous people, hill tribes, refugees and illegal migrants are the easy victims. Poverty, deprivation, natural disasters, inadequate educational and employment opportunities, economic disparities, erosion of traditional family systems, war and violation of human rights are, inter alia, some of the factors responsible for the growth of this malice in society³⁶⁶.

The expression traffic in human beings commonly known as slavery implies the buying and selling of human beings as if they are chattel. The worst of worst type of child trafficking is the involvement of the child in the flesh trade, one such case is *Vishal Jeet V. U.O.I.*³⁶⁷ In this case the petitioner found that many unfortunate teen-aged female 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 labor. But those who are acting as pimps or brokers in the 'flesh trade' and brothel keepers who hurt for these teenaged children and young girls to make money either purchase or kidnap them by deceitful means and justly and forcibly invisible them into flesh trade. Once these unfortunate victims are taken to the dens of prostitutes or 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 enters 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.

Therefore the petition was filed under Article 32 at the instance of an advocate by way of public interest litigation seeking issuance of certain directions to CBI

³⁶⁶ AIR 1986 Kant 119

³⁶⁷ AIR 1990 SC 1412

and the ultimate plea that the young children and girls who are forcibly pushed into flesh trade should be rescued and rehabilitated.

Here the court has said that "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 satisfactory solution in eradicating such sexual exploitation of children".

In view of Article 23 (Fundamental Rights and 39(e) & (f) (Directive Principles) of Constitution of India and several other legislations like Suppression of Immoral Traffic in women and girl Act, 1956 which is now changed in to the Immoral Traffic (Prevented Act, 1956; sections 366A, 366B, 272 & 373 of IPC, Juvenile Justice Act, 1986, the court casted the responsibility upon the state and central government to eradicate such devastating malady. It suggested that law enforcing authorities should take very severe and speedy legal action against all the earning 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 coding punishment on proof of such offences. Apart from legal actions Government can evaluate various measures and implement them in right direction.

6.4.2 PORNOGRAPHY

The rise of computer and others high technologies equipments has paved the way for the genesis of new crime types. High-Tech Crime involves an attempt to pursue illegal activities through the use of advance electronic media. High Technology as a form of sophisticated electronic devices- computer, cellular telephone, internet and other digital communication- that is in common use today. The concept of cyber crime is not radically different from the concept of conventional crime. the term cyber crime is simply as criminal activity involving the information technology infrastructure, including illegal access (unauthorized access), illegal interception (by technical means of non-public transmissions of computer data to, from or within a computer system), data interference

(unauthorized damaging, deletion, deterioration, alteration or suppression of computer data), systems interference (interfering with the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data), misuse of devices, forgery (ID theft), and electronic fraud.

The Internet is a paradox. It is everywhere, yet, at the same time, it is nowhere. It is "a worldwide entity whose nature cannot be easily or simply defined. Because the Internet "is a cooperative venture not owned by a single entity or government, there are no centralized rules or laws governing its use.

The lawmakers, law enforcers and law interpreters (judiciary) need to be updated on the nature of information technologies. I will cite a high profile case which occurred in India in end 2004.

The CEO of Baazee.com, which is a subsidiary of ebay was arrested by Indian police in a high profile pornography case. The case revolved around a video clip of a high school couple engaged in various sexual acts, which was filmed by the boyfriend using his mobile phone's video camera. He sent the video clip to several friends' mobiles and things got rapidly out of hand. The video clip landed in the local network of a top Indian technology institute, where it was transferred into a VCD and put on sale on Baze.com by an engineering student .By that time the easy availability of clip in various others forms had made it a public issue and the case had become high profile. The auction was up for a couple of days, but was yanked off by Baazee as soon as they realized what it was.

The main case against the CEO was under Information Technology Act 2000,a relatively new law enacted to deal with problems in the IT world. The law read " whoever publishes or transmits or causes to be published ,any material which is pornographicis liable for punishment....".By the act's definitions, it would appear that eBay India / Baazee came under the description of a "Service

Provider", a party that was being held responsible for the transmission of any pornographic material. It was argued that ebay/ Baazee was 'service provider' and different from a 'content provider' in terms of criminal liability. The argument was that a service provider, has no control over what was passing through his web site. The logic here is no doubt unquestionable.

Accordingly CEO got bail and last known, the case has been buried. The case however did throw up many interesting issues regarding the responsibilities of 'service provider' and their responsibilities as far as 'transmission and distribution' was concerned. It also highlighted the lack of knowledge of the technological issues involved by the investigating agencies and judiciary. In fact, if ebay/ Baazee was guilty of hosting the offending advertisement than so would be editors of many newspapers across the world which carry advertisements for 'escort services' and 'massage parlours'. The case was one of earliest of its kind in India and hopefully the law will evolve over time with experience. The question still remains about the capabilities of laws to take into account the rapidly developing internet technologies³⁶⁸.

In the *Air Force Bal Bharti School case*³⁶⁹, a school boy of The Air Force Bal Bharti School was arrested in Delhi on April 2001 for creating a web site carrying pornographic information. He scanned photographs of his classmates and teachers, morphed them with nude photographs and put them up on a website that he uploaded on to a free web hosting service. It was only after the father of one of the class girls featured on the website objected and lodged a complaint with the police that any action was taken. The boy did this because he was tired of the cruel jokes thrown on him by his friends for having pockmarked face. Just to teach them a lesson he scanned the photographs of these people and made the porn web site of them. For this the boy was remanded to judicial custody till the bail application was heard. After being found guilty he was sent to juvenile jail. "It is time to reflect on the impact of this action on the future of the boy".

³⁶⁸ Gyberlaws in India cyberlawindia.com

³⁶⁹ <http://www.hindustantimes.com/nonfram/300401/detfro05.asp>

The case of a school boy in Delhi having been charged under ITA-2000 for maintaining a porno site is a fit case for psychologist and sociologists to react. Because section 67 of Information Technology Act 2000 is applicable for obscene content/ porn material created by a juvenile. This has raised several issues for the Law Making Community. As this Act is not making any difference between an adult man committing the offence and the juvenile committing the same. But soon, it will be realize that putting the young offenders in the juvenile prison will be very painful for most parents and turn out to be counter productive.

According to the Psychologists most teenagers pass through a phase where in a bid for adventurism, they tend to commit small crimes. They soon grow out of this tendency and become good citizens there after. The crime Delhi boy appears to be falling under this category particularly since the boy is otherwise reported to be docile, and normal.

Cyber Pornography is the latest addition to such abnormal behavior pattern observed amongst the teen age persons. Biologically, it is stated that hormonal imbalances occur during this development stage which leads to such lack of maturity in that age group. It is therefore not correct to brand such youngsters as "Criminals" and invoke the stringent provisions of Law as envisaged in the ITA-2000.

*State of Tamilnadu v/s Dr L. Prakash*³⁷⁰ was the landmark case in which Dr L. Prakash was sentenced to life imprisonment in a case pertaining to online obscenity. This case was also landmark in a variety of ways since it demonstrated the resolve of the law enforcement and the judiciary not to let off the hook one of the very educated and sophisticated professionals of India.

Finally we can say that the rapid growth of information technologies have posed a challenge to policymakers. The pervasive influence of internet and its relative

³⁷⁰ <http://grove.ufl.edu/~techlaw/Vol4/issue2/index.html>

complexity need special laws which have to keep in step with technological developments. The lawmakers, law enforcers and law interpreters (judiciary) need to be updated on the nature of information technologies.

6.4.3 SEXUAL ABUSE AND SEXUAL EXPLOITATION

The sexual exploitation of children is defined as "use of children (under 18 years) for the sexual satisfaction of adult." The basis of this is unequal power and economic relations between the child and the adult. The term sexual exploitation is different from the term sexual abuse where the latter is defined as "the involvement of dependent, developmentally immature children and adolescents in the activities they do not truly comprehend and to which they are unable to give informed consent.

The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. In the present society sexual exploitation has taken such a wider form that a definitions of sexual exploitations, though grave in nature, are not covered under the stringent penal provisions of the Act.

As the illness of sexual abuse of the children was of great importance and keeping in view the increase in crime, the supreme Court in *Sakshi V. Union of India and others*³⁷¹ requested the law commission to examine the illness submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code or deal with the same in any other manner so as to plug the loop holes.

In the present case, the petitioner had made recommendation for redefining the rape under section 375 & 376 of IPC. According to petitioner the plain reading of Section 375 would make it apparent that the term "sexual intercourse" has not been defined and is, therefore, subject to and is capable of judicial interpretation. Further the explanation to Section 375 of IPC does not in any way limit the term

³⁷¹ 1999 (6) SCC 591

penetration to mean penile/vaginal penetration rather it can take many forms of sexual offenses like penile/ anal penetration, penile/ oral penetration, finger/ vaginal penetration to which children are unaware.

Supreme Court said that such interpretation is contrary to the contemporary understanding of sexual abuse and violence all over the world. We are, therefore, of the opinion that it will not be in the larger interest of the State or the people to alter the definition of "rape" as contained in Section 375 IPC by a process of judicial interpretation as is sought to be done by means of the present writ petition.

Supreme Court observed that the 156th report of the Law Commission, also does not deal with the precise illness such as sexual abuse of children and , therefore, Law Commission is requested to examine the feasibility of making recommendation for amendment of the Indian Penal Code or deal with the same in any other manner.

The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in court. Among the four suggestions made by the petitioner three of them was accepted. Accordingly the writ petition was disposed off with the following directions:

1. The provisions of Sub-section (2) of Section 327 Criminal Procedure Code shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under Sections 354 and 377 of IPC. 273 of Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-a-vis Section 273 Cr.P.C. has been held to be permissible

in a recent decision of this Court in *State of Maharashtra v. Dr. Praful B Desai*.³⁷²

2. In holding trial of child sex abuse or rape: (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused; (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing; (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

The decision in this case will certainly give some solace to the rape victim as the victim is not required to face the accused. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing.

In case of *Gajraj Singh V. State of M.P.*³⁷³ the court upheld the sentence of life imprisonment and fine to the father for raping his minor daughter.

³⁷² 2003 (4) SCC 601

³⁷³ 2000 Cri. L. J.

In *Kamal Kishore V State of Himachal Pradesh*³⁷⁴ A minor girl was raped by her neighbor. The high court convicted the accused under sections 376 of IPC but pronounced only three years of rigorous imprisonment along with fine on the ground that incident took place ten years ago such a decision is condemnable, because with the passing of time the heinous crime does not become less heinous when a minor girls is raped by accused and is proved he should be punished with full punishment.

In the case of *State of Rajasthan V. Om Prakash*³⁷⁵ prosecutrix child aged about 8 years was raped. The contention that victim or her family members did not shouted was not considered, rather the court said that the cases involving sexual molestation and assault require a different approach which a court may adopt in dealing with a normal offence under penal laws. It further observed that in our country a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse.

One more thing to be pointed in this case is that the incident took place around 13 years back from the decision of this case. So it was contended that the accused by this time has become matured of the age 31 years of age and had already undergone nearly three years of sentence therefore same may be treated by this court as sufficient punishment to him, and therefore should take sympathetic view.

But the court did not accepted this contention and imposed a sentence of seven years rigorous imprisonment besides fine. Having played with the life of child accused does not deserve any leniency and for him sympathy on the ground sought for will be wholly uncalled for. He deserves to undergo the remaining part of the sentences.

³⁷⁴ AIR 2000 SC 1920

³⁷⁵ 2002 CRIL-J 2951 (Supreme Court)

Child rape cases are cases of perverse lust for sex where innocent children are not spared in pursuit of the sexual pleasure. **There cannot be anything more obscene than this. It is a crime against humanity.** Many such cases are not even brought to thereto. According to some surveys, there has been steep rise in the child rape cases. In such cases responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. There physical and mental immobility call for such protection. Children are the natural resource of our country. They are country's future. Hone of tomorrow rests on them. These factors point towards a different approach required to be adopted by court.

In *State of Punjab V. Gurmeet Singh*³⁷⁶, the Hon'ble Supreme Court while convicting three rapists of a minor girl has directed that **all such trials must be held in camera**. This ruling of the apex court has widely welcomed, as it will check the character assassination and humiliation of the victim in public. Thus the ruling of the Hon'ble Supreme Court has emphasized that a child is a precious national asset and that the state is under an obligation to look after the child and to ensure the proper development of it's personality.

It is the matter of regret that despite several legislations and frequent exhortation by social scientists and authors, there are still large number of children who are exploited and abused by antisocial elements. Not only the anti social element but also the so called eminent and high officials also sexually exploit and abuse children. For instance, the case of Haryana D.G.P accused for abusing Ruchica, a teen age student, is still pending.

Taking cognizance of such events Supreme Court by the order dated 13/Jan/98 directed the law Commission to review of Rape laws³⁷⁷ as directed by the Supreme Court, law Commission presented its report in 2000. Then the apex court directed the Government of India to bring the "Implementation of action

³⁷⁶ AIR 1996 SC 1393.

³⁷⁷ the petition filed by "Shakti Vahini, Cr. Appeal No. 33 of 1997"

plan". Recently in 2002, Court extended the time limit on the request of government for implementation of the action plan.

There are some other cases in which Supreme Court laid down the principles and norms and has directed the Government to implement them. For example in the case of "*Praful Kumar Sinha V. State of Orissa*³⁷⁸" Court recognized that certain directions were necessary for the proper management of the institution and directed Union Government to implement them. It was the case about the **sexual exploitation of a blind student in a school of Behrampur of Orissa.**

*In Prerna V. State of Maharashtra and others*³⁷⁹, the facts of the case was that on 16-5-2003 the Social Service Branch raided the brothel at santacruz. Four brothel keepers/ pimps were arrested. Twenty four females were rescued . The four arrested accused were charged under sec 3,4 and 7 (2) (a) under Immoral Traffic (Prevention) Act, 1986 and twenty four rescued females were not charged, but were taken into custody for the purpose of ascertaining their age and family background. On 20-5-2002 the rescued females were sent for ossification test in which ten were found to be minor girls. The 14 adult females were released and 10 more girls were produced before the Child Welfare Committee as Juvenile Justice Board sits only on Mondays and Fridays.

The Board released the minor girls on the ground that they had not committed any offence and they were in custody for more than nine months. Further it observed that every detained girls had shown their eagerness to be released. Thus the Probation Officer could not take the minor girls to the Government Special Rehabilitation Centre for girls at Deonar.

Shocked with the order of Board at the manner in which rescued girls, though they were minors , were released contrary to the provision of law. The petitioner, who is a registered organization working in the red light areas of Mumbai and non Mumbai with the object of preventing the trafficking of

³⁷⁸ AIR 1989 SC 1783

³⁷⁹ 2003 (6) AIC674

women and children and rehabilitating the victims of forced prostitution, had filed the petition in the 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.

The Court examine the case and express the deep displeasure at the manner in which this case has been handled by the Board. It held that if the girls were minors and they were not involved in any offence, they would not be described as Juvenile in conflict with law. They are children in need of care and protection as per provisions of Juvenile Justice Act. They ought to have been produced before the Child Welfare Committee. Further such children are to be dealt with keeping in mind the possibility of their rehabilitation. The Juvenile Justice Act 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 the Magistrate to order removal of prostitutes from any place and prohibit them from re-entering it. The Court wondered how the Board has 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 showed eagerness to be released. The Court said that there is no provision under Juvenile Justice Act where under, 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.

The Court has also given directions for prevention of recurrence of such event in future:

No Magistrate can exercise jurisdiction over any person who is under 18 years of age whether that person is in conflict with law or a child in need of care and protection. At the first instance, the Magistrate must take step to ascertain the

age of the persons and when found to be under the age of 18 years should be sent to child Welfare Committee or Juvenile Justice Board as the case may be.

Age of the child is to be ascertained before the Magistrate before whom the child was presented.

Any Juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1986 or found soliciting in a public place should only be released after an inquiry has been completed by the probation officer.

The Juvenile should be released only to the care and custody of a parent or guardian found fit by the Child Welfare Committee.

If the parent or guardian is found to be unfit to have the care and custody of rescued juvenile, then the procedure laid down in Juvenile Justice Act should be followed for the rehabilitation of the rescued children.

The representation of the child rescued under the Immoral Traffic (Prevention) Act or found soliciting in a public place, is to be made by the parents/ guardian or through an advocate appointed for such purpose.

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.

Here the judiciary requires that police while arresting the juvenile must be very cautious about ascertaining his minority. Even though he may be found guilty, after making a proper inquiry he must be handed over to the appropriate guardian. Emphasis is made on the rehabilitation and welfare of the children rescued from the brothel home. Beside this, this case also shows that how irresponsible is our juvenile Justice Board. It did not even consider the gravity of the situation that if the children were released without giving them in custody of any guardian, where they will go. By this act what good they will be doing.

A very recent case on sexual abuse and sexual exploitation is *State of U.p V Moninder Sing Pandher and Surender Kohli (NOIDA CASE)* which was decided on 13th feb 2009³⁸⁰. The 2006 Noida serial murder investigation began in December 2006 when the skeletal remains of a number of missing children were discovered in the village of Nithari, India on the outskirts of Noida, a planned industrial township in Uttar Pradesh near New Delhi. On December 26, 2006, a rich and politically connected Punjabi businessman, Moninder Singh Pandher, and his servant, Surender Koli, were arrested by the Delhi Police on the suspicion of murdering a call girl named "Payal". Charges under various sections of the Indian Penal Code included rape, murder, kidnapping and criminal conspiracy. Pandher and Koli were sentenced to death on February 13, 2009

On December 29, 2006, two Nithari residents, both of them had lost their daughter, suspected Surender Koli, the domestic help at house D5, had something to do with the disappearances of children. Further they claimed that the municipal water tank running behind house D5 is being used for disposing the remains of children who had gone missing in the previous two years. Since they had been repeatedly ignored by local authorities, they sought the help of former Resident Welfare Association (RWA) President S C Mishra. That morning, Mishra and the two residents searched the tank drain, and one of the residents claimed to have found a decomposed hand, after which they called the police. By the time police arrived, local residents claimed they had found three partial skeletons in the drain. The residents alleged that the police were corrupt and involved with the rich people.

Pandher and Koli was arrested by the police on December 26 and December 27 respectively, in connection with the disappearance of "Payal". She was the 20 year old call girl whose mobile phone in switched off condition was found in

³⁸⁰ Amar ujala 13th feb 2009

Moninder Sing's Bungalow. Search of Payal by her parents had put the Moninder in suspicion.

Parents of the missing children rushed to Nithari with photographs. Koli, under the alias Satish, later confessed to killing six children and a 20-year-old call girl known as "Payal" after sexually assaulting them. After Koli's confession, the police started digging up the nearby land area and discovered the children's bodies.

Meanwhile on January 1, 2007, the remand magistrate granted the police custody of the two until January 10, 2007. The court also granted permission for Narco Analysis to complete the recovery of victims' remains.

The accused duo were brought to the Directorate of Forensic Sciences, Gandhinagar city for undergoing a series of medical tests. Brain mapping and polygraph tests were conducted on January 4, 2007 and narco analysis five days later.

During the investigation the CBI team discovered several gunny bags containing parts of human torsos in the drains outside the Pandher residence. After interrogating Surinder Koli, they came to a *prima facie* conclusion that "he is a psychopath who used to carry out the killings". The seized materials were sent to laboratory for post-mortem, individualisation and DNA extraction. The materials received from the Uttar Pradesh police were also forwarded for forensic examination. Some liquor bottles, a double-barrel gun, cartridges, mobile phones, photographs, photo albums and a blood-stained grill were handed over to the CBI for extensive examination. Preliminary investigations revealed that the bones were not more than two years old.

Through brain mapping and Narco analysis it was revealed that the call girl was the only adult victim in the string of serial murders. Young girls constituted the majority of victims. Post mortem reports of the 17 sets of skulls and bones recovered showed that 11 of the killed were girls. The top doctors of the Noida

Government Hospital revealed that there was a "butcher-like precision" in the chopping of the bodies and definite pattern in the killings³⁸¹. It was also concluded that there were 19 skulls in all, 16 complete and 3 damaged. The bodies had been cut into three pieces before being disposed off by the servant Surender Koli. The CBI sources said that the manservant, after strangulating the victims, used to sever their head and throw it in the drain behind the house of his employer. Sources also revealed that he used to keep the viscera in a polythene bag before disposing it off in a drain, so as to prevent detection.

On 12 Feb 2009, both the accused Moninder Singh Pandher and his domestic help Surinder Koli were found guilty of their crimes, by a special sessions court in Gaziabad. Both the accused Moninder Singh Pandher and his domestic help Surinder Koli were given death sentence on 13 Feb 2009, as the case was classified as "rarest of rare".

It is submitted that before the matter was taken up by the people of Noida the matter was considered to be fake and was neglected. The administration even the CBI was reluctant to help the Noida public, as Pandher was high profile personality. During the investigation CBI tried to escape the Pandher from such brutal act.

If such is our Government how can we ensure the future of our children in the hands of so called care taker of all children, upon whom the children's responsibility ultimately lies. The credit goes to judiciary who looked into the matter fairly well and convicted the duo.

6.4.4 INCEST

"In cest" is sexual relation or intercourse between persons who are within certain degrees of consanguinity, or are so closely related to one another that such relationship or intercourse is forbidden by law, for example brother and sister and father daughter, mother and son and so on. Sex between close

³⁸¹ AIIMSon February 06, 2007

relatives is forbidden in most societies. The children are easy virtue to fall in incestuous behaviour because of their immaturity in many respects. Incestuous behaviour with the children is child abuse, it is a juvenile delinquency.

In India, there is no separate provision for incest in Indian Penal Code, 1860. It is however, covered under the definition of rape under section 376 of IPC, the punishment for which may be imprisonment for life or for a term of 10 years rigorous imprisonment. The Bombay High Court in *Abdul wahid Ali Shaikh V. State of Maharashtra*³⁸² where the father was charged with having committed a sexual assault on his 8 years old daughter, the court ordered 10 years rigorous imprisonment instead of life imprisonment as awarded by the trial court. The reason for such lesser punishment as laid down by the Court is that, "the appellant is a hutment dweller and that his poverty has placed him in the difficult position of having to sleep huddled up in a tiny area is something that cannot be lost sight of. The appellant's wife had left him three years ago, he comes from weakest strata of society having been deprived of any form of education, and having struggled through life with no basic understanding of elementary issue of propriety. There is nothing on record to indicate that the accused had a background of sexual violence or any misbehavior for that matter. Further the Court observed that as the appellants wife had left him with the minor to school, he used to arrange for their meals from the hotel, provide them with toys and pocket money and cook the night meal for them. Court took these circumstances as mitigating circumstances and held that it was the momentary lapse which was occasioned due to the pathetic situation of the appellant.

Here the decision of the court is condemnable because the nature of the act itself calls for a heavy sentence. How one can lapse into such a heinous crime forgetting the blood relationship of father and daughter. How small the home may be, all the family members stay together in one home as a single unit. The blood relationship should be respected.

³⁸² 1993 Cr. L.J. 977 (Bom)

Where as Apex Court in *M.H. Kakkad V. Naval Dubey*³⁸³ convicted the accused who had rape d a girl and had also committed a similar sexual assault on his niece and other girls of the locality. The Court while inflicting severe punishment observed that —

“.....Though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offence committed on children. This is due to the reason that children are ignorant of the act of rape and are not able to offer resistance and unscrupulous, deceitful and insidious act of luring female children and young girls. Therefore such offenders, who are a menace to the civilized society should be mercilessly and inexorably punished in the severest terms”.

6.5 CARE, PROTECTION, REHABILITATION AND JUDICIARY

Under Article 32 of the Constitution i.e. Right to Constitutional remedies the Supreme Court has the power to lay down guidelines for effective enforcement of fundamental rights of the children of prostitutes and the law declared by the Supreme Court under Article 141 of the Constitution, to be treated as the law relating to that particular field. Exercising this power in number of cases the Supreme Court has given number of guidelines/ directions for care, protection and rehabilitation of neglected, ignored, destitute and delinquent children or the children who are in need of care, protection and rehabilitation.

In *Sheela Barse V. U.O.*³⁸⁴ the applicant under Article 32 of the constitution has asked for release of children below the age of 16 years detained in jails with in different states of the country, production of complete information of children in jails, information as to the existence of Juvenile courts, homes and schools and for a direction that the District Judges should visit Jail or sub-jails with in their jurisdiction to ensure that children are properly looked after when in custody as

³⁸³ 1992 AIR SCW 1480

³⁸⁴ AIR 1986 SC 1773

also for a direction to the state legal Aid Boards to appoint counsel to ensure availability of legal protection for children as and when they are involved in criminal cases and are proceeded against.

Accordingly, considering the gravity of situation, directives were made to District Judges in the country to nominate the CJM to visit the Dist Jail and sub-jails in their districts for the purpose of ascertaining how many children below the age of 16 years are confined to jail. *Sheela Barse* is the landmark case in this field where the SC had given many rulings.viz;

1. Detention of juvenile child below 16 years in a jail is deprecated if Child is a national asset, it is the duty of the state to look after the child with a view of ensuring full development of its personality. That is why all the states dealing with children provide that a child should not be kept in a jail. Even apart from the statutory prescription, it is elementary that jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society. The state government must setup necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a state Government has not got sufficient accommodation in its remand homes or observation homes the children should be released on bail instead of being subjected to incarceration in jail.
2. Necessity of speedy trial of children was emphasized where a complaint is or a FIR is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than seven years, the investigation shall be completed within a period of three months, from the date of filing of the complaint or lodging of FIR. If the investigation is not completed within this time the case against the child must be treated

as closed. If within three months, the charge sheet is filed against the child in case of any offence punishable with imprisonment of not more than seven years. The case must be tried and disposed within a further period of six months at the outside and this period should be inclusive of the time taken up in committal proceedings, if any.

3. Uniform children Act throughout India. It was recommended that instead of each state having its own children's Act different in procedure and content from the children's act in other states, it would be desirable if central government initiates parliamentary legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country.
4. Trial of children must take place in Juvenile Courts and not in criminal courts. There are special provisions enacted in various statutes relating to children providing for trial by Juvenile courts in accordance with a special procedure initiated to safeguard the interest and welfare of children and therefore **trial of children must take place in the juvenile courts and not in regular criminal courts**. It was also recommended by the SC that State Government will with all the earnestness at its command must set up Juvenile Courts, one in each district, and there must be one special cadre district, and there must be one special cadre Magistrate who must be suitably trained for dealing with cases against children, because these cases require a different type of procedure and qualitatively a different kind of approach.
5. By order dated 5th August, 1986 SC had suggested that instead of having separate state children's Act Parliament should make one central legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country.

At present we having Juvenile Justice Act 2000 which is applicable uniformly through out the country.

Again in *Vishal Jeet V. U.O.I.*³⁸⁵ a petition was filed under Article 32 at the instance of an advocate 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 devdasi 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 in flesh trade to protective home and then to rehabilitate them.

Held, that it was neither practicable and possible nor desirable to make a roving inquiry through CBI throughout the length and breadth of this country and no useful purpose will be served by issuing such directions. However, it would be appropriate if certain directions were given in this regard to State government and Union territories. In short the following directions were given:-

1. The State Government and the Governments of Union Territories should direct their concern towards law enforcing authorities to take appropriate and speedy action for eradicating child prostitution.
2. All Governments were directed to constitute the Advisory Committee for suggesting, measures to be taken for eradicating the child prostitution, and 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.

³⁸⁵ AIR 1990 SC 1412

3. The Governments (State + U.T.) should take steps in providing adequate and rehabilitative homes manned by well qualified trained social workers, psychiatrists and doctors.
4. For the proper implementation of suggestions, all the Governments should advice the machinery of its own.

Further the court expressed the hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, devdasi system and jogin tradition and will also at the same time protect and safeguard the interests of the fallen women.

*In Gaurav Jain V. U.O.I. and others*³⁸⁶, to seek improvement in the plight of the unfortunate fallen women and their progeny "Gaurav Jain" a public spirited lawyer filed a PIL seeking establishment of separate educational institutions for the children of the fallen women, and direction to the Union of India for the improvement, protection and rehabilitation of the children of prostitutes.

- The Court held that it is the duty of Government and all voluntary non-Governmental organizations to take necessary measure for protecting them from prostitution and to rehabilitate them so that they may lead a life with dignity of person.
- The Court directed that they should be provided opportunity for education, financial support, developed marketing facilities for goods produced by them. If possible their marriage may be arranged so that the problem of child prostitution can be eradicated. Marriage would them real status in the society. They should be given housing facilities ,legal aid, free counseling assistance and all similar aids and services so that they do not fall into the trap of red light area again.

³⁸⁶ AIR 1997 SC 3021

- The Court held that economic empowerment is one of the major factors, that prevents the practice of dedication of young girls to the prostitution as Devdasis, Jogins or Venkatasins. Referring to the various measures taken up by different States, the Court directed that the Social welfare Department should undertake similar rehabilitation programmes for the fallen victims so that the foul practice is totally eradicated and they are not again trapped into the prostitution.
- The Court held that segregating 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. The court directed that they should be taken from their mothers and be allowed to mingle with others and become a part of the society.
- Children of prostitutes should, however, not be permitted to live in slums and the undesirable surroundings of prostitute homes." This was felt particularly so in the case of young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. It also felt that "accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified." In this respect it constituted a committee comprising Shri V.C. Mahajan, R.K. Jain, Senior Advocates and others including M.N. Shraff, Advocate, as its convener, and other individuals to submit its report giving suggestions for appropriate action. Accordingly report was submitted and the Supreme Court held that -
- The rescue and rehabilitation of the child prostitutes and children should be kept under the nodal Department, namely, Department of Women and Child Development under the Ministry of Welfare and Human Resource, Government of India. It would devise suitable schemes for proper and efficient implementation, the institutional care, thus would function as an

effective rehabilitation scheme in respect of the fallen women or the children of fallen woman even if they have crossed the age prescribed under the juvenile Justice Act 2000. hey should not be left to themselves, but should be rehabilitated through employment schemes or such measurers as are indicated hereinbefore. The juvenile homes should be used only for a short stay to relieve the child prostitutes and neglected Juveniles from the trauma they would have suffered, they need to be rehabilitated in the appropriate manner.

As per the directions of Supreme Court the Central Government, State Government and Union Territory Administrators, should take adequate steps to rescue the prostitutes, child prostitutes and the neglected juveniles. They should take measure to provide them adequate safety, protection and rehabilitation in the juvenile homes, manned by qualified trained social workers or homes run by NGOs with the aid and financial assistance given by Government of India or state Government concerned. A nodal committee with the public spirited NGOs, in particular women organisation/ women members should be involved in the management. Adequate encouragement may be given to them, the needed funds should be provided and timely payments disbursed so that the scheme would be implemented effectively and fruitfully.

In *Prerna V. State of Maharashtra and others*³⁸⁷ Social service branch rescued the 24 females out which 14 were aduly and 10 were minors. The Board released the minor girls on the ground that they had not committed any offence and they were in custody for more than nine months. Further it observed that every detained girls had shown their eagerness to be released. Thus the Probation Officer could not take the minor girls to the Government Special Rehabilitation Centre for girls at Deonar.

Shocked with the order of Board at the manner in which rescued girls, though they were minors , were released contrary to the provision of law. The

³⁸⁷ 2003 (6) AIC674

petitioner, who is a registered organization working in the red light areas of Mumbai and non Mumbai with the object of preventing the trafficking of women and children and rehabilitating the victims of forced prostitution, had filed the petition in the 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.

The Court examine the case and express the deep displeasure at the manner in which this case has been handled by the Board. It held that if the girls were minors and they were not involved in any offence, they would not be described as Juvenile in conflict with law. They are children in need of care and protection as per provisions of Juvenile Justice Act. They ought to have been produced before the Child Welfare Committee . Further such children are to be dealt with keeping in mind the possibility of their rehabilitation. The Juvenile Justice Act 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 the Magistrate to order removal of prostitutes from any place and prohibit them from re-entering it. The Court wondered how the Board has passed such harsh order to the detriment of the minor girls.

The Court has also given directions for prevention of recurrence of such event in future:

- (A) The Juvenile should be released only to the care and custody of a parent or guardian found fit by the Child Welfare Committee.
- (B) If the parent or guardian is found to be unfit to have the care and custody of rescued juvenile , then the procedure laid down in Juvenile Justice Act should be followed for the rehabilitation of the rescued children.

Realising that jail environment are not congenial to the development of the child and mother, the court in the case of *R.D. Upadhyaya V. State of A.P. & Others*³⁸⁸ had issued the directions for the development of children who are in jail with their mother and who are in jail either as under trial prisoner or convicts. The directions were as follows;

1. Before sending a pregnant women to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as prevailing pre-natal and post-natal care for both the mother and the child. Similarly if she is found pregnant in jail, provision for medical examination should be made.
2. Regarding child birth in prison the Supreme Court said that pregnant women prisoner has a suitable option, arrangement for temporary release/ parole (or suspended sentence in case of minor and casual offender) to have her delivery outside the prison. Only in exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

When birth of child takes place in prison, his name shall be registered in the local birth registration office, but his birth place shall not be recorded as prison, only the address of the locality shall be mentioned.

3. Female prisoner should not be allowed to keep the child of above 6 years with her in prison. He should be sent to suitable surrogate as per the wishes of the female prisoner and situation run by social welfare department.
4. Children in jail shall be provided with adequate clothing suiting the local climatic requirement and proper fooding arrangement. In these respect

³⁸⁸ AIR 2006 SC 1949

SC had directed the state Government and union territories to lay down the scales.

5. The child of female prisoners living in the jails shall be given **proper educations** and recreational opportunities and while their mothers are at work in jail, the children shall be kept in creches under the charge of a matron/ female warden. This facility will also be extended to children of wardens and other female prison staff.
6. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.
7. The dietary guidelines for institutionalised infant children was provided.
8. Directions for amending jail manual and other relevant Rules, Regulations, instructions etc was made.

6.6 MAINTENANCE AND CHILD WELFARE BY JUDICIARY

In the absence of any uniform civil code of personal law for the muslims, in India the Supreme Court has been attempting to reform this branch of law within the constitutional- limits. One such landmark case is Noor Saba's case. Here the controversy was that whether in the existence of Muslim Women (Protection of Rights on Divorce) Act, 1986, a muslim divorced wife can claim maintenance for her children under section 125 of Criminal Procedure Code. Very oftenly respondent (prior husband) tries to get rid of maintenance liability by paying what has been discussed under Muslim personal law.

*In Noor Saba Khatoon V. Mohd. Quasim*³⁸⁹ Supreme Court observed that Section 3 (1) (b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 does not affect the rights of minor children of divorced Muslim parents

³⁸⁹ 1997 (6) SC 523

to grant maintenance under section 125 of the code, and accordingly the rights of such children are not affected by Section 3 (1) (b) of the said Act. The provisions of Section 3 (1) (b), restricting the rights of maintenance of a divorced Muslim Woman, have nothing to do with the rights of children to claim maintenance under section 125 of the code. Infact the maintenance of children absolutely lies on the father, irrespective of his religion and so long as he is in a position to do so and the children have no independent means of their own. There is nothing in section 125 which exempts a Muslim father from the obligation to maintain children.

Such a decision clearly lays down that section 9³⁹⁰ of Muslim Women (protection of rights on divorce) Act 1986, does not apply to applications moved on behalf of children under section 125 to 127 of Criminal Procedure Code. The child's right to claim maintenance from his father is separate and independent from his mother.

In the case of *Prem Chand Mahto, Petitioner V. Laxmi Devi and others*³⁹¹ Respondent, Laxmi Devi was married to petitioner Prem Chand in 1992 according to Hindu Rites and Custom. Till 2 and 1/2 years the marital relation between these remained peaceful but thereafter on account of illegal demand made by the parents of the petitioner and non fulfilment of the demands by the party she was subject to cruelty and several panchayaties were convened to settle the dispute between them, but there was no result and ultimately opposite party was driven out from the house of petitioner when she was carrying a pregnancy. Finding no way opposite party took shelter in the house of her parents and was blessed with a son. She alleged that she has no source of income of her own to maintain her and her son where as petitioner has got sufficient means. She filed a petition for maintenance which was allowed and sum of Rs.3000 and 150 was granted in her favour and her son respectively.

³⁹⁰ This section states that every pending application under section 125 to 127 of the Cr.P.C., is to be disposed of in accordance with the provision of the Act of 1986.

³⁹¹ CRI. L. J. 3242

Against this order petitioner preferred revision before session Judge which was transferred to court of 1st Addl. session Judge at Tenughat and the learned 1st Additional session judge, dismissed the revision application.

Learned counsel for the petitioner submitted that marriage of the petitioner with the respondent is voidable and is annulled under Sec. 12(c) of Hindu Marriages Act. Therefore she is not entitled to maintenance moreover petitioner has no source of income and **the son is also not entitled to get the maintenance as in a complaint filed by her she has not mentioned about any issue of her.**

On careful consideration of the discussions, High Court found that respondent from the inception cannot be said to be legally married wife of the petitioners as her marriages with the petitioner has been annulled by a decree and therefore she will not be entitled to maintenance. But so far as her son is concerned, his status becomes that of illegitimate child, **though petitioner has made out a case that in a case under sec. 498-A respondent has not mentioned about birth of son. But in the instant case, it appears that birth of a son has not been vehemently denied. So far as sec. 125 Cr.P.C. is concerned a son whether legitimate or illegitimate will be entitled to maintenance as he is born from having sexual relationship of petitioner and respondent. Maintenance of Rs.150 per month was allowed by learned court.**

Here again the judiciary has given paramount consideration to the welfare of children. In the above case parties have not mentioned about the birth of child out of their relationship but the court has given the recognition to the child as their son and allowed the maintenance to him under section 125 Of Criminal Procedure Code. The next case is still more interesting because here the **concept of living in relationship has been given recognition.** By the virtue of this concept the father of the son cannot plead that the offspring is not his son so he is not liable for maintaining him.

Facts of the case³⁹²; petitioner No.1, **Smt Dhani Nayak**, claims herself to be the legally married wife and petitioners No. 2 & 3 being children out of wedlock. She had claimed maintenance from the opposite party.

Petitioners application was resisted by the opposite party, **Sanakara Nayak**, on the ground that petitioner No. 1 is not his legally married wife and petitioner No. 2 & 3 are not the children out of such wedlock.

After hearing the arguments from both side and going through the evidences on record as well as the findings recorded by learned magistrate (Nimapara (Orissa). Supreme Court found that petitioner No. 1 was not the legally wedded wife of respondent and petitioners 2 and 3 are not his children.

However on the basis of voters lists, valid **presumption was made relating to sexual relationship** of petitioner and respondent so as to give petitioners 2 & 3 identity as the illegitimate children of opposite party.

Further Supreme Court held that son who has attained the majority was directed to be granted maintenance from the respondent. **Thus it has overruled the decision of the magistrate of Nimapara, that as son has attained the majority during the proceeding, he is not entitled to maintenance. But supreme Court had remedied the illegality by interfering with that order of magistrate and said that he is entitled to get maintenance from the date of application till date of his attaining majority.**

With the emergence of concept of living in relationship the opposite party don't have to prove that the marriage has taken place between them and they are husband wife. If it is found that parties were living together as husband and wife since long time and children are born out of that sexual relationship then court will presume them to be their children. Now the so called husband cannot have sweets in both hands. He cannot get rid of his liability by claiming that,

³⁹² Smt Dhani Nayak and others V. Sanakara Nayak, 2008 Cri L.J. 2413

neither the children nor their mother is having the relationship of lawful children and wife respectively.

6.7 JUDICIARY AND CUSTODY OF A CHILD

Custody is the protective case of the child. In divorce, hollity or domestic proceedings the courts have wide powers to determine which partner is to have custody of the children of the marriage. When any marriage is declared void under any personal law, or there is divorce between the spouses, the question of the custody, education and maintenance of the children arises first when the matter of hollity or divorce is subjudice, the court always gives priority to the consideration of the welfare of the children.

In *Amit Beri & another v. Smt. Shheetal Beri*³⁹³ Supreme court found that the mother was the working lady in Dubai and the child has to be kept for some time in a care home, that does not indicate that the mother will not be able to take care of the minor. It is not unusual for a working mother to utilize the services of the care home, that alone, therefore, is not a sufficient circumstance to indicate that the mother will not be able to take care of the minor. The child has been with the mother now for about 10 years and if his custody is transferred to the father in new surroundings, which may not be very congenial for him.

Even if father and father's father were extremely affluent, that will not entitle them to the custody of minor on this ground, because money is no substitute for affection. Custody of child was restored with mother.

In *Smt. Jhankhu v/s Goda*³⁹⁴, HC while granting the custody of minor had given wide expression to welfare of minor. It said that it ought not be measured in money only or by physical comfort alone but other factors such as financial educational, physical, moral and religious welfare should be considered.

³⁹³ AIR 2006 All. 267

³⁹⁴ AIR 2007 (NOC) 206(Raj)

Further it held that one of the paramount and germane considerations would be to take into account the wishes of the child, where the minor is old enough and is able to make intelligent preference. It is also the duty of the court to examine whether the wish expressed by the minor is free and frank desire. It may be pointed out that where a child above five years in custody of the mother throughout was found to be well nourished and playful, the application of the father for the custody of the child is to be considered more cautiously in the background of his conduct.

Similarly in *Rajendra Kumar Shukla and Another Vishnu Kumar Shukla & Ors*³⁹⁵. Supreme Court found that the boy was intelligent enough to decide his welfare. Thus his preference to live with either party will be considered. If he wishes to stay under the guardianship of his uncle, who moves arrangement of his cloth and education, then his guardianship should not be changed as such transfer will disturb his feelings and sentiments which he has developed with uncle. Such a mental tension may cause disturbance to his study and health. Therefore considering the age of the minor the preference of the boy was accepted.

By looking at the above cases we can conclude that the interest of child, the wishes of the child, the spiritual and moral support to the child is more important than the affluent status of other party.

6.8 ADOPTION AND JUDICIARY

This is further an area where the legislators have failed to make sufficient enactments for proper adoption by any non Hindu person or by foreigner. Indian legislations in regard to the adoption make reference of only Hindu adoption and Maintenance Act, 1956. So to fill up these gaps judiciary had again played a vital role through number of cases. One such leading case is mentioned

³⁹⁵ AIR 2006 All 173

below. The guidelines made under this case are taken as law for Inter-country Adoption.

Lakshmi Kant Pandey V. Union of India³⁹⁶ is a renounced case for Inter-country Adoption. In absence of any concrete legislation for inter-country adoption the Judiciary has taken progressive step in this respect.

In this case the writ petition was initiated on the basis of a letter addressed by one Lakshmi Kant Pandey, Advocate complaining malpractices indulged in by social organisation and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter was referred to the press report based on 'empirical investigation carried out by the staff of a reputed magazine called "The Mail" and alleged that not only Indian children are under the guise of adoption exposed to the long horrendous journey to distant foreign country at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and Relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foreign foster 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 obligation in the matter of adoption of Indian children by foreign parents.

Accordingly Indian Council for Social Welfare and child welfare filed their written submissions in response to the notice issued by the court. Based on the recommendations and suggestions by these welfare agencies the court in absence of any legislation gave full procedure of adoption of Indian child by foreign parents which is as follows:-

³⁹⁶ AIR (1984)2 SCC 244

Every application from a foreigner desiring to adopt a child must be sponsored by 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.

Every such application should be accompanied by home study report and a family photograph of the adoptive child, and other particulars showing social and financial status of foreigner and his declaration and appropriate security that he will maintain the child and provide for his education and upbringing it directed the Government to prepare the list of all recognised or licensed, social or child welfare agencies, in various countries indulged in inter country adoption and to supply copies to various High Courts in India and also social and welfare agencies operating in this area.

Further it said that if biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption. They should be helped to understand all the implications of adoption including the possibility of adoption by foreigner and they should be told specifically that in case the child is adopted, it would not be possible for then to have any further contact with the child. 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 the decision. But once the decision is taken and is not reconsidered within such further time it must be regarded as irrevocable and applications for appointment of foreigner as a guardian can be initiated. But no notice of such application is to be given to biological point.

But, biological parent 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 month from the date of birth.

The court also suggested that it would be desirable not to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption, it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter country adoption must not be looked upon as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerated into trading.

The social and child welfare agency which is looking after the child selected by a prospective adoptive parent is entitled to receive maintenance (including hospitalization charges if any) expenses from the date of selection of the child till the child leaves for going to its new home.

Court expressed the view that it would be desirable if the child is given in adoption before he completes the age of 3 years. But if the child is above 7 years his wishes must be ascertained.

Court also held that the proceedings on the application for guardianship should be held in camera and they should be regarded as confidential and as soon as an order is made proceedings including the papers and documents should be sealed.

6.9 CONCLUSION

The weaker section of Indian humanity have been deprived of justice for long, long years. They have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assess their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice. The majority of the people of our country are subjected to this denial of access to justice and

over taken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings. The judiciary has always, therefore, regarded it as its duty to come to the rescue of those deprived or vulnerable sections of Indian humanity in order to help them realize their economic and social entitlements. The strategy of public interest litigation has been evolved by this court with view to bringing justice within the easy reach of the poor and disadvantaged section of the community. This court has always shown the greatest concern and anxiety for the welfare of the larger masses of people in the country who are living the life of want and destitution, misery and suffering and has become a symbol of the hopes and aspirations of millions of people in the country.

Judiciary has always taken a sympathetic attitude towards children. The welfare of the child is given paramount importance. This same attitude is reflected in the above mentioned cases, whether it is Laxmikant Pandey V. U.O.I., vishal Jeet V. U.O.I., Bandhua Mukti Morcha case,, Smt Dhani Nayak and others V. Sanakara Nayak or number of M.C. Mehta's case.

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