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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Crl. Rev. No. 443/2009 & Crl.M.A.No.3071/2010

Date of Decision: 12th August, 2014

DELHI HIGH COURT LEGAL SERVICES COMMITTEE ..Petitioner

Through : Mr. V. Madhukar, Mr. Paritosh
Anil, Mr. Jayendra, Mr. V. Bhatt,

Mr. Sandeep Sethi, Sr. Adv.
appointed as Amicus Curiae

VERSUS

UOI & ANR.

....Respondents

Through: Mr. Manoj Ohri, APP for the
State.
Mr. Amit Chadha, Adv. for
applicant.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

GITA MITTAL, J

“It is highly deplorable and heart-rending to note that many poverty stricken children and girls in the prime of youth are taken to 'flesh market' and forcibly pushed into the 'flesh trade' which is being carried on in utter violation of all canons of morality, decency and dignity of humankind. There cannot be two opinions—indeed there is none—that this obnoxious and abominable crime

committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps.”

(1990) 3 SCC 318 (para 7) Vishal Jeet vs. UOI & Ors.,

1. By way of the instant revision petition, the petitioner challenges the order dated 10th August, 2009 passed by the Metropolitan Magistrate (Central) with regard to custody of two minors recovered in police actions in violation of the provisions of Section 17(A) of the Immoral Traffic (Prevention) Act, 1956 and other relative provisions. The petition has been filed by the Delhi High Court Legal Services Committee as per the mandate of Section 8(a) of the Legal Services Authority Act, 1987 and the High Court Legal Services Committee Regulations.

Factual Background

2. Two young girls A and B, aged 14 years and 16 years respectively, were rescued by the Delhi Police on 29th July, 2009. On a complaint made by B, FIR No. 98/2009 was registered by the police station Kamla Market on 29th July, 2009 under sections 366A, 368, 373, 323, 376, 109 read with Section 34 of the Indian Penal Code ('IPC' hereafter) and sections 3, 4 and 5 of the

Immoral Traffic (Prevention) Act, 1956 (hereafter referred to as the 'IT Act of 1956').

3. As per the complaint, it appears that A & B, hailing from extremely poor families of the District South 24 Paraganas in West Bengal, were fraudulently lured to Delhi, sold and compelled into prostitution by their captors till rescued by the police.

4. After the rescue, the senior officials in the police as well as an NGO concerned with such like matters, were informed. They were then produced before the Child Welfare Committee for Care and Protection at the Nirmal Chhaya Complex, Jail Road, Hari Nagar, New Delhi and lodged in the Children's Home for Girls.

5. One person claiming to be the father of B, thereafter, filed an application before the Metropolitan Magistrate seeking her custody. On this application, the Metropolitan Magistrate passed an order on 10th August, 2009, noting that as per the reply filed by the investigating officer, the age determination test of the prosecutrix had been conducted and that the investigating officer had no objection to handing over the physical custody of the victim to the father. The learned trial judge scrutinised the voter

identification card, ration card and transfer certificate of the applicant. On this material alone, without inquiring any further, the learned trial judge concluded that the applicant was the father of one of the girls and passed the order for handing over her custody to the applicant as he was her natural father. No further inquiry was deemed necessary by the learned Metropolitan Magistrate before directing handing over custody of the child to the father.

6. This order was orally brought to the Hon'ble the Chief Justice by Mr. V. Madhukar, learned counsel for the Delhi High Court Legal Services Committee, resulting in the passing of the following order dated 11th August, 2009 :-

“Crl.R...../2009 (to be numbered)

We have heard Mr. V. Madhukar, learned counsel for petitioner/DHCLSC.

In view of the submission of learned counsel for petitioner, operation of impugned order dated 10th August, 2009 passed by Metropolitan Magistrate (Central)-05 in FIR No.98/2009, Police Station Kamla Market is hereby stayed. The lower court is further directed not to pass any order in respect of other rescued girl, namely, Kavita, till further orders of this Court.

Petitioner is directed to file a proper petition before the Registry of this Court. Registry is directed upon filing of

petition, same be listed before appropriate Bench on 17th August, 2009.

Order dasti under the signature of Court Master.”

7. The present petition has been filed by the Delhi High Court Legal Services Committee through its Secretary pursuant to the above order. The case was first listed before this court on 17th August, 2009. The applicant before the trial court, (who was the person claiming to be the father of A), was represented by a counsel in this court. In the above facts, he was directed to be impleaded as a necessary party/respondent no. 3 in the present proceedings. He has since been represented by a counsel throughout in the present proceedings and has been heard in the matter.

8. On 17th August, 2009, the only grievance made by the petitioner in these proceedings, was an objection to the failure of the learned Metropolitan Magistrate to conduct the inquiry postulated under section 17A of the IT Act, 1956 before directing release of the victim by the Magistrate. In this regard, reference had also been made to the scheme of the statute, especially sections 16, 17, 17A thereof.

9. Learned counsel for the petitioner had drawn my attention to a pronouncement of this court reported at ***1995 JCC 509 Kumari Sangeeta vs. State & Anr.***, wherein a question had arisen as to whether the inquiry postulated under sub-section (2) and (5) of section 17 of the IT Act, 1956 was mandatory. It was urged in the above matter on behalf of the State, that the use of the expression 'may' under section 17(5) of the Act gave ample option and latitude to the Magistrate and left it to his judicial discretion to avail the services of five persons for the purposes of discharging functions under the said Act or to ignore the same. On the other hand, on behalf of the petitioners, it was urged that the word 'may' has been used in the sense of 'shall', making it obligatory on the part of the Magistrate to utilise the services of five respectable persons.

The learned Judge has alluded at length to the object and purpose of enacting the IT Act of 1956, pointing out that the statute was enacted by the Parliament pursuant to the ratification and signing of the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others at New York on 9th May, 1950. The court also referred to the Constitutional mandate and observed that the IT Act

of 1956 was a piece of social legislation intended to ameliorate the lot of those persons of the country who are being exploited by others. In this background, it was observed that having regard to the well established principles of legislative interpretation, the word 'may' in section 17(5) of the Act is to be read as 'shall' and that the legislature had used the same in the mandatory sense. The enquiry under sub-section (5) was therefore mandatory and the statutory provision was not merely an enabling one.

10. In view of the above, in the present proceedings, on 17th August, 2009, it was urged by the petitioner and found by this court, that the order of the trial court dated 10th August, 2009 passed in the instant case clearly reflected that no investigation at all, as was envisaged under section 17A, had been effected and the learned Magistrate had directed handing over of custody of the child victim to the respondent no. 3 on the finding that he was the natural father without conducting/directing any further investigation, which was contrary to the mandatory statutory scheme. In this background, status quo on the custody of the child, stated to be with Nirmal Chhaya, a children's home for girls was directed. Further, liberty was given to the respondent no. 3 to

file an application before the trial court for conducting the inquiry in accordance with section 17A of the IT Act, 1956.

11. Immediately thereafter, Crl.Misc.No.10648/2009 dated 8th September, 2009 was filed by the petitioner pointing out that the matter was to be examined in the light of the Juvenile Justice (Care & Protection of Children) Act, 2000 ('JJ Act, 2000' hereafter) and not by the Magistrate under Section 17A of the IT Act, 1956. It was apprehended, that the Magistrate may pass orders on the application without taking into consideration the mandatory provisions of the later enactment. It was contended that only the Child Welfare Committee constituted under section 29 of the statute would have the jurisdiction to rule on the issue about the competence of the claim for custody by a person claiming to be the parent. It was explained, that for the reason that the present petition was submitted in haste on 17th of August, 2009, this aspect of the matter had not been placed by the petitioner before the court. On account of the immediacy and urgency expressed, the same had escaped attention.

In view of the above submissions, by an order dated 23rd October, 2009, consideration of the application, if any, filed by respondent no. 3 before the trial court was directed to be deferred.

12. In the meantime Crl.M.A.No.3071/2010 has been filed by a lady claiming to be the mother of B seeking a direction for handing over custody of 'B' to her and an opportunity of being heard in the present matter.

13. On the 11th March, 2010, in order to avoid delay in passing appropriate orders for restoration or rehabilitation of the two persons concerned, it was deemed necessary that immediate orders be passed with regard to conduct of the appropriate inquiry in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. It was accordingly directed that the two rescued victims be produced before the concerned Child Welfare Committee on 18th of March, 2010 at 12:00 noon for the purpose of conducting the inquiry in terms of the procedure prescribed under the said statute.

14. Having regard to the importance of the above questions and its far reaching ramifications, I had appointed Mr. Sandeep Sethi, Senior Advocate as amicus curiae in the matter. I have been assisted in the hearing of the

present matter by Mr. Sandeep Sethi, learned Senior Counsel as amicus curiae, Mr. V. Madhukar, learned counsel representing the Delhi High Court Legal Services Committee; Mr. Manoj Ohri, learned APP and Mr. Amit Chadha, learned counsel.

Contentions

15. Mr. Sandeep Sethi, learned amicus curiae has pointed out, that so far as children are concerned, the JJ Act of 2000 is not only a later Act but is the special law on the subject of children or juveniles. It is also pointed out, that the legislature under Section 29 of the JJ Act, has carefully constituted a five member Child Welfare Committee which has exclusive jurisdiction in respect of children in need of care and protection in view of Section 31 of the enactment. Even the Juvenile Justice Board constituted under Section 4 of the Stature is a multiple member body consisting of experts which is conferred absolute jurisdiction with regard to children in conflict with law.

The submission is that these statutorily provided bodies constituted of experts would be more sensitive to the needs and interests of the child than the magisterial enquiry postulated under section 17A of the IT Act. Mr. Sethi has also pointed out that under section 2(t) of the JJ Act, it is stated that a

“public place” shall have the meaning assigned to it in the Immoral Traffic (Prevention) Act, 1956. Furthermore, so far as a child in need of care and protection is concerned, the legislature has included a child who is found vulnerable and is likely to be inducted into trafficking within the definition of the expression. The contention is that the legislative intention of giving supremacy to the provisions of the JJ Act in contra-distinction to the provisions of the IT Act in the context of persons under 18 years of age, is amply clear from a bare reading of the statute.

16. Mr. Madhukar has painstakingly pointed out that the IT Act of 1986 is a penal statute and section 4 thereof refers to a person over 18 years of age guilty of commission of an offence thereunder as liable for punishment. It is a statute concerned not only with children but refers to offences by ‘any person’ Mr. Madhukar has drawn my attention to sub-section 1A of section 7 of the IT Act, 1956, which is concerned with an offence in respect of a child. Section 10A deals with ‘female offenders’ without making any distinction between juveniles and adult offenders.

17. The provisions of section 17 including 17(3) and 17A of the JJ Act are also concerned with any person and are not confined to dealing with children.

The first proviso of sub-section (s) of section 17 of the Act makes it “open” to the Magistrate to place such child or minor, rescued under section 16, in any institution established or recognised under any Children's Act for the time being in force in any state for the safe custody of children, without anything more.

18. It has been pointed out, that the provisions of the IT Act of 1956, which is a special legislation in relation to immoral trafficking, postulates an inquiry by the magistrate under Section 17A with regard to the manner in which he is to proceed if he is of the opinion that a person brought before him is a juvenile or a child.

19. On the other hand, Section 7 of the JJ Act, 2000 contains an entire scheme including orders which are required to be made if he is of the opinion that the person brought before him under any of the provisions of the Act is a juvenile or a child. The Act of 2000 completely excludes the enquiry by the magistrate.

20. Section 7A of the JJ Act, 2000 proposes the procedure to be followed when there is a claim of juvenility of an accused person on the date of the offence. The court is empowered to conduct the inquiry to determine the age

of the person, record a finding, whether the person is a juvenile or a child or not, stating his age. In case of a finding that a person is a juvenile on the date of commission of the offence, the juvenile has to be forwarded to the Board for passing the appropriate orders. This section thus, is confined to accused persons produced before the court who set up a claim of juvenility on the date of commission of the offence.

Issues arising for consideration

21. The important question which firstly, arises for consideration, is the manner in which the court is to proceed in a matter where the persons recovered by the police in a raid under Section 15 or 16 of the IT Act, 1956, are under 18 years of age. Are the authorities required to proceed against them under the Immoral Traffic (Prevention) Act, 1956 ('IT Act') or in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 ('JJ Act')?

22. The court is therefore confronted with the question as to whether the provisions of the IT Act, 1956 would prevail over the provisions of the JJ Act, 2000. If the answer to the first question is that the JJ Act is to prevail, then whether the children rescued in a raid conducted under Section 15 and 16 of

the IT Act are to be treated as juveniles in conflict with law and the requirements of Section 7 of JJ Act have to be complied with as well as the inquiry is to be conducted by the JJB under section 14 or whether the children are to be treated as children in need of care and protection and the inquiry as required to be conducted by the CWC under section 33 of the JJ Act, 2000.

Constitutional Scheme

23. For the purposes of consideration of these issues, it becomes necessary to first consider the international instruments, constitutional scheme and statutory provisions on the subject which would enable appreciation of the spirit, intent and purpose of the statutes.

24. Appreciation of the statutory provisions requires an insight into the relevant constitutional provisions. A special status has been ensured for children under the Constitution of India in both the fundamental right provisions in Articles 15(3), 21A, 23, 24 as well as the directive principles of state policy enshrined in Articles 39(e) and (f), 45, 46 and 47.

25. The rights constitutionally ensured to the child, the prohibitions recognised under the Constitution of India and the duties imposed on the State thereunder deserve to be stated and read as follows :-

“15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing, ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

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21A. Right to education- The 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.

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Right against exploitation

23.Prohibition of traffic in human beings and forced labour-(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any

contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24. Prohibition of employment of children in factories, etc.-No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

26. The directive principles of state policy contained in Article 39 (e) and (f), 45, 46 and 47 also require to be examined and read as follows :-

“39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing

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(e) that the health and strength of workers, men and women, and the **tender age of children are not abused** and that citizens are **not forced by economic necessity to enter avocations unsuited to their age or strength;**

(f) that **children** are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that **childhood and youth are protected against exploitation** and against moral and material abandonment

45. Provision for early children and education to children below the age of six years - The 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 fourteen years.

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections-

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health- The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”

(Underlining by me)

27. The various grounds enumerated under Article 15(1) prohibiting discrimination do not include discrimination on grounds of age. Article 15(3) and clauses (e) and (f) of Article 39, permit the state to enact special legislation for children. Article 23 provides a fundamental right against

exploitation and makes contravention of Article 23(1) an offence punishable in accordance with law.

28. The Constitution (86th Amendment) Act 2002 inserted Article 21A in the Constitution to provide free and compulsory education of all children in the age group of six to fourteen years as a fundamental right in such a manner as the State may by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality. Implicit therein is that a child between six and fourteen years of age must be engaged in education and not other avocations, especially those against his/her welfare, as those covered under the IT Act.

29. It is noteworthy, that fundamental duties were introduced as chapter IV-A by way of the 42nd constitutional amendment. For the purposes of the present consideration, it is essential only to notice the objective under clause (e) of Article 39, which is that the State should direct its policy towards ensuring that the tender age of children is not abused and that they are not forced by economic necessity to enter avocations unsuited for their age or

strength. Clause (f) mandates upon the state to direct its policy towards not only providing opportunity and facility to children to develop in a healthy manner in conditions of freedom and dignity but also to protect them against exploitation, moral and material abandonment.

Article 45 imposes on the state a primary responsibility of ensuring that all children, until they complete the age of 14 years, are provided free and compulsory education.

Article 46 directs the state to promote the educational and economic interests of the weaker sections of the people and that it shall protect them from social injustice and all forms of exploitation.

Article 45 and 47 impose on the state a primary responsibility of ensuring that all the needs of the children are met, and that their basic human rights are fully protected.

International concerns and impact on Legislation regarding children in India

30. International recognition of the rights of the child was first manifested in the Geneva Declaration of the Rights of the Child which was adopted by the League of Nations on 26th September, 1924.

The Universal Declaration of Human Rights was thereafter adopted on 10th December, 1948 by the UN General Assembly which incorporated certain basic rights of children. Article 16 of this Declaration emphasises that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. Article 25(2) of this declaration states that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

31. Following the partition, there was an increased number of excluded children and delinquent juveniles in India.

32. As per the separation of powers provided under the Constitution of India adopted in 1950, the subject matter of legislation for children fell in the State List of the 7th Schedule of the Constitution. For this reason, even though, there was a crying need for a uniform countrywide legislation, but the same could not be enacted. The Constitutional scheme, thus while recognising the importance of affairs relating to the welfare of children, however had left matters as education, administration of justice, reformation and other institutions to the prerogative of the states. As a result of the 42nd

Constitution (Amendment) Act, 1976, education (at item no. 25) and administration of justice, constitution and organisation of all courts, except the Supreme Court, and the High Court (as item no. 11A) were transferred to the Concurrent List i.e. List III under the Seventh Schedule of the Constitution.

33. The impetus to the enactment of special laws for children in this country was provided by the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on the 20th of November, 1959. The preamble thereof provides that the child by reason of his or her physical or mental immaturity, needs special safeguards and care including her appropriate legal protection before as well as after birth. The Declaration makes a reference to Principle no. 9 which, reads as follows :-

“The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.”

34. The Children's Act, 1960 was the first Central legislation enacted in India relating to children. This enactment was applicable only to Union

Territories and was an attempt of the legislature to provide a model to be followed by the states for enactment of their respective children's legislations. In view of the Constitutional scheme, different states enacted different provisions in their respective statutes relating to children.

35. The year 1979 was celebrated as the International Year of the Child to draw the attention of people to the multifarious problems associated with the exploitation of the child and awareness of the rights of the child. There was a paradigm change in approach internationally from concerns being confined to 'welfare of the child' towards the protection of the 'rights of the child'

36. On or about 10th September, 1985, Sheela Barse, a journalist filed a petition in the Supreme Court of India seeking release of 1400 children illegally incarcerated in several jails in different states. Several issues, including absence of the 'Children's Act' in many states; non-establishment of alternate custodial institutions for children and processing of delinquent juveniles by ordinary criminal courts on account of non-availability of juvenile courts resulting in violation of their fundamental rights guaranteed under Article 14 and 21 of the Constitution of India, were raised. Having regard to the importance and urgency of the matter, the court expanded the

consideration in the writ petition and examined issues relating to institutionalisation of juveniles, implementation of the services under the juvenile justice scheme and made several orders for their improvement including directions to judicial officers as well as state legal aid boards to visit jails and sub-jails; the court examined conditions of homes under the Children's Act; reasons for non-enforcement of the state enactments as well as particulars and details of government and non-government homes and organisations for the care of mentally and physically handicapped juveniles. Keeping of children in jails was deprecated. Finally, in view of the extent of the problem and the difficulties in requiring each state to enforce its enactments, the Supreme Court suggested to the Union Government to initiate a 'parliamentary legislation' on the subject, so that there is complete uniformity in regard to the provisions relating to children in the entire territory of the country. (Ref: ***AIR 1986 SC 1773 Sheela Barse vs. UOI***).

37. In furtherance of the provisions of Declaration on Social & Legal principles relating to protection and welfare of the children with Special Reference to Foster or Placement and Adoption Nationally & Internationally : General Assembly resolution 41/85 of December 3, 1986; the United Nations

had also adopted the Standard Minimum Rules For the Administration of Juvenile Justice ‘commonly referred to as The Beijing Rules’ dated November 29, 1985. These standards were intended to meet the varying needs of juvenile offenders while protecting their basic rights and to meet the needs of society. The standards aimed to ensure that the juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

38. The adoption of the Beijing Rules in 1985, the suggestion in the **Sheela Barse case in 1986** for initiation of parliamentary legislation on the subject, and the recommendation for a uniform law on the subject also to be found in the 69th Report of the Committee on Subordinate Legislation tabled in the Parliament on 12th of May, 1986, added to the impetus for enacting a uniform law relating to juvenile justice.

The Juvenile Justice Act, 1986

39. In this background, the Juvenile Justice Act, 1986 (JJ Act, 1986 hereafter) came to be passed on the 1st of December, 1986 which was brought

into force on 2nd October, 1987 and extended to the whole of India except the state of Jammu & Kashmir.

40. The working of the JJ Act, 1986 and experience revealed that there was need for creating adequate infrastructure for ensuring that the rights of the child are protected. There was also the realisation that there were not only children who were in conflict with law but a large body of children in need of care and protection requiring assistance. Involvement of voluntary organizations and institutions was also deemed necessary. The available justice delivery system for adults was certainly not suitable for application to juveniles or children or any one on their behalf which included police, voluntary organizations, social workers, parents or guardians. A different infrastructure was also considered necessary with involvement of the informal systems including family, voluntary organizations and the community.

41. The JJ Act, 1986 was challenged by the Delhi Juvenile Welfare Board on the ground that it gave the police the power to send missing children to the welfare homes, including those run by private organisations, without producing them before the Board or searching for their parents, and in those

circumstances, there was every likelihood of the provisions of the Act being exploited by certain unscrupulous organisations.

42. A working committee reviewed the 1986 Act. The review indicated that the justice system provided was not considered suitable and that the Act did not provide for differential approach to children in conflict with law and those in need of care and protection.

43. On 20th November, 1989, the *Convention on the Rights of the Child* ('CRC' hereafter) was adopted by the United Nations General Assembly being the 30th anniversary of the Declaration of the Rights of the Child. This document is a binding treaty which, as of November 2009, stands ratified by 194 countries. India signed and ratified the convention in 1992.

This international instrument recognizes "*that in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration*". The Convention is the principle treaty for children for encompassing a full range of civil, political, economic, social and cultural rights and aimed at protecting children from discrimination, neglect and abuse. It grants and provides for the implementation of rights for children both in times of peace and during

armed conflict. The Convention constitutes a rallying point and is a very useful tool for civil society and individuals, working for the protection and promotion of the rights of the child, a truly innovative instrument.

44. Under this Convention *a child* is defined in Article 1 as “*every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.*” Article 3 of the Convention spells out the best interest of the child doctrine and emphasizes on the need for competent authorities to set up procedural formalities required in the area. Article 4 refers to the need for effective implementation of the rights spell out in the Convention and directs all state parties to undertake all appropriate legislative, administrative and other measures in this regard. The CRC provides inter alia for the following rights of the child:

“(i) to (v) xxx

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(vi) freedom of thought, conscience and religion;
(Article 14)

(vii) state parties to take all appropriate legislative, administrative, social and educational measures 'to **protect children' from** all forms of physical or mental **violence, injury** or **abuse**, neglect or negligent treatment,

maltreatment or **exploitation including sexual abuse** while in parental care or of a guardian (Article 19)

(viii) Further, the **state shall provide** for **protective measures and effective procedures** establishing social programmes to provide necessary **support to children**. [Article 19(2)]

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(xii) the right to education, with States making primary education compulsory and free; (Article 28)

(xiii) **protection from economic exploitation**, with a minimum age for admission to employment; (Article 32)

(xiv) **protection from involvement in the illicit production, trafficking** and use of narcotic drugs & psychotropic substances; (Article 33)

(xv) **protection from sexual exploitation and abuse**. (Article 34). The parties to take all appropriate national, bilateral and multilateral measures to prevent (a) **inducement or coercion of a child to engage in any unlawful sexual activity** (b) the **exploitative use of children in prostitution** or other unlawful sexual practices (c) the exploitative use of children in pornographic performances and materials (Article 34)

(xvi) State parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36)

(xvii) the right to life and to protection from capital punishment; and life imprisonment and no child be

subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37(a);

(xviii) State parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse; torture or any other forms of cruel, inhuman or degrading treatment or punishment (Article 39)”

(Emphasis added)

45. Under the CRC, the State Parties thus undertook to protect the ‘child’ being ***‘every human being under 18 years of age unless, under the law applicable to the child, majority is attained earlier’) from all forms of discrimination and to provide appropriate care.***

46. In 1990, the United Nations also framed the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The Juvenile Justice (Care & Protection of Children) Act, 2000

47. In the light of the several concerns spelt out by the international instruments noted above as well which remained to be addressed despite the 1986 enactment, the need was felt for a more suitable uniform juvenile justice system applicable throughout the country. Such system would be concerned with juveniles in conflict situations and provide, not only for all aspects of

their social, cultural and economic evolution in the country but would adequately involve and utilise informal systems; include family, social and community based welfare agencies concerned with care, protection, rehabilitation, treatment and also be concerned and deal with those needing care and protection.

48. Despite the above legislations and judicial pronouncements, not much had changed on the ground. This compelled the Supreme Court in 1997, while considering the plight of bonded and child labour in the judgment reported at *(1997) 10 SCC 549 Bandhua Mukti Morcha etc. vs. UOI & Ors.*

to lament thus:-

“4. 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. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to the humanity. Mankind has best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the 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, the social stability and good citizenry. The founding fathers of the Constitution, therefore, have emphasised the importance of the role of the and the need of its best development. Dr. Bhim Rao Ambedker, who was far ahead of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the role of law.”

49. In this background, it was considered expedient to re-enact the existing law relating to children resulting in the enactment of the **Juvenile Justice (Care and Protection of Children) Act, 2000** which received the assent of the President of India on 30th December, 2000 (referred to as the ‘JJ Act, 2000’ hereafter) and was brought into force on 1st April, 2001.

50. Apart from the foregoing concerns, in the JJ Act of 2000, the following further proposals were made:-

“(i) to lay down the basic principles of administering justice to a juvenile or the child in the Bill;

(ii) to make the juvenile justice system meant for a juvenile or the child more appreciative of the developmental needs in comparison to criminal justice system as applicable to adults;

(iii) to bring the juvenile law in conformity with the United Nations Convention on the Rights of the Child;

(iv) to prescribe a uniform age of eighteen years for both boys and girls;

(v) to ensure speedy disposal of cases by the authorities envisaged under this Bill regarding juvenile or the child within a time limit of four months;

(vi) to spell out the role of the State as a facilitator rather than doer by involving voluntary organizations and local bodies in the implementation of the proposed legislation;

(vii) to create special juvenile police units with a humane approach through sensitisation and training of police personnel;

(viii) to enable increased accessibility to a juvenile or the child by establishing Juvenile Justice Boards and Child Welfare Committees and Homes in each district or group of districts;

(ix) to minimise the stigma and in keeping with the development needs of the juvenile or the child, to separate the Bill into two parts - one for juveniles in conflict with law and the other for the juvenile or the child in need of care and protection; and

(x) to provide for effective provisions and various alternatives for rehabilitation and social reintegration such as adoption, foster care, sponsorship and aftercare of abandoned, destitute, neglected and delinquent juvenile and child.”

51. At that time, a writ petition bearing W.P.(C) No. 3447/2001 entitled B.S. Gahlaut vs. UOI came to be filed in this court challenging the provisions of Section 32, 33, 37(2), 41(4), 41(6), 56 (in relation to the local authority only), as well as those of Section 59(2) of the JJ Act, 2000 on the ground of their being unconstitutional and injurious to the well being of neglected children. The writ petition was disposed of by this court on 28th July, 2003 with the observation that some of the statutory provisions merited reconsideration.

Juvenile Justice (Care and Protection of Children) Amendment Act, 2006

52. In view of the courts' observations, widespread consultations were held and several amendments were proposed in the JJ Act, 2000. As a result, the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 (Act 33 of 2006) was finally brought into force with effect from 22nd August, 2006 and applies to the present consideration.

53. The Statement of Objects and Reasons of the Amendment Act 33 of 2006 manifests the legislative intent and inter alia include the following :-

“(ii) to clarify that the Juvenile Justice Act shall apply to all cases involving detention or criminal prosecution of juveniles under any other law;

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(iv) exclusion of the local authorities from the provisions authorising them to discharge or transfer a child in need of care and protection or a juvenile from the children's home or special home or for sending a juvenile in conflict with law undergoing imprisonment, to a special home or a fit institution;

(v) to have a procedure laid down where claim of juvenility is raised before any court.

(vi) to have a minimum period of twenty-four hours, excluding the time necessary for the journey from the place where the juvenile in conflict with law was apprehended, within which he should be produced before the Board and a similar provision with regard to production of a child before the Child Welfare Committee;

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(viii) to do away with the association of any police officer from the inquiry process, for the child in need of care and protection as the work is assigned to the Child Welfare Committee and to cover other cases where the child can remain in children/shelter home after completion of enquiry;

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(xi) to ensure the applicability of model rules framed by the Central Government in the States/Union territories who have not made their own rules, till the rules are framed in this regard by the respective States/Union territories.”

54. The emphasis, concern and mandate of all the international instruments, as well as the constitutional provisions, is securing the best

interest of the child which is manifested in the scheme of the JJ Act, 2000 (as amended by Act 33 of 2006) as well. The reference to the JJ Act, 2000 hereafter is to the amended provisions. The relevant provisions of the Act, necessary for the present consideration, for purposes of convenience are extracted hereunder :-

2. Definitions- In this Act, unless the context otherwise requires,-

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(d). "*child in need of care and protection*" means a child -

(i). who is found without any home or settled place or abode and without any ostensible means of subsistence,

[(ia) who is found begging, or who is either a street child or a working child,]

(ii). who resides with a person (whether a guardian of the child or not) and such person

(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or

(b). has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,

(iii). who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,

(iv). who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(v). who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,

(vi). who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(vii). who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(viii). who is being or is likely to be abused for unconscionable gains,

ix. who is victim of any armed conflict, civil commotion or natural calamity;

(e) "children's home" means an institution established by a State Government or by voluntary organisation and certified by that Government under section 34;

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(g) “competent authority” means in relation to children in need of care and protection a Committee and in relation to juveniles in conflict with law a Board;

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(k) **“juvenile” or “child” means a person who has not completed eighteenth year of age;**

(l). **“juvenile in conflict with law” means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;]**

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(p). **“offence” means an offence punishable under any law for the time being in force;**

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(r). **“prescribed” means prescribed by rules made under this act;**

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(t). **“public place” shall have the meaning assigned to it in the Immoral Traffic (Prevention) Act, 1956 (104 of 1956);**

(Emphasis supplied)

55. The other relevant provisions of the statute referred to by learned amicus curiae and counsels include section 4, 6, 7, 7A, 12, 14, 15, 29, 30, 31, 31(2), 32, 33, 38, 39, 49 & 50 of the statute which read thus:-

4. Section 4 - Juvenile Justice Board

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government may,1[within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette, constitute for every district,] one or more Juvenile Justice Boards for exercising the powers and discharging the duties conferred or imposed on such Boards in relation to juveniles in conflict with law under this Act.

(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974), on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the principal Magistrate.

(3) No Magistrate shall be appointed as a member of the Board unless he has special knowledge or training in child psychology or child welfare and no social worker shall be appointed as a member of the Board unless he has been actively involved in health, education, or welfare activities pertaining to children for at least seven years.

(4) The term of office of the members of the Board and the manner in which such member may resign shall be such as may be prescribed.

(5) The appointment of any member of the Board may be terminated after holding inquiry, by the Sate Government, if--

- (i) he has been found guilty of misuse of power vested under this Act,
- (ii) he has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or he has not been granted full pardon in respect of such offence,
- (iii) he fails to attend the proceedings of the Board for consecutive three months without any valid reason or he fails to attend less than three-fourth of the sittings in a year.

6. Power of Juvenile Justice Board.- (1) Where a Board has been constituted for any district or a group of district, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.

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7. Procedure to be followed by a Magistrate not empowered under the Act.- (1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding.

(2) The **competent authority** to which the proceeding is forwarded under sub-section (1) **shall hold the inquiry** as if the juvenile or the child had originally been brought before it.

7-A. Procedure to be followed when claim of juvenility is raised before any Court.- (1) Whenever a claim of juvenility is raised before any Court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the Court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the Court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence, if any, passed by a court shall be deemed to have no effect.

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14. Inquiry by Board-[(1)] Where a juvenile having been charged with the offence is produced before a Board, the Board shall hold the inquiry in accordance with the provisions of this Act and may make such order in relation to the juvenile as it deems fit:

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15. Order that may be passed regarding juvenile.- (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in

force, the Board may, if it thinks so fit,-

- (a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counseling to the parent or the guardian and the juvenile;
- (b) direct the juvenile to participate in group counselling and similar activities;
- (c) order the juvenile to perform community service;
- (d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;
- (e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;
- (f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;
- (g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.]

(2) The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organization or otherwise, and shall take into consideration the finding of such report before passing an order.

(3) Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion

that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such condition as it deems necessary for the due supervision of the juvenile in conflict with law:

Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4) The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

29. Child Welfare Committee.- (1) The *State government may*, by notification in Official Gazette, constitute for every district or group of district, specified in the notification, *one or more Child Welfare Committees* for exercising the powers and discharge the duties conferred on such Committees *in relation to child in need of care and protection* under this Act.

(2) The Committee shall consist of a Chairperson and four

other members the State Government may think fit to appoint, of whom at least one shall be woman and another, an expert on matters concerning children.

(3) The qualification of the Chairperson and member, and the tenure which they may be appointed shall be such as may be prescribed.

(4) The appointment of any member of the Committee may be terminated, after holding inquiry, by the State Government, if-

(i) he has been found guilty of misuse of power vested under this Act;

(ii) he has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee for consecutive three months without any valid reason or he fails to attend less than three-fourth of the sitting in a year.

(5) The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class.

30. Procedure, etc., in relation to Committee -

(1) The Committee shall meet at such times and shall observe such rules of procedure in regard to the transaction of business at its meetings, as may be prescribed.

(2) A child in need of care and protection may be produced before an individual member for being placed in safe custody or otherwise when the Committee is not in session.

(3) In the event of any difference of opinion among the members of the Committee at the time of any interim decision, the opinion of the majority shall prevail but where there is no such majority the opinion of the Chairperson shall prevail.

(4) Subject to the provisions of sub-section (1), the Committee may act, notwithstanding the absence of any member of the Committee, and no order made by the Committee shall be invalid by reason only of the absence of any member during any stage of the proceeding.

31. Powers of Committee

(1) *The Committee shall have the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights.*

(2) Where a Committee has been constituted for any area, *such Committee shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.*

32. Production before Committee

(1) Any child in need of care and protection may be produced before the Committee by one of the following persons:--

(i) any police officer or special juvenile police unit or a designated police officer;

- (ii) any public servant;
- (iii) childline, a registered voluntary organisation or by such other voluntary organisation or an agency as may be recognised by the State Government;
- (iv) any social worker or a public spirited citizen; or
- (v) by the child himself.

2[Provided that the **child shall be produced before the Committee without any loss of time but within a period of twenty-four hours** excluding the time necessary for the journey.]

(2) The State Government may make rules consistent with this Act to provide for the manner of making the report to and to the Committee and the manner of sending and entrusting the child to children's home pending the inquiry

33. Inquiry-(1) On receipt of a report under section 32, the Committee shall hold an inquiry in the prescribed manner and the Committee, on its own or on the report from any person or agency as mentioned in sub-section (1) of section 32, may pass an order to send the child to the children's home for speedy inquiry by a social worker or child welfare officer.

(2) The inquiry under this section shall be completed within four months of the receipt of the order or within such shorter period as may be fixed by the Committee:

Provided that the time for the submission of the inquiry report may be extended by such period as the Committee may, having regard to the circumstances and for the reasons recorded in writing, determine.

(3) The State Government shall review the pendency of cases of the Committee at every six months, and shall direct the

Committee to increase the frequency of its sittings or may cause the constitution of additional Committees.

(4) *After the completion of the inquiry, if, the Committee is of the opinion that the said child has no family or ostensible support or is in continued need of care and protection, it may allow the child to remain in the children's home or shelter* home till suitable rehabilitation is found for him or till he attains the age of eighteen years.

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38. Transfer – (1) *If during the inquiry it is found that the child hails from the place outside the jurisdiction of the Committee, the Committee shall order the transfer of the child to the competent authority having jurisdiction over the place of residence of the child.*

(2) Such juvenile or the child shall be escorted by the staff of the home in which he is lodged originally.

(3) The State Government may make rules to provide for the travelling allowances to be paid to the child.

39. Restoration

(1) Restoration of and protection to a child shall be the prime objective of any children's home or the shelter home.

(2) The children's home or a shelter home, as the case may be, shall take such steps as are considered necessary for the restoration of and protection to a child deprived of his family environment temporarily or permanently where such child is under the care and protection of a children's home or a shelter home, as the case may be.

(3) *The Committee shall have the powers to restore any child in need of care and protection to his parent,*

guardian, fit person or fit institution, as the case may be, and give them suitable directions.

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49. Presumption and determination of age – (1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person”.

(Emphasis supplied)

56. The two children before this court hail from West Bengal. The legislature has anticipated this position and enacted Section 50 in the JJ Act 2000, which reads as follow:-

“50. Sending a juvenile or child outside jurisdiction – In the case of a juvenile or the child, whose ordinary place of residence lies outside the jurisdiction of the competent authority before which he is brought, the competent authority may, if satisfied after due inquiry that it is

expedient so to do, send the juvenile or the child back to a relative or other person who is fit and willing to receive him at his ordinary place of residence and exercise proper care and control over him, notwithstanding that such place of residence is outside the jurisdiction of the competent authority; and the competent authority exercising jurisdiction over the place to which the juvenile or the child is sent shall in respect of any matter arising subsequently have the same powers in relation to the juvenile or the child as if the original order had been passed by itself”.

(Emphasis supplied)

57. In exercise of the powers under Section 68 of the JJ Act, 2000, the **Juvenile Justice (Care & Protection of Children) Rules, 2007** (hereafter referred to as the ‘JJ Rules) have also been notified. Rule 25 provides the functions and powers of the Child Welfare Committee ('CWC' hereafter) and reads as follows:-

“Rule 25. Functions and powers of the Committee- The Committee shall perform the following functions to achieve the objectives of the Act, namely :-

(a) take cognizance of and receive children produced before the Committee;

(b) decide on the matters brought before the Committee:

(c) reach out to such children in need of care and protection who are not in a position to be produced before the Committee, being in difficult circumstances, with

support from the District Child Protection Unit or State Child Protection Unit or the State Government;

(d) conduct necessary inquiry on all issues relating to and affecting the safety and well-being of the child;

(e) direct the Child Welfare Officers or Probation Officers or Non-Government Organisations to conduct social inquiry and submit a report to the Committee;

(f) ensure necessary care and protection, including immediate shelter;

(g) ensure appropriate rehabilitation and restoration, including passing necessary directions to parents or guardians or fit persons or fit institutions in this regard, in addition to follow-up and co-ordination with District Child Protection Unit or State Adoption Resource Agency and other agencies;

(h) direct the Officer-in-Charge of Children's homes to receive children requiring shelter and care;

(i) document and maintain detailed case record along with a case summary of every case dealt by the Committee;

(j) provide a child-friendly environment for children;

(k) recommend “fit institutions” to the State Government for the care and protection of children;

(l) declare “fit persons”;

(m) declare a child legally free for adoption;

(n) keep information about and take necessary follow-up action in respect of missing children in their jurisdiction;

- (o) maintain liaison with the Board in respect of cases needing care and protection;
- (p) visit each institution where children are sent for care and protection or adoption at least once in three months to review the condition of children in institutions, with support of the State Government and suggest necessary action;
- (q) monitor associations and agencies within their jurisdiction that deal with children in order to check on the exploitation and abuse of children;
- (r) co-ordinate with the police, Labour Department and other agencies involved in the care and protection of children with the support of District Child Protection Unit or State Child Protection Unit or State Government;
- (s) liaison and network with the corporate sector and non-governmental organization for any of the above, including for social inquiry, restoration and rehabilitation, as and when required; and
- (t) maintain a suggestion box to encourage inputs from children and adults alike and take necessary action.”

(Emphasis by me)

58. The legislature has thus anticipated a situation, where a juvenile or a child may be produced before a Magistrate who is not a member of the Juvenile Justice Board ('JJB' hereafter), and prescribed that such juvenile or child shall be treated in the manner set out in section 7 of the statute. This statutory provision mandates that the juvenile or the child, as well as a record

of the proceedings, shall be forthwith forwarded to the competent authority. In fact, sub-section (2) of section 7 renders non-est proceedings which may have been conducted and are forwarded by the Magistrate, inasmuch as it requires the competent authority, to whom the child and proceedings are forwarded, to hold a de novo and fresh enquiry, as if the juvenile or child had been originally produced before it. Section 12 mandates that when any arrested or detained person accused of a bailable or non-bailable offence, who is apparently a juvenile, is arrested or brought before a JJB, then notwithstanding the provisions of the Code of Criminal Procedure or any other law for the time being in force, such person is required to be released on bail with or without surety. In case the JJB is of the view that the release may result in exposing the person, to criminals, danger or it would defeat the ends of justice, he shall be sent to an observation home or a place of safety for the period which may be specified.

59. Sub-section (1) of section 15 of the statute, sets out the several orders which may be passed by the Juvenile Justice Board on enquiry and keeping in view the facts and circumstances of the case.

60. Section 29 is concerned with the provision of a Child Welfare Committee (CWC) in every district which exercises jurisdiction over children in need of “care and protection. The power to be followed by the CWC is stipulated in Section 30 of the Statute while vide powers have been conferred on it under Section 31.

61. The legislature has anticipated movement of children from one place to another. Therefore, in Section 38 it has been prescribed that if a child hails from a place outside the jurisdiction of the CWC before whom he/she has been produced, the child shall be ordered to be produced before the CWC having jurisdiction over place of residence of the child.

62. So far as restoration of custody of the children is concerned, the JJ Act of 2000 has also provided the manner in which the same is to be effected. Section 39 stipulates that restoration of and protection to a child shall be the prime objective of any children's home or the shelter home which is mandatorily required to take such steps as are considered necessary for the restoration and protection to a child deprived of this family environment temporarily or permanently.

63. Rule 25 of the JJ (Care & Protection of Children) Rules, 2007 dealing with the functions and powers of the Child Welfare Committee also provides the steps which a committee is required to take so far as custody of children is concerned. These include the provision of, inter alia, immediate shelter, ensuring appropriate rehabilitation, restoration of custody as well as making the declaration of a “fit person”. Rule 25 enables the CWC to make appropriate directions to parents/guardians/fit persons/fit institutions in this regard, in addition to follow up and coordination with district child protection units or state adoption resource agency's and other agencies.

64. These statutory provisions are efforts to discharge the responsibility of the Government of India to ensure the requisite constitutional protections guaranteed under article 15(3) of the Constitution of India, the prohibitions contained in Article 23 and in the discharge of its obligations under article 39(e) and (f), 45 and 47 which impose the primary responsibility upon the State of ensuring that all the needs of children are met and their basic human rights are fully protected. The statute originally enacted in the year 1986, has been amended, to ensure all the rights of the child and standards internationally recognised and ratified by the Government of India under the

international instruments are also incorporated and adequately provided for. This legislation has thus aimed at providing a juvenile justice system for juveniles in conflict with law as well as children in need of care and protection by adopting a child friendly approach in adjudication and disposition of matters in the best interest of children and for their rehabilitation, keeping in view the developmental needs of the children.

The Immoral Traffic (Prevention) Act, 1956

65. The instant case is thus concerned with the two persons apparently under eighteen years of age have been rescued by the police in action taken under section 15 & section 16 of the IT Act of 1956. As per the copy of the FIR placed on record, one of the two rescued persons is the complainant in the case. These two persons have been produced before the Magistrate dealing with criminal matters in exercise of ordinary criminal jurisdiction under the Code of Criminal Procedure. An issue has been raised with regard to the competence of the Magistrate to conduct an enquiry in respect of rescued children in exercise of powers under Section 17A of the IT Act in view of the enactment of the JJ Act, 2000 and the manner in which conflict, if any, between the two statutes is to be resolved.

66. The complaint has been registered by the police under the provisions of the Indian Penal Code as well as those of Immoral Traffic (Prevention) Act, 1956 (the 'IT Act'). It is necessary to examine the statutory spirit and intendment of that statute as well so as to answer the issue raised herein.

67. The 'International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others' was approved by the General Assembly of the UN on 2nd December, 1949. Article 23 of the Convention prohibits trafficking in human beings and any contravention of this prohibition is an offence punishable by law. The Government of India ratified the Convention in the year 1950.

68. Article 23 of the Constitution of India lays down that traffic in human beings, beggar and other similar forms of forced labour are prohibited and contravention thereof shall be an offence punishable in accordance with law. Article 35 of the Constitution obligates the Parliament to make laws for prescribing punishment for acts declared as offences under Part III as soon as possible after the commencement of the Constitution.

69. In discharge of the obligations under the international conventions and in compliance with the constitutional mandate, the Parliament passed the

‘Suppression of Immoral Traffic in Women and Girls Act, 1956’ which received the assent of the President of India on the 30th of December, 1956.

70. The statement of objects and reasons of this Act, stated that it was considered necessary and desirable to secure uniformity in applicable legislation all over the country as well as to provide a statute which was sufficiently deterrent for the purpose.

A special feature of the Bill was that it provided that no person or authority, other than the state government, could establish or maintain any protective home except under a licence issued by the state government. This statute was amended twice, firstly in 1978 and then again in 1986. By virtue of section 3 of the amendment Act of 1986 (Act 44 of 1986), the nomenclature of the statute was changed to the **Immoral Traffic (Prevention) Act, 1956** ('IT Act' hereafter).

71. Some of the relevant provisions of the IT Act which are relevant for the purposes of the present consideration, and have been relied upon during the course of arguments, for purposes of convenience are set out hereafter :-

2. Definitions—In this Act, unless the context otherwise requires

(2) Where **any person over the age of eighteen** years is proved,—

(a) to be living with, or to be habitually in the company of, a prostitute; or

(b) to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding abetting or compelling her prostitution; or

(c) to be acting as a tout or pimp on behalf of a prostitute, it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of sub-section (1).

7. Prostitution in or in the vicinity of public place .—

(1) Any **person** who carries on prostitution **and the person with whom** such prostitution is carried on, in any premises:

(a) which are within the area or areas, notified under sub-section (3), or

(b) which are within a distance of two hundred meters of any place of public religious worship, educational institution, hotel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or Magistrate in the manner prescribed,

shall be punishable with imprisonment for a term which may extend to three months.

[(1-A) Where an offence committed under sub-section (1) is in respect of a child, the person committing the offence shall be punishable with imprisonment of either description for a term which not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

10-A. Detention in a corrective institution .—(1) Where,—

(a) a **female offender** is found guilty of an offence under Section 7, and

(b) the character, state of health and mental condition of the offender and the other circumstances of the case are such that it is expedient that she should be subject to detention for such term and such instruction and discipline as are conducive to her correction, it shall be lawful for the court to pass, in lieu of a sentence of imprisonment, an order for detention in a corrective institution for such term, not being less than two years and not being more than seven years, as the court thinks fit:

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72. Having regard to the submissions which have been made, Section 16 and 17 of the IT Act, 1956 may also be set down and read as follows :-

“16. Rescue of [person]-(1) where a magistrate has reason to believe from information received from the police or from any other person authorised by the State Government in this behalf or otherwise, that [any person is living, or is carrying on, or is being made to carry on, prostitution in a brothel,] he

may direct a police officer not below the rank of a sub-inspector to enter such brothel, and to remove therefrom such [person] and produce [him] before him.

(2) The police officer, after removing the [person], shall forthwith produce [him] before the magistrate issuing the order.

17. Intermediate custody of [persons] removed under section 15 or rescued under section 16.-(1) When the special police officer removing a [person] under sub-section (4) of section 15 or a police officer rescuing a [person] under sub-section (1) of section 16, is for any reason unable to produce [him] before the appropriate magistrate as required by sub-section (5) of section 15, or before the magistrate issuing the order under sub-section (2) of section 16, he shall forthwith produce [him] before the nearest magistrate of any class, who shall pass such orders as he deems proper for [his] safe custody until [he] is produced before the appropriate magistrate, or as the case may be, the magistrate issuing the order :

Provided that no [person] shall be –

(i) detained in custody under this sub-section for a period exceeding ten days from the date of the order under this sub-section; or

(ii) restored to or placed in the custody of a person who may exercise a harmful influence over him.

(2) When the **[person] is produced** before the **appropriate magistrate** under sub-section (5) of section 15 or the magistrate under sub-section (2) of section 16, he shall, **after giving [him] an opportunity of being heard, cause an**

inquiry to be made as to the correctness of the information received under sub-section (1) of section 16, the age, character and antecedents of the [person] and the suitability of [his] parents, guardian or husband for taking charge of [him] and the nature of the influence which the conditions in [his] home are likely to have on [him] if [he] is sent home, and, for this purpose, he may direct a probation officer appointed under the Probation of Offenders Act, 1958, (20 of 1958), to inquire into the above circumstances and into the personality of the [person] and the prospects of his rehabilitation.

(3) The magistrate may, while an inquiry is made into a case under sub-section (2), pass such orders as he deems proper for the safe custody of the [person]:

(Provided that **where a person rescued** under section 16 is a **child** or **minor**, it shall be open to the magistrate to **place such child or minor** in any **institution established or recognized under any Children Act** for **the time being in force in any State for the safe custody of children**:

Provided further that, no [person] shall be kept in custody for the purpose for a period exceeding three weeks from the date of such an order, and no [person] shall be kept in the custody of a person likely to have a harmful influence over [him].

(4) Where the magistrate is satisfied, after making an inquiry as required under sub-section (2),-

(a) that the information received is correct; and

(b) that he is in need of care and protection,

he may, subject to the provisions of sub-section (5), make an order that such [person] be detained for such period, being not less than one year and not more than three years, as may be specified in the order, in a protective home, or in such other custody as he shall, for reasons to be recorded in writing, consider suitable:

Provided that such custody shall not be that of a person or body of persons of a religious persuasion different from that of the [person] and that those entrusted with the custody of the [person] including the persons in charge of a protective home, may be required to enter into a bond which may, where necessary and feasible, contain undertakings based on directions relating to the proper care, guardianship, education, training and medical and psychiatric treatment of the [person] as well as supervision by a person appointed by the court, which will be in force for a period not exceeding three years.

(5) In discharging his functions under sub-section (2), **a magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women, to assist him; and may, for this purpose, keep a list of experienced social welfare workers, particularly women social welfare workers, in the field of suppression of immoral traffic in [persons].**

(6) An appeal against an order made under sub-section (4) shall lie to the court of session whose decision on such appeal shall be final.]”

(emphasis supplied)

73. It is also noteworthy, that by a statutory amendment with effect from 26th January, 1987, the following section 17A of the IT Act of 1956 was inserted :-

“17A. Conditions to be observed before placing persons rescued under section 16 to parents or guardians
– Notwithstanding anything contained in sub-section (2) of

section 17, the magistrate making an inquiry under section 17 may, **before passing an order for handing over** any person rescued under section 16 to the parents, guardian or husband, **satisfy himself about the capacity or genuineness of the parents, guardian or husband to keep such person by causing an investigation to be made by a recognised welfare institution or organisation.**

I now propose to examine the issues raised in the present proceedings.

If persons recovered by the police in a raid under Sections 15 or 16 of the IT Act, 1956 are under 18 years of age, are they to be dealt with under the IT Act, 1956 or in accordance with the JJ Act, 2000?

In order to find answers to the questions arising in the present case, we may firstly consider the principles of statutory interpretation which would guide the present adjudication.

IT Act being a penal statute needs to be strictly construed

74. It has been submitted that the IT Act, 1956 is a penal statute which deals with all persons whereas the JJ Act, 2000 is a specific enactment for persons under 18 years of age.

75. Penal statutes are those which provide for penalties for disobedience of the law and are directed against the offender by making him liable to imprisonment , fine, forfeiture or other penalty. If the statute enforces obedience to the command of the law by punishing the offender and not by

the offender merely redressing an individual who may have suffered, it will be classified as penal. The IT Act largely defines offences and stipulates punishments for their commission. It is clearly a penal statute.

76. The general principles which govern interpretation of penal statutes are well settled. The summation thereof in the renowned text “Principles of Statutory Interpretation” (12th Edition) by Justice G.P. Singh, can be usefully extracted and reads as follows :

“(i) penal statutes are to be strictly construed. In penal statutes when in doubt that 2 or more constructions are equally open, doubt is resolved in favour of the alleged offender . (Ref: Tolaram vs. State of Bombay AIR 1954 SC 496 : 1955 (1) SCR 158) (see note 35 pg 895) xxx”

Thus, it is very clear that the IT act being a penal statute has to be strictly construed.

A later enactment would generally prevail over an earlier statute

77. It is also clear that the JJ Act, 2000 is a later enactment compared to the IT Act, 1956. The question now is that which of the two enactments will prevail and how is ambiguity or overlap, if any, between the two enactments vis-a-vis each other to be resolved.

78. This issue can be examined on the fundamental and accepted tests of legislative interpretation which also have been noticed by Justice G.P. Singh in the 'Principles of Statutory Interpretation', (12th Ed. 2010). At page 373 of this renowned text, the tests which apply to the issue as to which of the two enactments shall prevail are stated thus:-

“Another test that is applied is that the later enactment normally prevails over the earlier one. (Ref: A.P. State Financial Corporation vs. Official Liquidator, AIR 2000 SC 2642) It is also relevant to consider as to whether any of the two enactments can be described a special one; in that case the special one may prevail over the more general one notwithstanding that the general one is later in time.(Ref : Sanwarmal Karjiwal v. Vishwa Co-operative Housing Society Ltd., AIR 1990 SC 1563)”

79. In the case in hand the IT Act is prior and the JJ Act is a later enactment. But this by itself may not be determinative of the matter in the present case. Going by the above principles, we need to first determine whether any of the two enactments can be described as a special one, as the special one would prevail over the more general one.

Whether the IT Act and the JJ Act operate in the same field?

80. To ascertain as to which of the two statutes is special, it is necessary to first consider as to whether the two legislations – the IT Act and the JJ Act

operate in the same field and whether there is apparent conflict in respect of any of the provisions.

81. The IT Act deals generally with persons of all ages involved in prostitution and can be classified as a prior general law. JJ Act was enacted later in time and is confined in its application to a special class of persons i.e., those below eighteen years. It deals specifically with juveniles in conflict with the law (i.e, child offenders) as well as children in need of care and protection and would be termed as a later particular law.

The issue, thus, can be looked at from yet another angle that is to examine the legislations from the perspective of say as a conflict between a prior general law and a later particular law.

82. It is well settled, that a prior particular or special law is not readily held to be impliedly repealed by the later general enactment (*Ref: Unnoda Persaud Mookerjee vs. Kristocoomar Moitra (1872) 19 WR 5; Chandra Prakash Tiwari vs. Shakuntala Shukla AIR 2002 SC 2322 : (2002) 6 SCC 127*). However, a prior general Act may be affected by a subsequent particular or special Act , if the subject matter of the particular Act prior to its enforcement was being governed by the general provisions of the earlier Act. (*Ref : Life*

Insurance Corporation vs. D.J. Bahadur AIR 1980 SC 2181 : (1981) 1 SCC 315; Damji Valji Shah vs. LIC AIR 1966 SC 135 : (1965) 3 SCR 665). It needs no elaboration that in such a case the operation of the particular Act may have the effect of partially repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases . (Ref: *Mount vs. Taylor (1868) LR 3 CP 645*).

83. It is another well settled rule of construction, that if a later statute does not describe an offence created by a former statute and affixes a different punishment, varying the procedure, the earlier statute is treated as having been repealed by the later statute. (Ref: *AIR 1983 SC 150: (1983) 1 SCC 177 T. Barai vs. Henry Ah Hoe & Anr.*)

84. Going by the above discussion, it is clear that a later special statute would normally prevail over an earlier general one.

Test of object of the Statutes

85. It is trite that a statute or a rule has a structural or systemic quality that is reflected in some measure in the meaning of the other principal terms. Judicial process is something more than merely a cataloguing procedure. In construing and applying statutes, a court is required to place words in the

statute beyond general context. Examination of the statutes would be incomplete without looking to the object of the statutory provision and the nature of the evil it seeks to avert. (*Ref: Reed Dickerson in “The Interpretation and Application of Statutes”*)

86. Mr. Madhukar drew my attention to the pronouncement of the Apex Court reported at *(1981) 1 SCC 315 Life Insurance Corporation of India vs. D.J. Bahadur & Ors.* Interestingly, the question raised before this court (as to whether the JJ Act, 2000 is a special Act and the IT Act, 1956 is a general statute so that the later pro tanto repeals or prevails over the earlier one), is similar to the question which was being considered by the Supreme Court in the above pronouncement.

87. In this case, an issue was raised as to whether two settlements arrived at between the management and the workmen under the provisions of the Industrial Disputes Act, 1947 would operate in view of the provisions of the LIC Act, 1956 which vested power in the LIC and the Central Government to fix the terms and conditions of service of the corporation employees. This was answered on the consideration as to whether the LIC Act of 1956 is a special Act and the ID Act, 1947 a general statute which stood repealed or

prevailed over by the later statute. It was suggested that as there was an apparent conflict between the two, the ID Act, 1947 would prevail over the LIC Act, 1956. The Supreme Court reiterated the position that an implied repeal is the last judicial refuge and unless driven to that conclusion, it is rarely resorted to.

88. In *LIC vs. D.J. Bahadur & Ors. supra*, the discussion by the Apex Court in para 51 to 53 as well as 55 on the question as to whether a statute is a special or a general statute is important and deserves to be considered in extenso. The same reads as follows :-

“51. In determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity not absolutes-so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infra-structure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission-the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen.

Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the L.I.C. Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such are beyond the orbit of and have no specific or special place in the scheme of the L.I.C. Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to.

52. What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is 'an industrial dispute between the Corporation and its workmen' qua workmen. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis 'industrial disputes' at the termination of the settlement as between the workmen and the Corporation the ID Act is a special legislation and the L.I.C. Act a general legislation. Likewise, when compensation on nationalisation is the question, the L.I.C. Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt- that the ID Act being special law, prevails over the L.I.C. Act which is but general law.

53. I am satisfied in this conclusion by citations but I content myself with a recent case where this Court tackling a closely allied question came to the identical conclusion. [U.P. State Electricity Board v. H.S. Jain]. The problem that arose there

was as to whether the standing orders under the Industrial Employment (Standing Orders) Act, 1946, prevailed as against Regulations regarding the age of superannuation made by the Electricity Board under the specific power vested by Section 79(c) of the Electricity (Supply) Act, 1948, which was contended to be a special law as against the Industrial Employment (Standing Orders) Act. This Court (a bench of three Judges) speaking through Chinnappa Reddy, J., observed : (ibid at 365-66).

The maxim "Generalia specialibus non derogant" is quite well known. The rule flowing from the maxim . has been explained in *Mary Seward v. Veera Cruz*, (1884) 10 AC 59 as follows :

"Now if anything be certain it is this, that where there are general "words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so".

In J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh : (1961)ILLJ540SC , this Court observed (at page 1174) :

“The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect.

We have already shown that the Industrial Employment (Standing Orders) Act is a special Act dealing with a specific

subject, namely with conditions of service, enumerated in the Schedule, of workmen in industrial establishments. It is impossible to conceive that Parliament sought to abrogate the provisions of the Industrial Employment (Standing Orders) Act embodying as they do hard won and precious rights of workmen and prescribing as they do an elaborate procedure, including a quasi-judicial determination, by a general, incidental provision like Section 79(c) of the Electricity (Supply) Act. It is obvious that Parliament did not have before it the Standing Orders Act when it passed the Electricity (Supply) Act and Parliament never meant that the Standing Orders Act should stand pro tanto repealed by Section 79(c) of the Electricity Supply Act. We are clearly of the view that the provisions of the Standing Orders Act must prevail over Section 79(c) of the Electricity Supply Act, in regard to matters to which the Standing Orders Act applies.”

I respectfully agree and apply the reasoning and the conclusion to the near-identical situation before me and hold that the **ID Act relates specially and specifically to industrial disputes between work men and employers and the L.I.C. Act, like the Electricity (Supply) Act, 1948, is a general statute which is silent on workmen's disputes,** even though it may be a special legislation regulating the take-over of private insurance business.

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55. What is special or general is wholly a creature of the subject and context and may vary with situation, circumstances and angle of vision. Law is no abstraction but realises itself in the living setting of actualities. **Which is a special provision and which general, depends on the specific problem, the topic for decision, not the broad rubric nor any rule of thumb.** The peaceful co-existence of both legislations is best achieved, if that be feasible, by allowing to each its allotted field for play. Sense and

sensibility, not mechanical rigidity gives the flexible solution. It is difficult for me to think that when the entire industrial field, even covering municipalities, universities, research councils and the like, is regulated in the critical area of industrial disputes by the ID Act, Parliament would have provided an oasis for the Corporation where labour demands can be unilaterally ignored. The **general words in Sections 11 and 49 must be read contextually as not covering industrial disputes between the workmen and the Corporation.** Lord Haldane had, for instance in 1915 AC 885 observed that (The Political Tradition: The Lord Chancellors, 1912 p. 221

“General words may in certain cases properly be interpreted as having a meaning or scope other than the literal or usual meaning. They may be so interpreted where the scheme appearing from the language of the Legislature, read in its entirety, points to consistency as requiring modification of what would be the meaning apart from any context, or apart from the general law.”

To avoid absurdity and injustice by judicial servitude to interpretative literality is a function of the Court and this leaves me no option but to hold that the ID Act holds where disputes erupt and the L.I.C. Act guides where other matters are concerned. In the field of statutory interpretation there are no inflexible formulae or foolproof mechanisms. The sense and sensibility, the setting and the scheme, the perspective and the purpose-these help the judge to navigate towards the harbour of true intendment and meaning. **The legal dynamics of social justice also guide the court in statutes of the type we are interpreting.** These plural considerations lead me to the conclusion that the ID Act is a special statute when industrial disputes, awards and settlements are the topic of controversy, as here. There may be other matters where the

L.I.C. Act visa-vis the other statutes will be a special law. I am not concerned with such hypothetical situations now.”

(emphasis by me)

The above enunciation shows that for certain purposes, a statute may be general while for other purposes, it may be special.

89. Mr. Manoj Ohri, learned APP, has also urged at length that the test as to whether a statute is to be treated as a general statute on the subject or a special enactment are well settled.

90. In *AIR 1999 SC 3833 : (1999) 8 SCC 375 UOI vs. Sadha Singh*, the respondent was convicted under Section 69 of the Army Act, 1950 for the offence of murder. The court observed that the Army Act was a special Act which provided for investigation, trial and punishment for offences mentioned thereunder by a special procedure. It did not contain any specific statutory provision which was similar to Section 433A of the CrPC. The Army Act also did not contain any provision which was contrary to Section 433A of the CrPC. It is noteworthy that Section 433A is a special provision applicable to all convicts who are undergoing imprisonment for life as provided thereunder. In this background, it was held that Section 433A of the CrPC would operate

and would be applicable to a prisoner who is undergoing a sentence of imprisonment for life and is convicted for an offence for which death is one of the punishments provided by law or where a sentence of death imposed on a person has been commuted under section 433 (1) CrPC to imprisonment for life.

91. The conflict is thus resolved on a consideration of the purpose and policy underlying the enactments and the language used in them. (*Ref : AIR 1977 SC 265 (274, 275) Sarwan Singh vs. Kasturi Lal; AIR 1991 SC 855 (878) : (1990) 4 SCC 406 Ashoka Marketing Ltd. vs. Punjab National Bank*)

92. In *UOI vs India Fisheries Pvt. Ltd. AIR 1966 SC 35 : (1965) 3 SCR 679*, the Supreme court held that there can be a situation in law where the same statute is treated as a special statute vis-à-vis one legislation and as a general statute vis-à-vis another legislation.

93. In the pronouncement reported at *(2000) 4 SCC 427 Allahabad Bank vs. Canara Bank*, the Supreme Court was called upon to examine the question as to whether the Companies Act, 1956 is a general or special statute. On application of these principles, it was held in para 39 that for the purposes of recovery of debt to banks, the high courts had rightly treated the

Companies Act as a general statute and the Recovery of Debts Act, 1993 ('RDB' Act for brevity) as a special statute which would override the general statute.

Thus, it is clear that whether a statute is special or generally may vary depending upon the objects, intent and reach of the statutory provision.

94. The principles with regard to interpretation of statutes have been culled out by the Supreme Court in the judgment pronounced at ***AIR 1981 SC 1922 : (1981) 4 SCC 173 K.P. Varghese vs. Income Tax Officer, Ernakulam & Anr.*** The Supreme Court placed reliance on the judgment reported at (1584) 3 Co.Rep.7a referred to as the '*Heydon case*' wherein the principles were succinctly stated in the following terms :-

“..... for the sure and true interpretation of all statutes in general..... four things are to be discerned and considered :
:

“(1) What was the common law before the making of the Act,
(2) What was the mischief and defect for which the common law did not provide,
(3) What remedy the Parliament has resolved and appointed to cure the disease of the Commonwealth, and
(4) The true reason of the remedy, and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy.”

95. These rules were re-affirmed by the Earl of Halsbury in *Eastman Photographic Material Company v. Comptroller General of Patents, Designs and Trade Marks LR [1898] AC 571* in the following words:-

“My Lords, it appears to me that to construe the statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three being compared I cannot doubt the conclusion.”

96. The prescription therefore is that an examination of the mischief or defect which was overlooked or not provided by the prior enactment and the real intendment of the later law must be conducted. Let us examine the two statutes in question from the perspective of the legislative object.

97. The above narration would show the Constitutional recognition of the State responsibility for abuse of children, discrimination and denial of opportunities, failure to ensure the welfare of every child as well as facilities to develop in a healthy environment, education, conditions of freedom and dignity. The Constitution emphasizes that State Policy should be directed against protection against exploitation and against moral and material abandonment. Trafficking of human beings is prohibited under Article 23

while Article 15 of the Constitution enables the State to make special provisions for children.

98. The Indian experience showed that the differential laws enacted by the different States were not furthering the welfare of the children resulting in the relook direction by the Supreme Court in *Sheela Barse's* case (supra) for a parliamentary legislation. International standards prescribed making of such laws as well as institutions and bodies entrusted with the functions of administration of juvenile justice designed to meet the special needs of the juveniles as well as protection of their rights, i.e., a clear recognition of the principle that a child has to be dealt with differently than the adult. The need to provide for special measures qua children deprived of the basics of their physical and emotional needs, including creation of authorities devoted to their cause, was also recognized. It was essential to bring children's law in conformity with international instruments.

99. The JJ Act came into existence with the object of addressing the above concerns for a very special class of persons that is those under eighteen years of age. It draws a distinction between children in conflict with law and those in need of care and protection provides special treatment for them, mandates a

special inquiries. The constitution of the JJB as well as the CWC is of persons with expertise and training in child welfare related areas. Even the Magistrate concerned is required to be one with expertise in the psychology of children.

100. On the other hand, the IT Act is a more general prior enactment and is concerned with all persons irrespective of ages, involved in immoral trafficking or prostitution.

101. In its applicability, the JJ Act makes no exception so far as persons who are found involved in issues addressed by the IT Act. The nature and extent of the evils and concerns with regard to the special class of persons under eighteen years of age which have weighed with the legislature in enacting the JJ Act, 2000 as well as the mischief and injustice which it seeks to correct, leave no manner of doubt that the JJ Act is a special subsequent enactment, concerned specifically with the special class of all persons being under 18 years of age, who may either be in conflict with law (juveniles) or in need of care and protection.

Therefore, when the legislations are subjected to the ‘object test’ as well, so far as children, i.e. persons under eighteen years of age is concerned,

the JJ Act, 2000 is a special enactment would thus prevail over the provisions of the IT Act, 1956.

Non-obstante clause in both the enactments

102. Yet another tool of statutory interpretation utilised for resolving conflict or doubt over which statute would prevail is to be found in examination of whether the legislature has provided a non-obstante clause in the legislation? Such clause would give supremacy to the statute to resolve the conflict of applicability.

103. So far as the IT Act, 1956 is concerned, a non-obstante clause is found in Section 22B which provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the State Government may, if it considers it necessary to do, direct that offences under the Act shall be tried in a summary way by a magistrate.

104. A non-obstante clause is also found in Section 17A of the IT Act, 1956 which stipulates that notwithstanding anything contained in sub-section (2) of Section 17, the magistrate making an enquiry under Section 17 may satisfy himself about the capacity or genuineness of parents, guardian or husband to

keep such person by causing an investigation to be made by a recognised welfare institution or organisation.

105. So far as the JJ Act, 2000 is concerned, non-obstante clauses are to be found in sections 6, 12, 15 and sub-section (2) of section 31. Section 6 confers exclusive power on the JJB to deal with all proceedings under the Act relating to a juvenile in conflict with law, notwithstanding anything contained in any other law. Similarly, under Section 12, any juvenile accused of a bailable or non-bailable offence shall be released on bail notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law in force. Section 15 enables the JJB to make any of the orders on inquiry provided in the provision regarding the juvenile on inquiry notwithstanding anything to the contrary contained in any other law in force. So far as the CWC is concerned, sub-section 2 of Section 31 provides that wheresoever it has been constituted, the CWC will have the exclusive power to deal with all proceedings under the Act relating to children in need of care and protection.

106. A non obstante clause may be utilised as a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some

other enactment, that is to say, to avoid the operation and effect of all contrary provisions. (Ref : *AIR 1984 SC 1022 UOI vs. G.M. Kokil & Ors.*)

107. A pronouncement of the Apex Court reported at *AIR 1987 SC 117 : (1986) 4 SCC 447 Chandavarkar Sita Ratna v. Ashalata S. Guram* sheds valuable light on the impact of a non-obstante clause and may be usefully adverted to. The relevant extract thereof reads as follows :

"A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is often appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. The expression 'notwithstanding' is in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject."

(Emphasis supplied)

108. In order to give effect to a non-obstante clause in a statutory provision as against a provision in another enactment, in *AIR 1998 SC 866 : (1998) 2*

SCC 663 Indian Bank vs. Usha & Anr., it was observed that there must be two contradictory provisions on the same topic in these two enactments expressing an entirely different and contrary intention.

If this is so, then the non-obstante clause would be examined to decide which legal provision would apply.

109. Impact of a non-obstante clause on other statutory provisions has also fallen for consideration before the Apex Court in the pronouncement reported at **(2009) 4 SCC 94 entitled Central Bank of India vs. State of Kerala and Ors.** In para 103 of the judgment, the court held as follows :-

“A non obstante clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole. While interpreting non obstante clause, the court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used. This rule of interpretation has been applied in several decisions.”

(underlining supplied)

110. As in the present, it may happen that two or more enactments which appear to be operating in the same field overlap in some areas, each contain non obstante clauses stating that its provisions will have effect ‘notwithstanding anything inconsistent therewith contained in any other law

for the time being in force'. Difficulty arises if there is an overlap. The principles laid down to resolve such conflict are well settled and bind the present consideration.

111. This court is, therefore, concerned with two statutes, both replete with non-obstante clauses. In such a situation, the question which would require to be answered first and foremost is as to whether there is any overlap and repugnancy between the two enactments and if so, which will prevail.

112. Certain well established principles help resolve the quandary before us. Even if the general Act contains a non obstante clause, a general statute's operation may be curtailed by a later special Act. (*Ref: Damji Valji Shah vs. Life Insurance Corpn. of India AIR 1966 SC 135 : (1965) 3 SCR 665*).

113. The curtailment of a general Act will be more readily inferred when the later a Special Act also contains an overriding non obstante provision (*Ref: Allahabad Bank vs. Canara Bank (2000) 4 SCC 406 : AIR 2000 SC 1535*).

114. What happens when both the concerned enactments are special? A conflict between two special enactments both of which have notwithstanding clauses, can also be resolved by examining which is '*more special than the other*', in addition to the consideration that the conflict arose because of a

provision added later in the statute which is more special (Ref: ***Bank of India vs. Ketan Parekh (2008) 8 SCC 148 : AIR 2008 SC 2361***).

115. If the statutes contain wide notwithstanding clauses covering ‘any other law for the time being in force’ and operate in different fields, harmonious construction has to be applied and when in a given case, the application of the earlier Act is attracted, the question of its giving way to the later act would not arise . (Ref: ***(2006) 8 SCC 677 : AIR 2006 SC 3252, Jay Engineering Works Ltd v. Industry Facilitation Council***).

116. So far as a 'non-obstante' clause in the statutory provision is concerned, Mr. Ohri, learned APP has placed reliance on the pronouncement reported at ***(2008) 9 SCC 763 KSL Industries Ltd. Vs Arihant Threads Ltd.*** in this behalf. It is noteworthy that in this case there was a difference of opinion between the two learned judges on the question that if the non obstante clause in a later enactment is subject to and supplemental to an earlier enactment also containing a non obstante clause, the earlier enactment may be interpreted to prevail over the later enactment. In this case, following exercise was directed to be undertaken:-

“70. I am thus at a point where two statutes employ non-obstante clause having “overriding effect”. Such a conflict, as laid down in several cases, may be resolved by judiciary on various considerations: such as the policy underlying the enactments, the language used, the object intended to be achieved, or mischief sought to be remedied, etc. One of the tests applied by courts is that normally a later enactment should prevail over the former. The courts would also try to reconcile both Acts by adopting harmonious interpretation and applying them in their respective fields so that both may operate without coming into conflict with each other. In resolving the clash, the court may further examine whether one of the two enactments is “special” and the other one is “general”. There can also be a situation in law where one and the same statute may be held to be a “special” statute vis-a-vis one legislation and “general” statute vis-a-vis another legislation. On the basis of one or more tests, the court will try to salvage the situation by giving effect to non-obstante clause in both the legislations.”

(underlining by me)

117. Mr. Manoj Ohri, learned APP has drawn my attention to the pronouncement of the Supreme Court in *(1993) 2 SCC 144 Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd. & Anr.* wherein the court was called upon to consider the provisions of SICA and the State Financial Corporation Act, 1951. Both the statutes contained competing non-obstante clauses. The conflict was resolved by the court observing thus:-

“9. ...The 1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause found in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one. In that event the maxim *generalia specialibus non derogant* would apply. But in the present case on a consideration of the relevant provisions of the two statutes we have come to the conclusion that the 1951 Act deals with pre-sickness situation whereas the 1985 Act deals with the post-sickness situation. It is, therefore, not possible to agree that the 1951 Act is a special statute vis-a-vis the 1985 Act which is a general statute. Both are special statutes dealing with different situations notwithstanding a slight overlap here and there, for example, both of them provide for grant of financial assistance though in different situations. We must, therefore, hold that in cases of sick industrial undertakings the provisions contained in the 1985 Act would ordinarily prevail and govern.”

118. The court had occasion to examine this very issue also in the context of the Companies Act, 1956 vis-a-vis the Recovery of Debts Due to Banks & Financial Institutions Act (RDB Act for brevity) in the pronouncement reported at (2000) 4 SCC 406 (427) *Allahabad Bank vs. Canara Bank & Anr.* Both the statutes had non-obstante clause. The Court held as follows:-

“39. There can be a situation in law where the *same statute is treated as a special statute vis-à-vis one legislation and again as a general statute vis-à-vis yet another legislation*. Such situations do arise as held in *LIC of India v. D.J. Bahadur*. It was there observed:

“.... For certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law.”

For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-à-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in *Damji Valji Shah v. LIC of India* (already referred to), this Court has observed that vis-à-vis the LIC Act, 1956, the *Companies Act*, 1956, the *Companies Act*, 1956 can be treated as a *general* statute. This is clear from para 19 of that judgment. It was observed:

“Further, the provisions of the special Act, i.e., the LIC Act, will override the provisions of the general Act, vis., the *Companies Act* which is an Act relating to companies in *general*.”

Thus, some high courts rightly treated the *Companies Act* as a general statute and the RDB Act as a special statute overriding the general statute.

40. Alternatively, the *Companies Act*, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of India : [1993] 1 SCR 340* where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to

prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non-obstante clauses but that the "1985 Act being a subsequent enactment, the non-obstante clause therein would ordinarily prevail over the non-obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 statute is a special one". Therefore, in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts.”

(Emphasis supplied)

119. The principle therefore would be that the court must look into the objectives of the two special acts. In case both the enactments have competing non-obstante provision, then the non-obstante clauses of the subsequent statute would prevail the non-obstante clauses found in the earlier enactment unless it is found that the subsequent act is a general one of the earlier enactment is a general statute.

120. The Supreme Court had occasion to deal with the issue of repugnancy also between two enactments on several occasions. Binding principles of law on this aspect stand laid down in ***AIR 1979 SC 893 : (1979) 3 SCC 431 M. Karunanidhi vs. UOI*** to guide issues of repugnancy between the two enactments which read as follows :-

“(i) It must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

(ii) There can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

(iii) Where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other.

(iv) Where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.”

JJ Act vis-a-vis other statutes

121. Valuable light on the issue raised is also thrown by the manner in which courts have examined the provisions of the JJ Act in the context of some other statutes. Several judicial precedents are to be found of juveniles implicated for specific offences under other statutes and pleas of juvenility on the date of the offence were set up. The directions by the court on the manner they deserve to be treated can be usefully considered as also the jurisprudence which has evolved in this regard. Some of the cases on this aspect are considered hereafter:

(i). In the case reported at ***AIR 1996 SC 905 : (1996) 1 SCC 665 Abdul Mannan vs. State of West Bengal***, the Supreme Court was concerned with commission of an offence punishable under **Section 302 of the IPC** by appellants who were under the ages of 17 and 18 years. The procedure prescribed under the West Bengal Children Act, 1958 and the Juvenile Justice Act, 1986, which came into force during the pendency of the trial, was held to be mandatory.

(ii). In ***(2000) 6 SCC 759 Raj Singh vs State of Haryana***, the appellant was less than 16 years of age. He was therefore a juvenile within the meaning of the expression under the JJ Act on the date of the alleged committal of offence under section 20 of the **Narcotic Drugs & Psychotropic Substances Act, 1985** ('NDPS Act' for brevity). The court held that for the reason that he was a juvenile at the time of the occurrence, his trial could have only been held under the provisions of the Juvenile Justice Act, 1986 and that his trial having been conducted by the sessions court was bad in law, and consequently, his conviction stood vitiated.

(iii). In ***Ex.Grn. Ajit Singh vs. UOI (110) 2004 DLT 326***, this court had occasion to examine the provisions of the JJ Act vis-a-vis the provisions of

the Army Act. The petitioner had contended that he was a juvenile on the date of the alleged offence and consequently could not have been tried by a court martial constituted in accordance with the provisions of the Army Act. A Division Bench of this court held that from the plain reading of the statutory provisions, there was little room for doubt that the JJ Act is applicable inspite of any other law in force which would include the Army Act, 1950 and that no exclusion of the Army Act from the operation of the JJ Act could be read into the statutory provisions. The Division Bench had observed that the JJ Act provided the complete method and manner of custody, bail, enquiry and orders which could have been passed by the Juvenile Justice Board alone.

(iv). It is noteworthy that in *Ajit Singh (supra)*, the court had placed reliance on a Division Bench decision of the Kerala High Court reported at **1995 CrLJ 330 In Re: Sessions Judge** which dealt with the provisions of the Juvenile Justice Act, 1986 vis-a-vis a later Act being the Scheduled Castes and Scheduled Tribes (Provision of Atrocities) Act, 1989 (SC&ST Act, 1989).

The Division Bench of Kerala High Court in para 9 of the judgment held that:-

"The 1989 Act was enacted to check and deter crimes against the members of the Scheduled Caste and Scheduled Tribe communities committed by non-Scheduled Castes and non-Scheduled Tribes. The provisions of the 1989 Act aim at giving protection to the members of the Scheduled Caste and Scheduled Tribe communities against whom atrocities are being committed. A reading of the provisions of 1989 Act will show that the Act was concerned with the victims of the crimes. It is not concerned with the offenders who perpetrate crimes against the members of the Scheduled Castes and Scheduled Tribes. In order to protect the victims, Section 20 was enacted, giving an overriding provision vis-a-vis the provisions contained in all the existing enactments. That overriding power, according to us, cannot be extended to nullify the provisions contained in the 1986 Act, which deals with juveniles who are offenders. The 1989 Act is not concerned with the offenders. So it cannot have any impact on 1986 Act which is concerned with juvenile offenders. The 1986 Act is a special enactment which deals with juvenile offenders. The provisions of that Act cannot be nullified by the 1989 Act which deals with an entirely different field. In this view we hold that the 1989 Act cannot override the provisions of the 1986 Act which specifically deal with juvenile offenders."

(emphasis supplied)

(v). The pronouncement of the Rajasthan High Court reported at **2007 CrLJ 3047 Tara Chand vs. State of Rajasthan** is to the same effect wherein the court held that the exclusion of anticipatory bail under the **Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act of 1989** does not apply to juveniles who have to be mandatorily dealt with according to the provisions of section 12 of the Juvenile Justice Act of 2000. It was held that the

subsequent central legislation of the year 2000 would have an overriding effect over the provisions of the earlier Act of 1986.

(vi). Mr. Manoj Ohri, learned APP for the state, has referred to the pronouncement of the Division Bench of the Karnataka High Court reported at ***2005 Crl.L.J. 2357 State by Basavapatna Police Station vs. Harshad*** wherein an issue of jurisdiction of the ***fast track court*** to conduct a trial in respect of a charge sheet for offences under section 143, 147, 148, 302 read with 149 of the ***IPC*** was laid against the respondent who was a juvenile alongwith others who were also implicated in the same case. On a consideration of the statutory provisions, the Division Bench observed as follows :-

“15. xxx we answer the questions referred as follows:-

xxx

xxx

xxx

(2) Whether Section 27 Cr.P.C.r/w pronouncement of the Division Bench of this Court in the case of Krishna v. State of Karnataka reported in ILR 2000 Kar 2542 ***has overriding effect over Section 6 of the Juvenile Justice (Care and Protection of Children) Act, 2000 or vice versa?***

OR

Which Court/Board has to deal with juvenile in respect of offences punishable with death or imprisonment for life?

Ans. It is held that Section 27 of the Cr.P.C. has no inconsistency with Section 6 of the Juvenile Justice (Care and Protection) of Children Act, 2000. However the words “notwithstanding anything contained in any other law for the time being in force”. used in Section 6(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000 has overridden the provisions of section 26(a) of the Cr.P.C. In view of specific provision in Section 6(1) of the Juvenile Justice Care and Protection of Children) Act and pronouncement of the Supreme Court in Sheela Barse v. UOI, AIR 1986 SC 1773 : (1986 CriLJ 1736) and Raghbir v. State of Haryana, AIR 1981 SC 2037 : (1981 CriLJ 1497), the decision of Karnataka High Court in Krishna's case is no more good law.”

(emphasis supplied)

(vii). In the case reported at **(134) 2006 DLT 507 : Mohd. Irshad @ Shivraj vs. State**, an order directing the juvenile petitioner to undergo trial before the Special Judge under **the NDPS Act** was held to be not sustainable and it was held that a juvenile can be tried only in terms of the Juvenile Justice Act, 2000. The court placed reliance on the non-obstante clauses in the various provisions of the Juvenile Justice Act and also noticed that section 6 and section 36A of the JJ Act contained non-obstante clauses which made it clear that the provisions of section 6 of the statute will override any other law in force. The court also noted that the Juvenile Justice Act was enacted in the year 2000, whereas the NDPS Act was an enactment of 1985. Both laws were

special laws. In para 5 of the judgment, it was held that the later law would prevail over the NDPS Act. It was pointed out that the Juvenile Justice Act was a beneficial legislation and its provisions were clear and mandatory.

122. In an exhaustive pronouncement of the High Court of Madras reported at *MANU/TN//0347/2003 Prabhakar vs State of Tamilnadu*, the same question was raised in context of the *Prevention of Terrorism (POTA) Act, 2000* vis-a-vis the JJ Act, 2000, considering the history of the legislation, judicial pronouncements as well as rules of interpretation, it was held as follows :-

“29. Both Acts, viz., JJ (C&PC) Act and the POTA are special Acts passed by the Parliament. Both contain a surfeit of non obstante clauses having overriding effect. But then juveniles have been given a special place in the scheme of things. Our country, as already noted, has been a party to various international conventions and agreements and invoking Article 253 of the Constitution enacted various Acts with children as the prime theme and ensured that all their needs are met and their basic human rights are protected. We have created greater responsibilities in ourselves when it comes to juveniles in conflict with law. The various sections in JJ (C&PC) Act already referred to vouch for the same. As pointed out in *MUNNA v.. STATE OF UP MANU/SC/0035/1982* :
"The law is very much concerned to see that juveniles do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with

criminal offenders. The law throws a cloak of protection round juveniles and seeks to isolate them from criminal offenders, because the emphasis placed by the law is not on incarceration but on reformation. How anxious is the law to protect young children from contamination with hardened criminals is also apparent from Section 27 of the Act which provides, subject only to a few limited and exceptional cases referred to in the proviso, that notwithstanding anything contained to the contrary, no court can sentence a child to death or transportation or imprisonment for any term or commit him to prison in default of payment of fine. It would thus be seen that even where a child is convicted of an offence, he is not to be sent to a prison but he may be committed to an approved school under Section 29 or either discharged or committed to suitable custody under Section 30. Even where a child is found to have committed an offence of so serious a nature that the court is of opinion that no punishment which under the provisions of the Act it is authorised to inflict is sufficient, Section 32 provides that the offender shall not be sent to jail but shall be kept in safe custody in such place or manner as it thinks fit and shall report the case for the orders of the State government. Section 33 sets out various methods of dealing with children charged with offences. But in no case except the exceptional ones mentioned in the act, a child can be sent to jail."

The above enunciation was made by the Supreme Court with reference to U.P. Children Act, 1951, and at a time when even Central Act JJ act, 1986 had not been enacted. It will apply with greater force in the present context. JJ (C&PC) Act no doubt reached the statute book two years earlier to the POTA. It is possible to argue that at the time POTA was passed Parliament was aware of the presence of JJ (C&PC) Act as law, that still it chose to introduce Sec. 56 conferring overriding powers under POTA and that

therefore POTA should prevail. As pointed out in the LIC case as between ID Act and LIC Act, so far as nationalisation and insurance business are concerned the latter Act is a special legislation but when it comes to particular problem of disputes between employer and employees, or investigation and adjudication of such disputes it makes way to ID Act. By the same logic, JJ (C&PC) Act dealing as it does with 'Alpha to Omega' of the problems facing juveniles and juveniles in conflict with law providing as it does for specialised approach towards the prevention and treatment of juvenile delinquency in its full range is a special law and will prevail over POTA which is a mere special law compared to JJ (C&PC) Act. JJ (C&PC) Act is the monarch of all that it surveys, in its field. Both are special but JJ (C&PC) Act is more special (apologies to George Orwell).

30. May be the offence committed by the juvenile is shocking like murder or rape but as pointed out in KRISHNA BHAGWAN v.. STATE OF BIHAR [MANU/BH/0043/1989 : (though under the earlier Act), the appropriate provision in the Act is quite conscious of such situations. Section 7 of JJ (C&PC) Act enjoins the Magistrate, who is not empowered under the Act to exercise the powers of the Board and before whom the juvenile or child is brought, to forward the child to the competent authority. Section 12 provides that if the release of the juvenile on bail is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would, defeat the ends of justice. If a Board is satisfied that a juvenile has committed an offence it may allow the juvenile to go home with an advice or admonition or direct him to participate in group counselling; community service, etc.; direct him to be released on probation as also

order such directives as it may think fit. The Board may also make the terms and conditions of supervision and furnish copy to the juvenile, parent, guardian or other person or fit institution. Thus, welfare of the juvenile is the prime concern of the law makers. The legislature had intended that the juvenile should be extended special care, treatment, development and rehabilitation.

The Act overwhelmingly contemplates total separation of juveniles from the mainstream offenders. Under no circumstance should the juvenile have anything to do with them.”

(underlining supplied)

123. The above narration also supports only conclusion that the JJ Act has been enacted by the legislature giving primacy to the welfare of children and has to be given primacy in matters relating to them irrespective of the concerns of other legislations.

124. It is noteworthy that so far as Section 17 of the IT Act, 1956 is concerned, the same is applicable to a consideration on the matter of intermediate custody of persons removed under Section 15 or rescued under Section 16 alone. Interestingly, no similar provisions have been made with regard to persons who would be covered under Section 7 of the IT Act of 1956.

125. Section 17A of the IT Act was incorporated into the statute by way of an amendment by Act 44 of 1986 w.e.f. 26th January, 1987. So far as the provisions of Section 17A are concerned, it is also confined to conditions which are required to be observed before placing a person rescued under Section 16 with parents or guardians. The magistrate is required to satisfy himself about the capacity or genuineness of the parents, guardians or husband to keep such person by causing an investigation to be made by recognised welfare institution or organisation.

126. The legislature in its wisdom did not consider the existing provisions of the IT Act, 1956 as sufficient provisions looking to the benefit of the children, having regard to the enquiry postulated under and the scheme of the Juvenile Justice Act of 1986 which was passed on the 1st of December, 1986.

127. So far as juveniles in conflict with law or children in need of care and protection are concerned, they cannot under any circumstances, be equated with or treated in the manner in which adult persons are treated. This statutory scheme is provided under sub-section (4) of section 1 of the Juvenile Act, 2000 which states as follows :-

“Section 1(4)- **Notwithstanding anything contained in any other law for the time being in force, the** provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law.

128. So far as the children rescued from brothels are concerned, special statutory provisions have been made under the JJ Act of 2000. There is therefore, substance in the submissions of Mr. Madhukar, learned counsel for the petitioner that the intent of the statute, to protect the human rights of the child is to be given primacy, and its provisions have to be strictly followed.

129. Such reading of the two statutes would prevent conflict in the statutory provisions as well as absurdity. Certainly the legal dynamics of social justice as well as the clear legislative intendment guides this court in holding that so far as a matter involving a juvenile in conflict with law or/and children in need of care and protection are concerned, the statutory intent is clear and has to be given full effect. The words of the statute given their plain and literal meaning, leave no manner of doubt that so far as a child is concerned, the JJ Act of 2000 has primacy. No court or authority has any option in the matter and the provisions of the Juvenile Justice Act, 2000 have to be strictly applied.

130. The rights of the juvenile and children having been placed on such a high pedestal by the legislature, and so it has to be held that the procedure prescribed under the Juvenile Justice Act, 2000 governs all cases concerning juveniles in conflict with law irrespective of the offence they are alleged to have committed as well as all children covered under the definition of children in need of care and protection. Every aspect of the matter including detention, prosecution, sentencing, rehabilitation, restoration of a person who has not completed eighteen years of age under Section 18 has to be dealt with in accordance with provisions of the Juvenile Justice Act.

131. The two legislations under construction address specific concerns and areas, the JJ Act being restricted in its application to a specific class of persons. In case the IT Act of 1956 is allowed to prevail, it will lead to such construction as was not so intended by the legislature. Both the special enactments are required to be allowed to operate in entirety just as any other self contained code. The construction of the legislations has to be harmonious/in tune so as to ensure that the special features and purpose of both the enactments can remain intact and in the best interest of children as well as for the benefit of the society. If an enactment meant to apply to all

age groups is allowed to override the special enactment meant for children, it will ultimately result and reduce such statute (i.e. the special enactment for children) to a state of futility.

132. Going by the above principles, the JJ Act deals specifically with person below 18 years of age whereas the IT Act deals with persons of all ages; also the JJ Act being a subsequent or later enactment and the IT Act being an earlier enactment and both containing non-obstante clauses, the non-obstante clause in the JJ Act would ordinarily prevail over the non-obstante clause in the IT Act.

133. Thus, in the context of persons covered under the definition of ‘child’ under the JJ Act, it is the special enactment vis-a-vis the IT Act.)

134. The matter, however, does not end here. There is another important issue which requires to be addressed. We are confronted with a situation where a person under eighteen years of age has been recovered by the police in action taken under Section 15 and Section 16 of the IT Act of 1956. The question which has been raised is whether such person is guilty of commission of offences under provisions of the IT Act and therefore to be

dealt with as a juvenile in conflict with law under the JJ Act or such person is to be treated as a child in need of care and protection.

Is a child recovered by the police in a raid under Sections 15/16 of the IT Act to be treated as an offender under IT Act and therefore as a juvenile under JJ Act or whether such child is to be treated as a child in need of care and protection thereunder

135. It is clear from the above discussion, that both the enactments benefit the society largely. While the IT Act, 1956, addresses primarily a social cause, the JJ Act, 2000 has also been enacted in social cause to further the best interest of children - the future of this nation.

136. As noticed hereinabove, the IT Act, 1956 as well as the JJ Act are special Acts with regard to the specific object which they are addressing. Difficulty has arisen as to the manner in which a person, who is covered within the definition of juvenile or child under the provisions of the JJ Act, 2000, is found involved in any manner in any case which attracts applicability of the IT Act, 1956, is to be treated.

137. The JJ Act 2000 is a later enactment. In its wisdom, the parliament has defined “juvenile or child” under Section 2(k) to include every person who has not completed 18 years of age.

From the statutory scheme, it is apparent that a distinction is drawn under the JJ Act, 2000 only between a child who is in conflict with law, who is described as a juvenile, and a child in need of care and protection. No exception to the applicability of the Act has been provided to such persons. None can be read into the statute.

138. The IT Act of 1956 however defines a 'child' under section 2(aa) as a person who has not completed the age of 16 years and defines a minor under section 2(c)(b) as a person who has completed the age of 16 years but has not completed the age of 18 years.

139. Under sub-section (1), '*juvenile in conflict with law*' has been defined as a child who is alleged to have committed an offence and has not completed the eighteenth year of age as on the date of commission of such an offence.

Sub-section (d) of Section 2 of the JJ Act, 2000 defines '**child in need of care and protection**'. In clause (vi) and (vii) thereof, the legislature has included a **child who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts**. The legislature has clearly covered a child being sexually exploited for sexual abuse and trafficking (as is envisaged under the IT Act, 1956 as well) within the

definition of a child in need of care and protection under Section 2(d) of the JJ Act, 2000.

Therefore under the JJ Act, a person under eighteen years of age who is found involved in prostitution is a child who has been sexually exploited as they are not old enough and thus not capable to make an informed choice. Such person thus is classified as a child in need of care and protection and need to be covered and protected under the provisions of the JJ Act.

140. An examination of the scheme of the IT Act is necessary to answer the aspect under consideration. The expression '*prostitution*' is defined under sub-section (f) of Section 2 of the IT Act, 1956 as 'sexual exploitation or abuse of persons for commercial purposes'. It is further statutorily prescribed that the expression 'prostitute' shall be construed accordingly. The IT Act, 1956 does not prescribe any specific exceptions to its application.

141. The IT Act of 1956 is primarily penal and the punishment which has been prescribed is intended to act as a deterrent. It strictly punishes only those who are over eighteen years of age. This legislation also does not permit penalizing a person even if found indulging in the penal acts, if such person is

less than eighteen years of age, recognizing that such person cannot be held culpable for the acts involved.

142. It is noteworthy, that a juvenile who is in conflict with law may at the same time be a child in need of care and protection. The definition of a 'juvenile' under the Act of 2000 does not exclude such person from being a child in need of care and protection.

143. On the 19th of June, 2012, the legislature enacted the ***Protection of Children from Sexual Offences Act, 2012*** (POCSO, Act hereafter) for the reason that sexual offence against children were not being adequately addressed by the existing laws. The enactment was pursuant to the mandate of Article 15 of the Constitution of India and in discharge of the responsibility of the Government of India under the International Treaties. This statute is a self-contained comprehensive legislation to provide for protection of children from offences of sexual assault, sexual harassment and pornography. The above intent and spirit of the legislation is supported by the recent enactment as well in this regard. The provisions of the statute shed valuable light on the issue under consideration and are extracted hereafter. A child is defined under Section 2(d) thus:-

“2(d). “Child” means any person below the age of eighteen years.”

144. The statute proposes to protect children from the offence of sexual assault, sexual harassment and pornography. It separately defines the penetrative sexual assault in Section 3 in the following terms:-

“3. Penetrative sexual assault:- A person is said to commit “penetrative sexual assault” if –

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus, of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

145. Under Section 4 of the statute, minimum sentence of imprisonment of seven years which may extend to imprisonment for life has been prescribed for this offence.

The legislature has prescribed the offence aggravated penetrative sexual assault on the child under Section 5.

146. For the purpose of the present case, we may also refer to the offence of sexual assault which has been defined under Section 7 of the statute in the following terms:-

“7. Sexual Assault – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

Aggravated sexual assault is defined under Section 9 of the statute.

147. By virtue of Section 11, the legislature has rendered penal sexual harassment of a child which provision reads as follows:-

“11. Sexual harassment – A person is said to commit sexual harassment upon a child when such person with sexual intent.-

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefor.”

148. Varying imprisonment sentences have been prescribed for these offences as well.

149. Some light on the issue is also thrown on the issue from an examination of the *Indian Penal Code* which renders certain acts as not only illegal, but punishable in the terms prescribed thereunder. So far as the present consideration is concerned, the offences prescribed under the heading 'Sexual Offences', as well as certain acts rendered penal for the reason that they relate to kidnapping, abduction, slavery and forced labour, have a bearing and deserve to be considered in extenso. The relevant provisions of the penal code (as on 29th July, 2009, the date when the two children were rescued in the present case) in this behalf are set out hereafter :-

“366A. Procuration of minor girl – Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

XXX

XXX

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372. Selling minor for purposes of prostitution, etc.-

Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

[Explanation I.- When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.- For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.]

373. Buying minor for purposes of prostitution, etc. Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[Explanation I.-Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.-"Illicit intercourse" has the same meaning as in section 372.]

374. Unlawful compulsory labour-Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

150. The legislature has viewed with extreme seriousness the magnitude of the problems while effecting the Criminal Law Amendment Act, 2013. Section 370 which dealt with buying or disposing of any person as a slave

was substituted by the Amendment Act of 2013 and the relevant extract of the amended Section reads thus:-

“370. Trafficking of person.-(1) Whoever, for the **purpose of exploitation**, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—

First.— using threats, or

Secondly.— using force, or any other form of coercion, or

Thirdly.— by abduction, or

Fourthly.— by practising fraud, or deception, or

Fifthly.— by abuse of power, or

Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.— The expression "**exploitation**" shall include **any act of physical exploitation or any form of sexual exploitation**, slavery or practices similar to slavery, servitude, or the forced removal of organs

Explanation 2.— **The consent of the victim is immaterial in determination of the offence of trafficking.**

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the **trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years**, but which may **extend to imprisonment for life**, and shall also be liable to fine.

(5) Where the offence involves the **trafficking of more than one minor**, it shall be **punishable with rigorous imprisonment for a term which shall not be less than fourteen years**, but which may **extend to imprisonment for life**, and shall also be liable to fine.

(6) If a person is convicted of the offence of **trafficking of minor on more than one occasion**, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

151. Trafficking of a person is a penal offence under Section 370. Under explanation 2 to Sub-Section 1, the consent of the victim is immaterial in determination of the offence of trafficking.

The offence of trafficking of a minor is punishable even more stringently under Section 370(4). Mandatory sentence of rigorous

imprisonment for a term of not less than ten years but which may extend to imprisonment for life with fine has been prescribed.

152. The seriousness with which the legislature has treated the offence in respect of minor is also manifested from the punishment prescribed for trafficking of more than one minor under Sub-Section 5 of Section 370. Such an offence is punishable with imprisonment for a term which shall not be less than fourteen years but which may extend to imprisonment for life as well as fine. The repeat offender of the offence of trafficking of a minor is punishable with imprisonment for life which means imprisonment for the remainder of that person's natural life and shall also be liable to fine. Exploitation of trafficking child is punishable under Section 370(a) with a minimum sentence of not less than five years rigorous imprisonment which may extend to seven years as well as fine.

153. Valuable light has been thrown on the issue under consideration from the legislative intent when the definition of rape under Section 375 of the Indian Penal Code after the amendment of 2013 is considered. The relevant extract of Sections 375 and 376 read as follows:-

“Section 375. Rape - A man is said to commit "rape" if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

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Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

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Section 376. Punishment for rape - (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which **shall not be less than seven years**, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

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(i) commits rape on a woman when she is under sixteen years of age;
Or

(j) commits rape, on a woman incapable of giving consent; or

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shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.”

It is noteworthy that the substantive ingredients of the offence have been redefined by the amendment of 2013. Consent of a person under 18 years of age is immaterial.

154. It would be pertinent to advert to Section 90 of the IPC as well in this regard. The relevant extract thereof reads as follows:-

“90. Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or xxx

Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

Section 375 however renders consent of persons upto 18 years of age inconsequential.

155. It is important to note that in some jurisdictions, the phrase '*statutory rape*' is a term used to describe sexual relations that occur when one participant is below the age required to legally consent to the behavior. Although it usually refers to adults engaging in sex with minors under the age of consent, i.e., the age at which individuals are considered competent to give consent to sexual conduct. This expression is a generic term, and very few jurisdictions use the actual term "statutory rape" in the language of statutes. Different jurisdictions use many different statutory terms for the crime, such as "sexual assault," "rape of a child," "corruption of a minor," "carnal knowledge of a minor," "unlawful carnal knowledge", or simply "carnal knowledge." Statutory rape differs from forcible rape in that overt force or threat need not be present. The laws presume coercion, because a *child* is *legally incapable of giving consent to the act*.

156. The above narration manifests the legislative recognition in India of the fact that a child is incapable of giving lawful consent so far as the sexual acts are concerned. The provisions of the POCSO Act as well as the Indian Penal Code stridently reinforce this position, prescribing stringent punishment for the involved adult offenders.

157. Different enactments have prescribed different ages so far as the definition of a child is concerned. Section 11 of the Indian Contract Act which defines persons who are competent to contract states that every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

158. The Indian Majority Act, 1875 declares in Section 3 that every person domiciled in India shall be deemed to have attained his majority when he shall have completed the age of 18 years, and not before. The age of majority being 18 years, a person less than that age even by a day would be a minor for the purposes of contracting. (Ref: ***Bhim Mandal Magaram Corain, AIR 1961 Pat. 21***).

A minor is not competent to contract and an agreement with a minor has been held to be void. In respect of contracts thus it has been presumed that a minor is not capable of making an informed choice and taking a decision and thus the consent of a minor has no effect of binding him to any contract.

159. Section 4 of the Hindu Minority and Guardianship Act, 1956 defines a 'minor' as a person who has not completed the age of eighteen years. It has also been held that a minor is incompetent to act as guardian of property. The courts have also emphasised that the welfare of the minor is to be of paramount consideration. Thus, it has again been recognised that a child is incapable of giving lawful consent and their interests need to be protected.

160. Section 2(a) of the Child Marriage Restraint Act, 1929 (Repealed) defined a child as “a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age”

A “child marriage” was defined under section 2(b) as a marriage to which either of the contracting parties is a child;

A “contracting party” to a marriage is defined under Section 2(c) to mean either of the parties whose marriage is [or is about to be] thereby, solemnised. This statute also contained a definition of a “minor” under Section 2(d) means a person of either sex who is under eighteen years of age.”

161. The Act provided a punishment under Section 3 and 4 for any person contracting a child marriage. Section 3 prescribes punishment for a male above eighteen years of age and below twenty-one who contracted a child marriage. Section 4 prescribes punishment for a male above twenty-one years of age who contracts a child marriage. Section 5 prescribes punishment for solemnising a child marriage for whoever performs, conducts or directs any child marriage, unless he proves that he had reason to believe that the marriage was not a child marriage.

162. Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised is punishable under section 6. No woman was punishable under Section 6 with imprisonment.

It is noteworthy that for the purposes of this section, it was presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

It is pertinent to note that no punishment was prescribed for a minor under the Child Marriage Restraint Act, 1929 as the law presumes that a minor is incapable of giving lawful consent. The law presumed that the consent of a child is irrelevant as they are not capable of legally consenting or having an informed choice.

163. The Child Marriage Restraint Act was repealed in the year 2006 and replaced by the Prohibition of Child Marriage Act, 2006 ('the PCM Act' hereafter). While the new law maintains some parallels with the older law, there are significant departures too in the new Act. The definition of 'child' remains the same as under the previous statute.

164. Unlike the Act of 1929 where punishment was negligible for marrying a minor, the PCM Act of 2006 provides for enhanced punishment for any male over 18 years of age with rigorous imprisonment of up to 2 years or with a fine up to 2 years or with a fine up 1 lakh rupees or both. Similar punishment is prescribed for anyone who performs, conducts, directs or abets or negligently failed to prevent any child marriage. The statutory scheme manifests the legislative intent of not simply restraining child marriages but

prohibiting them and is statutory recognition of social and adult responsibility for the same. It places not a shadow of responsibility on the child.

138. Section 2(ii) of the Child Labour (Prohibition and Regulation) Act, 1986 defines a child as a person who has not completed his fourteenth year of age. Section 3 thereof lays down that no child shall be permitted to work or be employed in any occupation as set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on.

Section 14 prescribes the penalties for offences under the Act thus:-

“for whoever employs any child or permits any child to work in contravention of the statutory provisions or does not comply with the statutory provision.”

Thus, under the Child Labour (Prohibition & Regulation) Act, 1986 as well, the child who has been employed or engaged in work in contravention of section 3 is not punishable. However, the employer or any person who permits the child to work as such is liable to punishment. Once again we see that the legislature presumes that the child cannot be held guilty as he is presumed to be incapable of giving a lawful consent.

165. The examination of the several legislations noticed above shows that a person who is below eighteen years of age is considered incapable of making an informed choice which could bind him even in a matter of contract.

166. So far as the Indian Penal Code is concerned, under Section 366A (minor girl under the age of 18 years), Section 372 and 373 (person under the age of 18 years), Section 375 (women under 16 years of age) abduction and sexual exploitation of different persons have been made penal offences inviting special stringent penalties.

167. Child prostitution is used to describe the wide concept of commercial sexual exploitation of children. It may be noted that this is only one of the manifestations of the exploitation of the child which as the above narration shows may include several other acts including child marriage, domestic child labour, trafficking etc.

168. The scheme of the penal laws noticed heretofore, would show that sexual activity with a child has not only been unequivocally declared as their sexual exploitation and abuse, but is covered under the distinct and the serious penal offence of rape.

169. An issue similar to that before us arose for consideration before the Bombay High Court in the judgment reported at *2002 AllMR (Crl.) 2400* entitled *Prerna vs State of Maharashtra & Ors. (Crl.W.P.No. 788/2002 decided on 7th October, 2002* with regard to custody of girls rescued who were under the age of 18 years. A challenge had been laid before the Division Bench with regard to an order passed by the Juvenile Justice Board for releasing the rescued girls. It had been argued that it was obligatory on the part of the Juvenile Justice Board to record a finding that they were not minors but were adult females before making the order releasing them.

170. The contentions on behalf of the rescued persons before the Bombay High Court, with regard to the manner in which they are to be treated, have been detailed in para 14 of the judgment which may be usefully adverted to and extracted in extenso, which reads as follows:-

“14. Ms. Adenwalla urged that some of the rescued girls being under 18 years of age are victims and cannot be treated as accused. Under section 8 of the PITA soliciting in a public place is an offence. The same provision cannot be applied to juveniles. The learned counsel urged that the law does not permit a girl under 18 years of age to consent to sexual intercourse. Hence a child cannot be charged for soliciting as in the eyes of law, her consent has been vitiated. She also drew our attention to certain provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (“The

JJA” for short). She submitted that the said Act aims at providing proper care, protection and treatment of children under 18 years of age. 'Juvenile' or child is defined under the JJ Act as a child who has not completed 18 years of age. A child who is said to have committed an offence is described as a juvenile in conflict with law and destitute children who are likely to be grossly abused or tortured or who are mentally or physically challenged, are described as children in need of care and protection. She submitted that a juvenile in conflict with law has to be produced before Juvenile Justice Board and a child in need of care and protection has to be produced before the child welfare committee. Thus, the JJA deals with two types of children, juveniles in conflict with law and children in need of care and protection. A juvenile girl found soliciting can be categorised both as a juvenile in conflict with law under section 2(1) as well as child in need of care and protection under section 2(d)(vi). **The learned counsel contended that considering the fact that the girls under 18 years of age are victims of circumstances and are forcibly brought into flesh traffic by traffickers, who may include their family, relatives and friends, such girls cannot be treated as accused. They would more appropriately fall in the category of children in need of care and protection under section 2(d)(vi).** She submitted that it is, therefore, necessary that all such girls should be produced before the Child Welfare committee and not before the Juvenile Justice Board. This is because it is necessary to rehabilitate these girls rather than penalise them, for they are forced into these activities.”

(Emphasis supplied)

171. The court had dwelt on the issue as to when a child would be dealt with as a juvenile in conflict with law, and whether a person rescued in such

circumstances, is a child in need of care and protection. The observations of the Bench on this aspect are important and read as follows :-

“33. We express our displeasure at the manner in which this case has been handled by the Board. First of all **if the girls were minors and they were not involved in any offence, they could not have even been described as juveniles in conflict with law. They were children in need of care and protection as per the provisions of the JJA. They ought to have been produced before the Child Welfare Committee once their minority was confirmed.** Assuming they had to be produced before the Magistrate to seek orders for their production before the Child Welfare Committee and not before the Juvenile Justice Board because they were minors and not accused. Assuming further, that they could have been produced before the Juvenile Justice Board, there was no warrant for the board to release them because the record before the Board clearly indicated that the girls were minors. The Board could have released them, without conditions, only if they were majors. Because they were minors, the Board was duty bound to follow the procedure prescribed under the JJA. The Board ought to have given due consideration to the request of the probation officer that they should not be released because she was awaiting information about them from the states from where they had come. This request was obviously made to explore the possibility of finding out their parents so that their custody could be entrusted to them with some conditions. Surprisingly the Board released them on a condition that they shall not enter into the local jurisdiction of social welfare branch.

34. We have referred to the relevant provisions of the JJA which make it evident that both, a juvenile in conflict with law or a child in need of care and protection have to be dealt with, keeping in mind the possibility of their reformation and rehabilitation. The JJA provides for Protection Homes or Special Homes where such girls have to be kept for safe custody, because the fear is that they may be driven back to the brothels. The Board should have been alive to this. By asking

the girls not to enter into the local jurisdiction of Social Service Branch, the Board has treated them as confirmed prostitutes. Such orders can be passed under Section 20 of the PITA which empowers a Magistrate to order removal of prostitutes from any place and prohibit them from re-entering it. We wonder how the Board could have passed such harsh order to the detriment of the minor girls. The learned Magistrate presiding over the Board has observed that he had personally asked the girls and they had shown eagerness to be released. **There is no provision under the JJA whereunder, the board can release the minor girls because they desired to be released without giving a thought to their rehabilitation and the frightening possibility of their re-entry into brothels.**”

(Emphasis supplied)

172. On a careful consideration of the matter, the following directions were inter alia made by the court :-

“37. We feel that the following directions may prevent recurrence of such events in future.

(A) No Magistrate can exercise jurisdiction over any person under 18 years of age whether that person is a juvenile in conflict with law or a child in need of care and protection, as defined by Sections 2(1) and 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000. At the first possible instance, the Magistrates must take steps to ascertain the age of a person who seems to be under 18 years of age. **When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law, or to the Child Welfare Committee if such a person is a child in need of care and protection.**

(B) A Magistrate before whom persons rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place are produced, should, under Section 17(2) of the said Act, have their ages ascertained the very first time they are produced before him. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a Juvenile in conflict with law, or to the **Child Welfare Committee if such person is a child in need of care and protection.**”

(Emphasis supplied)

173. So far as release of a person under eighteen years of age under section 16 and 17 of the IT Act, 1956 are concerned, the Division Bench of the Bombay High Court directed as follows :-

“(C) Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the Probation Officer.

(D) The said **juvenile should be released only to the care and custody of a parent/guardian** after such parent/guardian has been found fit by the Child Welfare Committee to have the care and custody of the rescued juvenile.

(E) **If the parent/guardian is found unfit** to have the care and custody of the rescued juvenile, the **procedure laid down under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be followed** for the rehabilitation of the rescued child.

(F) No advocate can appear before the Child Welfare Committee on behalf of a juvenile produced before the Child Welfare Committee after being rescued under the Immoral Traffic (Prevention) Act,

1956 or found soliciting in a public place. Only the parents/guardian of such juvenile should be permitted to make representations before the Child Welfare Committee through themselves or through an advocate appointed for such purpose.

(G) An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (Prevention) Act, 1956.”

(underlining by me)

174. It was observed by the High Court of Bihar in the judgment reported at ***AIR 1989 Pat 217 Krishna Bhagwan vs. State of Bihar*** that an extraordinary procedure has been prescribed under the JJ Act for enquiring into the offence alleged to have been committed by child/juvenile and punishment to be imposed, the basic approach appears to be curative instead of punitive. It was held by the Bench that the Juvenile Justice Act is a solemn promise by the present to the future. Those who are charged with the statutory duty must not fall. Obedience to law by all concerned alone shall ensure justice to delinquent children.

175. The above conclusions are supported by the International Conventions and Protocols.

176. By 1990, international awareness of the commercial sexual exploitation and the sale of children had grown to such a level that the United Nations

Commission on Human Rights decided to appoint a Special Rapporteur on the sale of children, child prostitution and child pornography by resolution 1990/68, mandating the Special Rapporteur to investigate the exploitation of children around the world and to submit reports thereon to the General Assembly and the Commission on Human Rights, making recommendations for the protection of the rights of the children concerned. These recommendations are targeted primarily at Governments, United Nations bodies and non-governmental organizations.

177. The **Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography** works on behalf of the United Nations Human Rights Council to investigate the exploitation of children around the world and make recommendations to governments on how to end such practices.

The act of prostituting a child is sometimes carried out by another party, as stated in the definition provided by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography.

178. According to the Special UN Rapporteur, *child trafficking “consists of all acts involved in the recruitment or transportation of persons within or across borders, involving deception, coercion or force, debt bondage or*

fraud, for the purpose of placing children in situations of abuse or exploitation, such as forced prostitution, slavery-like practices, battering or extremely cruelty, sweatshop labour or exploitative domestic services.”

179. The United Nations Special Rapporteur defines **child prostitution** as “*sexual exploitation of a child for remuneration in cash or in kind, usually but not always organized by an intermediary (parent, family member, procurer, teacher, etc.).*”

180. Moreover, Europol’s definition of trafficking is that “*subjection of a person to the real and illegal way of other person by using violence or menaces or by abuse of authority or intrigue, especially with to the exploitation of prostitution, homes of sexual exploitation and assault or minors or trade in abandoned children. These forms of exploitations also include the production, sale or distribution of child-pornography material*” (Report on trafficking of women and children in Europe, 2001).

181. On the 7th of June, 1999, **Convention no. 182** of the **International Labour Organization** being ‘**The Worst Forms of Child Labour Convention, 1999**’ was adopted.

182. Article 3 of this Convention describes the expression ‘*the worst forms of child labour*’ thus: -

For the purposes of this Convention, the term ***the worst forms of child labour*** comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the **use, procuring or offering of a child for prostitution**, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

183. This Convention has unequivocally declared that the use, procuring or offering of a child for prostitution is one of the **worst forms of child labour**.

184. This Convention has not been ratified by India.

185. Article 3 of ILO Convention No.182 also defines “*child exploitation and child labor*” as

“(a) *all forms of slavery or practices similar to slavery, sale and trafficking of children, forced or compulsory labour including*

debt bondage and serfdom and forced or compulsory labour including forced or compulsory recruitment of children for use in armed conflict;

- (b) the use, procuring or offering of a child for prostitution, production of pornography or for pornographic performances.*
- (c) The use, procuring or offering of a child for illicit activities in particular for the production and trafficking of drugs as defined in the revised international treaties.*
- (d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”*

186. The problems which trafficking of persons has raised are not confined to national borders. In view of the trans-national nature of the problem, the ***'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children'*** (also referred to as the '*Trafficking Protocol*') which is a protocol to the Convention against Transnational Organised Crime was adopted by the United Nations in Palermo in 2000. It entered into force on 25th December, 2003. The protocol had been signed by

117 countries by October, 2009 India signed the same on 12th December, 2002 and there were 124 parties to it.

187. *Article 2* of the *Trafficking Protocol* provides the following Statement of purpose:

“The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.”

188. *Article 3* of the *Protocol* covers the Use of terms and definitions for the purposes of this Protocol.

“(a) Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms

of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) *The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;*

(d) Child shall mean any person under eighteen years of age”

Thus, the above Protocol also recognises and declares that the recruitment, transportation, transfer, harbouring or receipt of any person under eighteen years of age , for the purpose of exploitation of the prostitution of others or other forms of sexual exploitation *shall be considered ‘trafficking in persons’*

189. Emphasis has been laid in this Protocol to provide definitions of trafficking which reflect the need 'for special safeguards and care for children including appropriate legal protection'. The Protocol has also laid emphasis on ensuring that trafficked persons are not punished for any affairs or

activities related to their having been trafficked such as prostitution and immigration violations, clearly treating them as victims and not offenders.

190. I may refer to yet another document, that is, the **Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.** This protocol was adopted and opened for signature, ratification and accession by the General Assembly resolution of 25 May 2000 and was entered into force on 18 January 2002. The Protocol has 117 signatories and 137 parties who undertook to prohibit child prostitution. India signed the Protocol on 15th November, 2004 and ratified the same on 16th August, 2005. The Protocol was entered into in order to further achieve the purposes of and reinforce the Convention on the Rights of the Child and for the implementation of its provisions, the state parties including India undertook to guarantee the protection of the child from the sale of children, child prostitution and child pornography.

191. Article 2 of the **Optional Protocol** to the Convention on the Rights of Child on Sale of Children, Child Prostitution and Child Pornography states as follows:

“Article 2

For the purpose of the present Protocol:

(a) xxx xxx xxx

(b) ***Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration”***

192. **Article 8** of this Protocol states that -

“1. States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:

(a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;

(b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;

(c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;

(d) Providing appropriate support services to child victims throughout the legal process;

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3. States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described

in the present Protocol, the best interest of the child shall be a primary consideration.”

193. It is important to note that throughout the Protocol, child prostitutes are referred to as child victims. It is recognised that the child is vulnerable and needs care and protection.

194. The United States of America has enacted the *U.S. Trafficking Victims Protection Act of 2000*. The definition of 'Severe Forms of Trafficking in Persons, in this enactment includes any commercial sex act performed by a person under the age of 18. This means that any minor who is commercially sexually exploited is defined as a *trafficking victim*.

195. I have referred to the Convention on the Rights of the Child earlier which recognizes the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development; it recognizes that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation and that girl children are disproportionately represented among the sexually exploited; believes that the elimination of

the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach. The International instruments also recognize factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts amongst others as contributing to the trafficking in children.

The international instruments therefore declare and treat a child found involved in any aspect of prostitution as a victim and do not permit him/her to be treated as an offender.

Permissibility of reading International Covenants/Protocols into domestic law and extent thereof

196. We have noticed above some international instruments which have a bearing on the rights of the child and obligations of the state as well as society but have not been ratified by India and may not be the subject matter of India legislation. Is it legally permissible to refer to these instruments? if yes, then to what extent and purpose? I propose to consider these questions briefly hereafter.

197. The Supreme Court has repeatedly held that International Treaties and Conventions are significant for the purpose of interpretation of the Constitution and domestic jurisprudence and should be read while interpreting domestic law if they are not contrary to domestic law and that there would be no inconsistency in the use of international norms to the domestic legislation. Thus, the international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them.

198. In *AIR 1996SC2715 : (1996) 5 SCC 647 Vellore Citizens Welfare Forum Vs. Union of India and others*, while deciding on a public interest petition ,filed under Article 32 of the Constitution of India and directed against the pollution being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu, the Supreme Court held that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. The Supreme Court referred to the enunciation of the principle in its earlier pronouncements in *Addl. Distt. Magistrate Jabalpur v. Shivakant Shukla 1976 Cri LJ 945*,

Jolly George Varghese's case [1980] 2 SCR 913 and the Gramophone Company's case 1984 (2) ECC 142

199. In the case of ***AIR 1997 SC 3011 Vishaka and others Vs. State of Rajasthan and Others***, the Supreme Court again reiterated the above principle holding that–

“ 7. xxx Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil.”

200. In ***(2003) 6 SCC 1 Kapila Hingorani Vs. State of Bihar***, stressed on the importance of reading into International Treaties and Conventions while interpreting domestic law and the constitution observing as follows-

“47. It is also well-settled that a statute should be interpreted in the light of the International Treaties and Conventions. In ***Chairman, Railway Board and Ors. v. Mrs. Chandrima Das and Ors. : 2000 Cri LJ 1473*** this Court stated the law thus:-

"24. The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence." “

201. The principles which would govern the extent and manner of applicability of International Conventions and treaties have been recently summed up in a pronouncement of the Supreme Court reported at **(2008) 13 SCC 30 *Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd.*** Here the court was concerned with an issue involving interpretation of Section 31 of the Copyright Act, 1957 . With regard to the application of International conventions and treaties in India, the court extracted several prior pronouncements and laid down the principles thus :-

“APPLICATION OF INTERNATIONAL CONVENTIONS IN INDIA

47. It is for the aforementioned limited purpose, a visit to the provisions of International Conventions would be necessary. In interpreting the domestic/municipal laws, this Court has extensively made use of International law inter alia for the following purposes:

- (i) As a means of interpretation;
- (ii) Justification or fortification of a stance taken;

- (iii) To fulfill spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;
- (iv) To reflect international changes and reflect the wider civilization;
- (v) To provide a relief contained in a covenant, but not in a national law;
- (vi) To fill gaps in law.

48. Beginning from the decision of this Court in ***Kesavananda Bharati v. State of Kerala* : AIR 1973 SC 1461**, there is indeed no dearth of case laws where this Court has applied the norms of international laws and in particular the international covenants to interpret domestic legislation. In all these cases, this Court has categorically held that there would be no inconsistency in the use of international norms to the domestic legislation, if by reason thereof the tenor of domestic law is not breached and in case of any such inconsistency, the domestic legislation should prevail.

In ***Jagdish Saran and Ors. v. Union of India* : [1980] 2 SCR 831**, it was observed:

It is also well-settled that interpretation of the Constitution of India or statutes would change from time to time. Being a living organ, it is ongoing and with the passage of time, law must change. New rights may have to be found out within the constitutional scheme. Horizons of constitutional law are expanding.

49. In the aforementioned judgment, this Court referred to a large number of decisions for the purpose of interpreting the constitutional provisions in the light of the international treaties and conventions. Yet again in ***Indian Handicrafts Emporium and Ors. v. Union of India* : AIR2003SC3240**, this Court considered the Convention on International Trade in Endangered Species (CITES) and applied the principles of purposive constructions as also not only the Directive Principles as contained in Part IV of the Constitution but also Fundamental Duties as contained in Part IVA thereof.

50. These judgments were referred to in the decision of *Liverpool and London S.P. and I Asson. Ltd. v. M.V. Sea Success I and Anr.* : (2004) 9 SCC 512 , wherein this Court observed that as no statutory law in India operated in the field, interpretative changes, if any, must, thus be made having regard to the ever changing global scenario. Liverpool also referred to the decision of the court in *M.V. Elisabeth 1993 Supp. (2) SCC 433* as an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence of any domestic legislation to the contrary. Concurring with the said decisions, it was however opined that the same could not mean that it restricted the jurisdiction of the Indian High Courts to interpret the domestic legislation strictly according to the judge made law.

51. *Liverpool and London S.P. and I Asson. Ltd.* (supra) has been followed by the Supreme Court in a plethora of cases inter alia *The State of West Bengal v. Kesoram Industries Ltd. and Ors.* [2004] 2 66I TR 721(SC) . In *Pratap Singh v. State of Jharkhand and Anr.* : 2005 Cri LJ 3091 wherein this Court directed to interpret the Juvenile Justice Act in light of the Constitutional as well as International Law operating in the field. { See also *Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited* (2006) 11 SCC 245 ; *State of Punjab and Ors. v. Amritsar Beverages Ltd. and Ors.* : AIR 2006 SC 2820 ; *State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr.* : (2004) 11 SCC 26 and *Anuj Garg and Ors. v. Hotel Association of India and Ors.* : AIR 2008 SC 663.

52. *However, applicability of the International Conventions and Covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the Conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the International Covenants can be utilized. Where International Conventions are framed upon undertaking a great deal of exercise upon giving an opportunity of hearing to both the parties and filtered at several levels as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the*

benefits thereof. Those Conventions to which India may not be a signatory but have been followed by way of enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible.

53. This kind of stance is reflected from the decisions in *PUCL v. Union of India* : AIR 1997 SC 1203 , *John Vallamattom v. Union of India* : AIR 2003 SC 2902 , *Madhu Kishwar v. State of Bihar* : AIR 1996 SC 1864 , *Kubic Darusz v. Union of India* : 1990 Cri LJ 796 , *Chameli Singh v. State of U.P.* : AIR 1996 SC 1051 , *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil* : [1996] 1 SCR 1068, *Apparel Export Promotion Council v. A.K. Chopra* : (1999) ILLJ 962 SC , *Kapila Hingorani v. State of Bihar* : (2003) III LLJ 31 SC , *State of Punjab and Anr. v. Devans Modern Breweries and Anr.* : (2004) 11 SCC 26 and *Liverpool & London S.P. & I Asson. Ltd. v. M.V. Sea Success I* : (2004) 9 SCC 512 .

“78. However, applicability of the international conventions and covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the international covenants can be utilised. Where international conventions are framed upon undertaking a great deal of exercise upon giving an opportunity of hearing to both the parties and filtered at several levels as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the benefits thereof.

79. ***Those conventions to which India may not be a signatory but have been followed by way of enactment of new parliamentary statute or amendment to the existing enactment, recourse to international convention is permissible.*** This kind of stance is reflected from the decisions in *People's Union for Civil Liberties v. Union of India*[(1997) 3 SCC 433 : 1997 SCC (Cri) 434]

, John Vallamattom v. Union of India [(2003) 6 SCC 611] , Madhu Kishwar v. State of Bihar [(1996) 5 SCC 125] , Kubic Darusz v. Union of India [(1990) 1 SCC 568 : 1990 SCC (Cri) 227] , Chameli Singh v. State of U.P. [(1996) 2 SCC 549] , C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil [(1996) 8 SCC 525] , Apparel Export Promotion Council v. A.K. Chopra [(1999) 1 SCC 759 : 1999 SCC (L&S) 405] , Kapila Hingorani v. State of Bihar [(2003) 6 SCC 1] , State of Punjab v. Devans Modern Breweries Ltd. [(2004) 11 SCC 26 : (2003) 10 Scale 202] and Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I [(2004) 9 SCC 512 : (2003) 10 Scale 1] .

80. Furthermore, as regards the question where the *protection of human rights, environment, ecology and other second-generation or third-generation rights is involved, the courts should not be loathe to refer to the International Conventions.*”

(Emphasis supplied)

202. Thus, it is clear that courts have repeatedly relied on and applied the norms of International Laws and international covenants to interpret domestic legislation. The Supreme Court has reiterated that there would be no inconsistency in the use of international norms to domestic legislation, if by reason thereof the domestic law is not breached. International conventions and norms have been read into fundamental rights in the absence of domestic law occupying the field. Conventions to which India is not a signatory have also been permitted to be referred to for the purposes of statutory interpretation.

203. Article 23 of the Constitution of India prohibits trafficking in human beings and beggar and several similar forms of forced labour. It further mandates that any contravention of this constitutional right shall be an offence punishable under the Law.

204. Pursuant to the mandate of the Constitution of India, several legislations have been adopted, some of which may usefully be referred to hereafter. These legislations also reflect India's seriousness of discharging its commitment and responsibility under international instruments.

205. Begging is the subject matter of a special enactment titled **Bombay Prevention of Begging Act, 1956** (adopted by Delhi about 45 years ago in 1960). Section 2(1)(i) of the Act defines begging. Section 6 provides penalty for begging after a detention as a beggar. Under Section 11, any person who employs or causes, any person to solicit or receive alms, or whoever having the custody, charge or care of a child, connives at or encourages the employment or the causing a child to solicit or receive alms or whoever uses another person as an exhibit, is rendered liable for imprisonment of up to three years but not less than one year. So far as the

definition of a child is concerned, under Section 2(1)(iv) a child is defined as the meaning assigned to it under the Children's Act.

206. Similarly, **The Child Labour (Prohibition and Regulation) Act, 1986** prohibits child labour. Section 3 of Child Labour (Prohibition and Regulation) Act, 1986 lays down that no child be permitted to work or be employed in any occupation as set forth in the schedule or the Act. The regulations of conditions of work of children have been dealt under Section 7 to 13 prescribing the hours and period of work, holidays, disputes as to age, minimum standards to ensure health and safety. Section 14 prescribes a penalty of imprisonment of 3 months extendable to one year or fine of Rs.10,000/- upto Rs.20,000/- or both or having contravened the limitations laid down in Section 3.

207. Begging and child labour thus are specific offences under the two special enactments noticed above.

208. So far as the IT Act is concerned, an examination of Section 4 would show that it makes punishable, an act of a person over the age of eighteen years who knowingly lives wholly or in part on the earnings of the prostitution of any other person, with imprisonment for a term of two years.

Where such earnings relate to the prostitution of a child or a minor, the Act is punishable with the more severe sentence of imprisonment for a term of not less than seven years and not more than ten years. A presumption is provided under sub-section (2) of Section 4 of the IT Act, 1956, that even having prior knowledge of such an offence and yet to continue to stay on the earnings is made punishable.

209. A protection home is defined under sub-section (g) of section 2 as an institution by whatever name called (being an institution established or licensed as such under section 21), in which persons, who are in need of care and protection, may be kept under this Act and where appropriate technically qualified persons, equipment and other facilities have been provided, but does not include – (i) a shelter where undertrials may be kept in pursuance of this Act, or (ii) a corrective institution.

210. The scheme of the JJ Act clearly points to only one conclusion. It is important to note that while defining a “**child in need of care and protection**” in the JJ Act, the legislature has inter alia included “a child who is **found begging**, or who is either a **street child, or a working child**’ [Section 2(d)(ia)]. The definition also includes a child who is **being** or is **likely to be grossly**

abused, tortured or exploited for the purpose of sexual abuse or illegal acts [Section 2(d)(vi)] as well as a child who is found vulnerable and is likely to be inducted into drug abuse or trafficking.

211. Under Section 23 of the JJ Act, 2000, if a person, having the actual charge of or control over, the child, inter alia assaults, abandons, exposes or wilfully neglects him or causes or procures him to be assaulted abandoned, exposed or neglected in a manner likely to cause such child unnecessary mental or physical suffering, he shall be punishable with imprisonment for a term which may extend to six months or fine or with both.

Similarly by virtue of section 24, whoever employs or uses any juvenile or the child for the purpose or causes any such person to beg shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

Abetment of the commission of such offence is punishable with imprisonment for a term which may extend to one year and also with fine.

212. The ostensible procurement by any person of a child for the purpose of any hazardous employment, keeping him in bondage and withholding his earnings or uses such earning for his own purposes shall be punishable with

imprisonment extendable upto three years as well as fine under Section 26. Prostitution of a child is without any doubt hazardous employment of the child. It severely adversely impacts the mental and physical health and welfare of the child.

213. Offences punishable under Sections 23, 24, 25 and 26 are made cognizable under Section 27 of the JJ Act, 2000.

214. Under Section 28 of the JJ Act, 2000 where an act or omission constitutes an offence punishable under the JJ Act as well as any other Central or State Act, then notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offences shall be liable to punishment only under such of the enactments as which provides for punishment which is greater in degree.

215. My attention has also been drawn to the binding principles laid down in **Rule 3 of the Juvenile Justice and Protection of Children of the Juvenile Justice (Care & Protection) Rules, 2007** which are placed in Chapter II of the Rules. The same clearly sets out the legislative intent of presumption of the innocence of a child. The relevant principles statutorily prescribed read as follows :-

3. Fundamental Principles to be followed in administration of these rules

-(1) The State Government, the Juvenile Justice Board, the Child Welfare Committee or other competent authorities or agencies, as the case may be, while implementing the provisions of these rules shall abide and be guided by the principles, specified in sub-rule (2).

(2) The following principles shall, inter alia, be fundamental to the application, interpretation and implementation of the Act and the rules made hereunder:

I. Principle of presumption of innocence:

(a) A juvenile or child or juvenile in conflict with law is presumed to be innocent of any malafide or criminal intent up to the age of eighteen years.

(b) The juvenile's or juvenile's in conflict with law's or child's right to presumption of innocence shall be respected throughout the process of justice and protection, from the initial contact to alternative care, including aftercare.

(c) Any unlawful conduct of a juvenile or a child or a juvenile in conflict with law which is done for survival, or is due to environmental or situational factors or is done under control of adults, or peer groups, ought to be covered by the principles of innocence.

(d) The basic components of presumption of innocence are:

(i) Age of innocence

Age of innocence is the age below which a juvenile or child or a juvenile in conflict with law cannot be subjected to the criminal justice system. The Beijing Rule 4(1) clearly lays down that “the beginning of the age of criminal responsibility shall not be fixed at too

low an age level bearing in mind the facts of mental and intellectual maturity”. In consonance with this principle, the **mental and intellectual maturity of juvenile or child or a juvenile in conflict with law below eighteen years is considered insufficient throughout the world.**

II. Principle of dignity and worth:

(a) Treatment that is consistent with the child’s sense of dignity and worth is a fundamental principle of juvenile justice. This principle reflects the fundamental human right enshrined in Article 1 of the Universal Declaration of Human Rights that all human beings are born free and equal in dignity and rights. Respect of dignity includes not being humiliated, personal identity, boundaries and space being respected, not being labelled and stigmatized, being offered information and choices and ***not being blamed for their acts.***

(b) The juvenile’s or **child’s right to dignity and worth has to be respected and protected** throughout the entire process of dealing with the child from the first contact with law enforcement agencies to the implementation of all measures for dealing with the child.

XXX XXX

IV. Principle of best interest:

(a) In all decisions taken within the context of administration of juvenile justice, the **principle of best interest of the** juvenile or the juvenile in conflict with law or **child** shall be the **primary consideration.**

(b) The principle of best interest of the juvenile or juvenile in conflict with law or child shall mean for instance that the traditional objectives of criminal justice, retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice.

(c) This principle seeks to ensure physical, emotional, intellectual, social and moral development of a juvenile in conflict with law or child so as to ensure the safety, well being and permanence for each child and thus enable each child to survive and reach his or her full potential.

(Emphasis supplied)

216. Each one of us is a product of the social values in which we have grown. Whatever we have witnessed within the confines of our homes as well as in the behavior of close ones, especially parents would indelibly impact the manner in which we think and conduct ourselves. Thus a child who has witnessed a drunken father beating his hapless mother every night and then indulge in violent intimacies will grow up believing that the manner in which his father treated his mother is the right and only way that women are to be treated. The fact that the hapless mother bears such violence day after day would lend further credibility and permissibility to such treatment of

women in the child's mind. A child has little, if any, ability to rationalise or understand that the poor mother perhaps had no other option or was subjugated by the weight of her economic deprivation or, more importantly concerns about the welfare of the child as well as fears of being separated from him. The impact of violence or lawlessness on the child gets aggravated by insufficiency in education, lack of role models amongst peers as well as adults and societal trends.

217. *Benjamin N. Cardozo* wrote about the mind of the judges at page 11 of the 5th Indian Reprint in his renowned publication '***The Nature of the Judicial Process***'. While dwelling on the principles followed by judges in decision making, the learned judge has referred to consciousness. Some light on the issues raised in the present matter are thrown by the observations of the learned judge when he talks of the forces which influence even judicial process thus:-

“More subtle are the forces so far beneath the surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another. We are reminded by William James in a telling page of his lectures on pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the

notions of philosophy are unknown or anathema. there is in each of us a stream of tendency, whether you choose to call it philosophy or not, (Cf. N.M. Butier, "Philosophy" pp.18, 43-) which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, tradition beliefs, acquired convictions; and the resultant is an outlook of life, a conception of social needs, a sense in James's phrase of "*the total push and pressure of the cosmos*," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."

218. If such is the influence of surrounding forces on the mind of even the discriminatory judge how can anyone expect a child to not to be influenced by his upbringing, society, community, education and experiences? Certainly, he would be more vulnerable to every such pressure, completely raw and untrained in discerning the difference between the right and the wrong, the permissible and the impermissible, the legal and the illegal.

219. What compelled the child to have indulged in objectionable activity? Was it threat and force or was it economic necessity or peer pressure or was it just an idle past time? The conduct of the child is undoubtedly a product of his circumstances and experiences.

220. The Convention on the Rights of the Child recognizes the vulnerability of girl children who are at a greater risk of sexual exploitation. Prostitution is one of the offences described in the protocol which reiterates that children are the victims of the offences described in the protocol.

221. For these reasons, the international conventions and instruments proceed on the basis that so far as trafficking is concerned, children are exploited and victims, not offenders. The victims of the trap often being the poor, illiterate and ignorant sections of society being the target group of the flesh trade. It has been repeatedly held that the rights of the child is the concern of the society in order to provide a better future for our nation. All International covenants and treaties have thus also provided means to ameliorate the social, educational, economical and cultural conditions of children and to provide our children with a secure environment conducive to their growth.

222. On the question under examination; the observations of the Supreme Court in the pronouncement reported at ***(1997) 8 SCC 114 : AIR 1997 SC 3021 Gaurav Jain vs. Union of India & Ors.*** shed valuable light on the subject. In this case, the court was concerned with several writ petitions filed

under Article 32 of the Constitution on behalf of the prostitutes claiming their right to be free citizens; right not to be trapped again, re-adjusted by economic empowerment, social justice and self sustenance thereby with equality of status, dignity of person in truth and reality and social integration in the main stream, being the magna carta. The court found that many prostitutes themselves were child prostitutes or had children residing with them. Addressing the plight and needs of such children, the court made several observations which throw light on the issue raised in the present case. A reading of the judgment would show that a child found engaged in prostitution has been referred to as a “neglected juvenile“ which expression has been used synonymously as a “*child in need of care and protection*”. The court considered the provisions of the Juvenile Justice Act and observed as follows :-

“35. A child brought to associate with a prostitute or is engaged in the prostitution or the profession of prostitution or another juvenile who leads an immoral or depraved life or one who is likely to be abused or exploited for immoral or illegal purposes for unconscionable gain is also a juvenile. The crime is not attached for identifying him/her as neglected juvenile; it is so in the case of a delinquent juvenile under the Act. They are to be kept in the juvenile home as a place of safety.

37. Even, in certain cases a delinquent juvenile who commits an offence like begging, being the neglected juvenile, is covered as a neglected juvenile and should not be treated as delinquent juvenile since he began begging due to destitution or was forced to beg by organised gangsters. Therefore, all the types of juveniles defined within the ambit of neglected juvenile, though attached with certain acts or omission, are punishable under law they still remain to be neglected juvenile and should be dealt with by the Welfare Board and he brought within the protective umbrella of the juvenile home established under Section 9.....

38. Every child who is found to be neglected juvenile should be dealt by the Board and should be brought within the protective umbrella of the juvenile home. The attribution as 'neglected children' is not social stigma; the purpose is to identify the children as juveniles to be dealt with under the JJ Act which is more a reformative and rehabilitated center rather than for punishing the child as criminal; and mend their behavior and conduct. The definition of 'neglected juvenile', therefore, should be interpreted broadly which is an important function for the purpose of identifying the groups of children who need care and attention and protection for rehabilitation.
 Their withdrawal from the protective umbrella of the JJ Act foils the goals set out; besides all measures to bring the neglected juvenile into the mainstream of the social status end up in failure and frustration.

39. Even if the economic capacity of the mother of neglected juvenile in the red light area to educate and to bring him up would not relieve the child from social trauma: it would always be adverse to keep the neglected juvenile in the custody of the mother or the manager of the brothel; thus, the child prostitute is unsafe and insecure. So, they should be rescued, cared for and rehabilitated. As stated earlier, the three C's, namely, counselling, cajoling and

coercion of the fallen women to part with the child or child prostitute herself from the manager of the brothel is more effective, efficacious and meaningful method to rescue the child prostitute or the neglected juvenile. The income criteria, therefore, is not a factor not to rescue the child prostitute or the neglected juvenile for rehabilitation.

40. It is of necessity to remember that the arms of law are long enough to mould the law to operate on the even keel. The coercive power with the law enforcement agency to rescue the child prostitute or the neglected juvenile, may not necessarily end up as a successful means. It would be last resort when all avenues fail. On the other hand, involvement of the nongovernmental organisations in particular women organisations which are more resourceful for counselling and cautioning, would make deep dent into the thinking mould of the fallen victims and would be a source of success for their retrieval from the prostitution or sending the neglected juvenile to the juvenile homes for initial treatment, psychologically and mentally, and will yield place to voluntaries to surrender guardianship of the child prostitute or neglected juvenile to the Welfare Board or to the NGOs to take custody of a child prostitute or the neglected juvenile for, care, protection and rehabilitation.”

(Emphasis supplied)

223. We find endorsement of this spirit in the Juvenile Justice legislation and specifically recognized fundamental principles enumerated in Rule 3 of the Juvenile Justice (Care & Protection) Rules, 2007.

224. The fundamental principles contained in the JJ Rules are required to be abided by. They guide the application, interpretation and implementation of the statute by the State Government, JJB, CWC as well as the competent

authority and agencies. These are premised on the presumption of the innocence of the child.

225. Rule 3(2)I(a) of the JJ Rules unequivocally declares the fundamental principle that a child is to be presumed to be innocent of any malafide or criminal intent up to the age of eighteen years. Rule 3(2)I(b) mandates that a child's right to presumption of innocence shall be respected throughout the process of justice. Any unlawful conduct of a juvenile or a child or a juvenile in conflict with law which is done for survival or is due to environmental or situational factors or is done under control of adults, or peer groups, ought to be covered by the principles of innocence [Rule 3(2)(Ic)].

226. Under Rule 3(2)I(d)(i) the age of innocence is indicated as the age below which a juvenile or child or a juvenile in conflict with law cannot be subjected to the criminal justice system.

227. The JJ Rules, 2007 also statutorily recognise the principle of family responsibility. [Rule 3(2)(V)]. It is stated that the primary responsibility of bringing up children, providing care, support and protection shall be with the biological parents. Of course, an exception to this situation is provided when

responsibility for the care of the child may be bestowed on willing adoptive or foster parents.

228. The inevitable and only answer to the second question formulated earlier in this judgment is that a person under eighteen years of age who is recovered in police action under Sections 15 and 16 of the IT Act, has to be treated as a '*child in need of care and protection*' within the meaning of the expression under the JJ Act 2000. Such person shall not be treated as a '*juvenile in conflict with law*'.

Conclusions

- (i) A child is incapable of giving consent and any sexual behavior or activity involving a child renders the participating adult open to stringent penal action under several enactments. No penal liability vests on the child for the same.
- (ii) A bare reading of the statutory provisions, International Conventions & Treaties as well as the available jurisprudence manifests the statutory intendment that such child (i.e. a child found begging is a street child, a working child or a child being or likely to be grossly abused, tortured, or exploited for the purpose of sexual abuse or illegal acts as well as a

child who is found vulnerable and likely to be inducted into drug abuse or trafficking) is not to be treated as an offender but is only to be treated as a victim hence as a '*child in need of care and protection*' within the meaning of the expression under the JJ Act.

- (iii) A person under the age of eighteen years, if found involved in any aspect of trafficking or prostitution, within the meaning of the expression in the IT Act, 1956, or is rescued in police action under Section 15/16 of the IT Act cannot be treated as a 'juvenile in conflict with law' as defined Section 2(l) and has to be treated as a 'child in need of care and protection' as defined under section 2(d) of the JJ Act, 2000.
- (iv) Notwithstanding the provisions of Section 17 and 17(A) of the Immoral Traffic (Prevention) Act, 1956 by virtue of Section 31(1) and 39(3) of the Juvenile Justice (Care and Protection of Children) Act, 2000, it is only the Child Welfare Committee constituted under Section 29 of the enactment which has the final authority in respect of the custody and restoration of a child victim – a child in need of care and protection.

- (v) If a person rescued by the police under the IT Act, 1956 and produced before the Magistrate appears to be under 18 years of age, such person must forthwith be transferred to the Child Welfare Committee which shall proceed in the matter in accordance with the provisions of Sections 30, 31, 33 and other relevant provisions. If the child is found to be hailing from a place outside the jurisdiction of the Committee, the Committee shall ensure compliance with the provision of Section 38 of the JJ Act, 2000.

Result

The inevitable result of the forgoing discussion is that it has to be held that the order dated 10th August, 2009 passed by the learned Metropolitan Magistrate is held to be contrary to law and is hereby set aside and quashed. I am informed that pursuant to the orders passed by this court, the Child Welfare Committee has proceeded in the matter in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and therefore, no further orders are required to be passed.

I would also like to place on record my appreciation for the valuable assistance rendered by Mr. Sandeep Sethi, Senior Advocate, Mr. V.

Madhukar, learned counsel for the appellant and Mr. Manoj Ohri, APP for the State in the present matter.

This revision petition and application are disposed of in the above terms.

(GITA MITTAL)
JUDGE

AUGUST 12, 2014
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