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LEGAL STATUS OF PROSTITUTION IN INDIA

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ABSTRACT

The Immoral Traffic (Prevention) Act, 1956 has criminalised commercial prostitution in India but this law does not talk about criminalising voluntary, paid and consensual sex work. In modern times, due to the activeness of various NGOs, due to more focus on the rights of women and due to various progressive judgements of higher courts, women have been given freedom to choose their profession. In this regard, the concerned authorities have been asked to not take any legal actions on the women who are consensually involved in the profession of sex work. In the light of various ambiguities in the modern and traditional societies and due to the changing mindsets of people, it becomes necessary to analyse the legal status of the prostitution as a profession in India and it has to be found out what steps should be taken to secure the rights of sex workers and to provide them an opportunity of rehabilitation.

In this paper, it has been examined whether the act of prostitution is legalised in India or not. The legal status of paid and consensual sex work is analysed. Doctrinal method of research has been followed. Indian laws and judgements of courts have been analysed. The shortcomings and loopholes in the existing legal system have been detected. It has checked how legalisation of paid and consensual sex works will solve various existing and ongoing dilemmas in the perception of people regarding sex work as profession and how legalisation will protect people involved in paid and consensual sex work.

KEYWORDS: Prostitution, The Immoral Traffic (Prevention) Act, 1956, Legalisation of prostitution, Commercial prostitution, Organised sex work, Sex trafficking, Rights of sex workers, exploitation of sex workers, Right to livelihood of sex workers.

1- INTRODUCTION

1.1- FREEDOM TO PRACTICE THE PROFESSION OF SEX WORK

The Bombay HC in a case had said "There is no provision under the law which makes prostitution per se a criminal offence or punishes a person because he indulges in prostitution."¹

The Indian Constitution has provided freedom to do profession as a fundamental right with some reasonable restrictions. According to the Indian constitution, all citizens shall have the right "to practise any profession, or to carry on any occupation, trade or business".² Sex workers who are involved in prostitution with their own consent also have freedom of profession unless they violate the laws made against spreading diseases, sex trafficking, organised commercial prostitution, etc. A law was made in 1956 to criminalise commercial and organised prostitution. But till now this law has not been able to completely eliminate the act of commercial prostitution from India. It is suggested by many experts that paid and consensual sex work must be formally recognised in India through written laws. Through formal recognition, sex workers can be legally allowed to carry on their profession which will prevent the trafficking of girls/ women into prostitution and women consensually coming into this profession can be protected from exploitation and shame.

Places where organised and commercial prostitution is openly visible in India like Sonagachi in Kolkata, GB road in Delhi, Kamathipura in Mumbai, etc. have become hubs for trafficking girls and women into prostitution. Apart from these notorious places, there are many less popular places and many temporary hubs where girls/women are forcefully kept to involve them in prostitution. These sex workers face a lot of violence, they are sexually exploited a lot and not paid well. In this way, laws have to be rigorously implemented to take actions against all permanent, temporary as well as popular and less popular hubs of commercial and organised prostitution. But the sex workers who themselves choose to offer sex services must be allowed to earn livelihood because a complete ban on prostitution is not possible and the right to profession of sex workers(who are not trafficked) must be protected.

2- THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956

Sex trafficking and organising prostitution through brothels are criminalised by the ITPA Act in India. This act assumes prostitution as "the sexual exploitation or abuse of persons for commercial purpose".³ According to this act a brothel is a place "used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes".⁴ Commercial prostitution is very commonly organised in brothels in India and if a person who is running a brothel or any premises to be used a brothel, then he can be punished with a maximum punishment of rigorous imprisonment upto 5 years with fines.⁵ A maximum

¹ *Kajal Mukesh Singh vs State of Maharashtra*, CRIMINAL WRIT PETITION NO. 6065 OF 2020.

² The Constitution of India, 1950, Art.19 (1) (g).

³ The Immoral Traffic (Prevention) Act, 1956 (Act No. 104 of 1956), s.2(f).

⁴ The Immoral Traffic (Prevention) Act, 1956 (Act No. 104 of 1956), s.2(a).

⁵ The Immoral Traffic (Prevention) Act, 1956 (Act No. 104 of 1956), s.3.

punishment of imprisonment upto 10 years can be imposed if a person is detained for prostitution in a brothel or in any other premises, and this punishment has to be imposed if there was the consent of that victimised person or not.⁶ It has to be said that the perception regarding livelihood has changed in the modern times, it is not logical to criminalise consensual sex work and courts of India also have many times asked for securing the rights of sex workers. The silence of the existing laws regarding paid and consensual sex work creates ambiguity because it indirectly debars actions against persons who involve in paid and consensual sexual activities but at the same time many sex workers become prone to exploitation because their rights are not expressly explained in the written laws. Sex trafficking and organising commercial prostitution should still be treated as crimes but India needs a modern law to properly define laws related to prostitution by abolishing the old ambiguous laws. The new law must expressly provide it to be a legal act if a sex worker is providing sexual services without being enforced by someone and in this new law all the rights of sex workers must be codified.

3- COMMERCIAL PROSTITUTION AS AN ORGANISED CRIME

The BNS, 2023 has defined what constitutes an organised crime and it has included "human trafficking for prostitution" as an organised crime.⁷ According to the BNS, 2023 maximum punishment for an organised crime can go upto imprisonment for life or death penalty can also be granted.⁸ Though, unlike the IPC, the BNS has expressly defined and criminalised organised crimes but commercial prostitution has always been an organised crime in India in which most of the workers are trafficked and forcefully recruited. According to an estimate there are nearabout 8.25 lakh female sex workers in India who have been identified⁹ while the real numbers of sex workers can be much more than this. NACO (National AIDS Control Organisation) which comes under the Ministry of Health & Family Welfare has said that in India there are nearabout 9 lakh sex workers. But many sex workers profess this job temporarily or very secretly, hence the exact number of sexworkers can be even more than 10 lakh in India. Also, there are many syndicates which are still not trapped which may have been recruiting so many sex workers who are still not counted.

Living conditions of sex workers are quite bad and because these workers are marginalised and discriminated against hence sexually exploiting them continuously becomes so easy. Most of the sex workers can not openly explain what profession they do because it will bring shame towards them from society members. Due to moral policing and shame, the sex workers are not considered as a part of dignified society in India. Generally, commercial sex works are performed in traditional hubs or small or temporary hubs through an organised syndicate.

⁶ The Immoral Traffic (Prevention) Act, 1956 (Act No. 104 of 1956), s.6.

⁷ The Bharatiya Nyaya Sanhita, 2023 (Act No.45 of 2023), s.111(1).

⁸ The Bharatiya Nyaya Sanhita, 2023 (Act No.45 of 2023), s.111(2).

⁹ Ms. Amritha VS, Dr. Jobi Babu and Dr. KM Ashifa, "Legalization Of Sex Work in India: Perspectives on Changes in Socio-Economic and Living Conditions of Female Sex Workers" Vol.10 No.4S *Journal of Survey in Fisheries Sciences* 409-418 (2023), available at: <https://sifisheriessciences.com/journal/index.php/journal/article/view/829> (last visited on March 12, 2024).

4- PAID & CONSENSUAL SEX WORK IS NOT A CRIME

The West Bengal HC in 2011 had said that sex workers are covered under Article 21¹⁰ to live a dignified life.¹¹ Since sex workers have the right to carry on their profession and no law in India has expressly criminalised the paid and consensual sex work hence it is a violation of fundamental right of sex workers if they are tortured, shamed or harrassed for involving in and carrying on their profession. Attaching social stigma with the profession of sex work and not respecting the rights of sex workers stops them to live a dignified life.

Paid sex work or prostitution is considered as a taboo in Indian society but in reality no Indian law has power to criminalise consensual sexual activities. The Indian laws criminalise trafficking of victims like girls & women for prostitution and these laws don't allow opening and running of the brothels. Indian laws also have criminalised the act of pimping or soliciting others or persuading customers for providing them sexual activities in brothels or at other places but the Indian laws can not punish people who are involved in consensual sexual activities even if it was a paid sexual activity still there have been many cases in which consenting people have been tortured mentally and physically by police and locals. Even when the victims were involved in consensual sexual activities still they were trapped in various legal cases. The problem here is that the laws of India have not expressly said about the legal status of consensual and paid sexual activities that is why many people get the licence to torture those consenting people. In this way, it has become quite necessary to declare in a written law in India that paid and consensual sexual work is not a crime. In other words, India has to legalise the act of prostitution in India through which sex workers involved in consensual and paid sexual activities can be protected from shame and torture.

Here, legalisation of prostitution does not mean legalisation of organised prostitution but it means giving a formal legal sanction to consensual & paid sex work, and providing protection to an individual sex worker who has adopted the profession sex work with her own consent. The trafficking of victims, organising brothels, soliciting and pimping for sexual activities still have to be continued as crimes and the culprits must not be spared.

5- DECISIONS OF THE SUPREME COURT PROTECTING THE RIGHTS OF SEX WORKERS

In many decisions, the Supreme Court (SC) has declared that sex workers are also allowed to live with dignity and they have the right to livelihood, but still the trauma of sex workers has not ended. In this way, proper protection and safeguard can only be provided if the prostitution or consensual, paid sexual activities are formally legalised in India.

¹⁰ The Constitution of India, 1950, Art.21.

¹¹ *Budhadev Karmaskar vs State of West Bengal*, 2011 AIR SCW 1303, 2011 (11) SCC 538, 2011 CRI. L. J. 1684, AIR 2011 SC (CRIMINAL) 575,

The SC in 2018, had urged the Government to protect sex workers by stopping their exploitation. In some specific areas the act of prostitution was asked by the SC to be legalised.¹² The SC has also ordered that sex work is a profession and equal protection and dignity are deserved by those who practice this profession. Police has been asked as per the directions of the SC to not interfere in the workings of sex workers, the police is asked also not to take criminal actions if any adult sex work is practicing their profession with their own consent.

5.1- THE SC IN SUPPORT OF SEX WORKERS' RIGHT

A panel was appointed in 2011 by the SC to frame recommendations with respect to the "rights of sex workers".¹³ In 2016, this panel had submitted its report. In 2022, guidelines were issued by the Hon'ble SC to implement a few recommendations of the panel. In this regard, the SC had used the powers granted to it under Article 142.¹⁴ The existing laws fail to provide remedies to the sex workers, in this regard the steps taken by the SC is quite commendable to provide justice to the sex workers. The major directions of The SC were-

- In this order, the SC had directed the police to not verbally or physically abuse sex workers and police were also asked to treat or behave with sex workers in a dignified manner.
- Media was prohibited to publish the pictures of sex workers, the identity of sex workers were also asked not to be published when media persons report any rescue operation. The SC directed to file a case under Section 354C of the IPC for voyeurism against the media persons if they publish in their reports the pictures/images of sex workers and their clients together.
- The SC stated that it is unlawful to run a brothel but voluntary sex work by the sex workers is not illegal hence no sex workers should be "arrested or penalised or harassed or victimised" in the process of raid into any brothel.
- The SC said that a mother who is a sex worker should not be separated from her child. Involvement of that woman into sex work should not be a ground to separate the child from the mother. If a child or minor is living with sex workers then there should be no presumption regarding the trafficking of that child/minor. Through tests it can be determined whether a child is a son/daughter of a sex worker and if the claim of the sex worker regarding her child is found true then that child should not be separated from that sex worker.
- Sex workers also have the right to file complaints and the SC ordered to accept the complaint and asked police to not torture and discriminate with sex workers when they ask to file complaint. Even if the offence is of sexual nature then also the complaint of sex workers must be accepted without any discrimination.
- In this regard separate guidelines were asked to be published by the Press Council of India.

¹² Garima Harsh, "Prostitution: Legality and Morality in India" *Times of India*, Jun 19, 2023, available at: <https://timesofindia.indiatimes.com/readersblog/welfaremeasuresunderthefactoriesactcriticalappraisal/prostitution-legality-and-morality-in-india-55396/> (last visited on March 12, 2024).

¹³ Panel formed on July 19, 2011 comprising Senior Advocates Pradip Ghosh and Jayant Bhushan, and the NGOs Usha Multipurpose Co-operative Society, Durbar Mahila Samanwaya Committee and Roshni Academy.

¹⁴ The Constitution of India, 1950, Art.142.

- The directions given by SC have pressured the central government to frame a law to protect the rights of sex workers and the directions of the SC will remain in force until the central government brings that specific law.

The guidelines of the SC also imposed some responsibilities on the states:

- As a survivor of sexual assault is provided various facilities, the same facilities should be provided to a sex workers when she has become a victim of sexual assault.
- A survey to examine all protective homes can be ordered, it is to be conducted by the state governments for the purpose of knowing how many adult women are detained there against their will, it will help to take quick action in their rescue and release.
- Sensitisation of the police & other law enforcement agencies was also asked to be done.
- If sex workers are taking any measures in the interest of their health & safety then those measures must not be declared as an offence and at the same time it must not be construed as an evidence in the process of committing a crime.

6- FINDINGS OF AN EMPIRICAL STUDY FOR LEGALISATION OF PROSTITUTION IN INDIA

In a recent study, researchers found that the sex workers had to choose this profession either because they were so poor or the women chose this profession because they were not supported financially by their family members or there were some women who deliberately picked this profession either because of money, pleasure or because they joined this profession by influencing from the other women of community who had already joined this profession. It was found in this study that many of the sex workers were arrested multiple times even when they had deliberately chosen this profession. The allegation of Police was that these women mostly work as pimps and invite people to have sex with other young women. Police alleged that they don't usually take actions against sex workers but when these workers work as pimps or they involve in crimes then arresting them becomes necessary. All sex workers in this study when asked about the legalisation of sex work had supported the legalisation of sex work in India and according to them legalisation will protect sex workers from legal disputes & unnecessary police interrogations and the legalisation will give them a dignified life. The researchers concluded that better quality of life can be ensured for sex workers in India by the legalisation of prostitution. Decriminalisation and effective implementation of new laws will improve the social & economic conditions of sex workers and it will protect their fundamental right of profession. The researchers also said that without collective effort, the protection of the rights of sex workers is quite difficult hence prevention of atrocities and existence of a safe society is very essential if legal status to the prostitution has to be given in India.¹⁵

¹⁵ Ms. Amritha VS, Dr. Jobi Babu and Dr. KM Ashifa, "Legalization Of Sex Work in India: Perspectives on Changes in Socio-Economic and Living Conditions of Female Sex Workers" Vol.10 No.4S *Journal of Survey in Fisheries Sciences* 409-418 (2023), available at: <https://sifisheriessciences.com/journal/index.php/journal/article/view/829> (last visited on March 12, 2024).

7- CONCLUSION AND SUGGESTIONS

India has criminalised commercial prostitution and the new criminal code i.e. the BNS, 2023 has called it an organised crime if human trafficking is done to recruit the victims in sex work for which death penalty or life imprisonment can also be imposed on conviction. According to the existing Indian laws, anybody running a brothel, pimping and publicly asking people for availing the services of sex workers or trafficking victims for prostitution is said to be committing a cognisable offence and hence the culprit is severely punished on conviction. But the Indian laws are silent on the status of paid and consensual sex work at private places. It shows that people involved in the paid and consensual sexual activities in any private place or premises can not be punished because Indian laws do not formally declare it as a crime. In this way sex workers who provide sexual services need to be protected from shame and torture. For protecting sex workers from unnecessary legal disputes, interrogations, shame, tortures, etc. it is suggested that India should formally declare paid and consensual sex work at private places or private premises as a legal act. The formal declaration must also explain in detail all the rights of sex workers which is currently not formally explained in any Indian laws.

Here are some suggestions which have to be seriously considered to extend a dignified life to the sex workers in India-

- A written law must be brought as soon as possible which must formally give legal sanction to paid and consensual sex work at private place or private premises,
- the new law must consider the recommendations of the panel formed by the SC in 2011,
- the directions of the SC in 2022 based on the recommendations of the panel formed in 2011 must be mandatorily added into those written laws,
- people must be made aware of the rights of the sex workers and the orders of the courts in the favour of sex workers must be implemented strictly,
- awareness must be increased to respect the right to profession of sex workers,
- All the opportunities for rehabilitation must be given to the sex workers,
- the new laws if passed from the Parliament must be implemented as soon as possible,
- There must be provisions for mandatorily providing quick legal aid to the sex workers if they want to complain against any form of crimes or wrongs,
- The purpose of legalisation of sex work must be to provide legal protection to the existing sex workers, there must advanced programmes to teach them some vocational skills and to rapidly provide them an opportunity to rehabilitate. The purpose should never be to encourage other women to adopt sex work as a profession.