

Supreme Court of India

Bachpan Bachao Andolan vs Union Of India & Ors on 18 April, 2011

Author: D Bhandari

Bench: Dalveer Bhandari, A.K. Patnaik

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) No.51 OF 2006

Bachpan Bachao Andolan

... Petitioner

Versus

Union of India & Others

... Respondents

J U D G M E N T

Dalveer Bhandari, J.

1. This petition has been filed in public interest under Article 32 of the Constitution in the wake of serious violations and abuse of children who are forcefully detained in circuses, in many instances, without any access to their families under extreme inhuman conditions. There are instances of sexual abuse on a daily basis, physical abuse as well as emotional abuse. The children are deprived of basic human needs of food and water.

2. It is stated in the petition that the petitioner has filed this petition following a series of incidents where the petitioner came in contact with many children who were trafficked into performing in circuses. The petitioner found that circus is one of the ancient forms of indigenous entertainment in the world, with humans having a major role to play. However, the activities that are undertaken in these circuses deprive the artists especially children of their basic fundamental rights. Most of them are trafficked from some poverty-stricken areas of Nepal as well as from backward districts of India. The outside world has no meaning for them. There is no life beyond the circus campus. Once they enter into the circuses, they are confined to the circus arena, with no freedom of mobility and choice. They are entrapped into the world of circuses for the rest of their lives, leading a vagrant

tunnelled existence away from the hub of society, which is tiresome, claustrophobic and dependent on vicissitudes.

3. It is submitted that the petitioner is engaged in a social movement for the emancipation of children in exploitative labour, bondage and servitude. Bachpan Bachao Andolan has been able to liberate thousands of children with the help of the judiciary and the executive as well as through persuasion, social mobilization and education.

4. It is submitted that for the first time the petitioner came to know about the plight of children in Indian circuses way back in 1996. At that time, the petitioner had rescued 18 girls from a circus performing in Vidisha District of Madhya Pradesh. This was possible after a complaint made by a 12 year old girl, who managed to escape from the circus premises. Her complaint was that she and several other Nepalese girls had been trafficked and forced to stay and perform in the circus where they were being sexually abused and were kept in most inhuman conditions.

5. Following this incident, an organised attempt was made by the petitioner to understand and learn more about the problem of child labour in Indian Circuses and how to eradicate the same. This began in July 2002 with the initiation of a research on the problem of child labour in Indian circuses. The findings in the abovementioned research were compiled in a report termed "Eliminating Child Labour from Indian Circuses".

6. Once all the above facts and figures were established, the petitioner decided to implement a multi-pronged strategy to eradicate the practice of employing children in Indian circuses. Simultaneously, preparations were made to put across the problem in front of circus owners to make them aware of the moral and legal questions pertaining to the use of children in circuses. The petitioner initiated a dialogue with all the major circus owners and appealed to them to stop trafficking, bondage, Child labour and other violations of child rights. The Indian Circus Federation (for short 'I.C.F.') responded positively but ironically this body has a very thin representation from the circus industry with approximately less than 10% of the big circuses and probably less than 20% of all the circuses were members of this Federation.

7. It is submitted that the petitioner convened a meeting with the circus owners on the 18th and 19th August, 2003 where a few owners under the umbrella of I.C.F. agreed to make a declaration that there shall be no further use of children in the circuses in India and a full list of the children employed by them will be provided to the petitioner and that they would voluntarily phase out all the children from their circuses in a time bound manner. It was also decided that the petitioner and its partner Non-

Governmental Organizations (for short, NGOs) in Nepal will help in repatriation and rehabilitation of liberated children.

8. The petitioner submitted that since the I.C.F. does not have enough influence even on its own members, the agreement did not get implemented. However, the petitioner kept on receiving information and complaints from several parents through the NGOs working in Nepal. The

petitioner sent the staff of his organization to cross-check and reconfirm the facts in Bhairawa, Hetauda in Nepal and Siliguri in India and found that organized crime of trafficking of children for Indian circuses, particularly from Nepal is rampant. In February and March, 2004, the petitioner received complaints from many Nepalese parents whose children have been trapped in circuses for more than 10 years and had never been allowed to meet them on one pretext or the other even after repeated requests to the circus owners. Majority of the complaints were for the children in the Great Indian circus (a non-federation circus) which was found to be located in Palakkad, Kerala. In June, 2004, the petitioner came to know through credible NGOs and individuals working in Hetauda, Nepal that the daughters of 11 parents were trapped into Great Roman Circus in India. The petitioner has since then conducted several studies and interviews with various people who are engaged in circus.

9. The petitioner further found that life of these children begins at dawn with training instructors' shouting abuses, merciless beatings and two biscuits and a cup of tea. After 3 to 5 shows and of lot of pervert comments of the crowds, the young girls are allowed to go back to their tents around midnight. Even then, life might have something else in store, depending upon the nature and mood swings of the circus owners and managers. If any child complains about the inadequate amount of food or the leaking tent in the rain or if a child is scared on the rope while performing the trapeze, he/she is scolded and maltreated by the managers or employers and sometimes even caned on one pretext or the other.

10. There are no labour or any welfare laws, which protect the rights of these children. Children are frequently physically, emotionally and sexually abused in these places.

The most appalling aspect is that there is no direct legislation, which is vested with powers to deal with the problems of the children who are trafficked into these circuses. The Police, Labour Department or any other State Agency is not prepared to deal with the issue of trafficking of girls from Nepal holding them in bondage and unlawful confinement. There is perpetual sexual harassment, violation of the Juvenile Justice Act and all International treaties and Conventions related to Human Rights and Child Rights where India is a signatory.

11. The petitioner submitted that this Court in the case of N.R. Nair & Others v. Union of India & Others (2001) 6 SCC 84 upheld the rights of animals who are being made to perform in these circuses after understanding their plight.

The situation of children in circuses is no different if not worse.

12. The petitioner has made various attempts to regulate and improve the conditions of children in circuses including engaging the circus owners association. However, none of them have derived good results. It is categorically submitted that the petitioner does not want the circuses to be completely banned or prohibited but there is a strong need to regulate this as any other industry including ensuring safety and other welfare measures of all those who are working in circuses, particularly the children.

Almost all the circuses employ at least 50 persons and therefore a large number of labour laws should be applied.

13. The petitioner seeks application of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and also suggests that intra-state trafficking of young children, their bondage and forcible confinements, regular sexual harassment and abuses should be made cognizable offences under the Indian Penal Code as well as under section 31 of the Juvenile Justice Act. Children Welfare Committees under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be empowered to award compensation to all those victims rescued from the circuses with a time bound rehabilitation packages and the State Government to create a fund of the same.

14. Mostly, these children are sold to the circus owners either by the agents or their relatives or sometimes the poor parents are lured into the web by promising high salaries, luxurious life etc. However, some exceptional circuses were also found (only 4) that treated their employees marginally better and allowed them to avail the privilege of limited movement outside the circus campus for limited time, but child labour was prevalent in these circuses as well and artists were not given minimum wages.

15. The petitioner has complained about living and working conditions of the children and has enumerated the following broad categories which are set out as under:

i. Insufficient Space In almost all the circuses visited by the research team, the living conditions were quite similar, but nonetheless deplorable. There are separate sleeping arrangements for males and females, with the Company Girls segregated from the rest of the circus troupe by a boundary. There are also separate tents for the families working in the circuses. Usually 5 to 10 and sometimes even more people are crammed into a single tent, thus most of the child artists complain of insufficient space and lack of personal space and privacy.

ii) Meals Most of the circuses provide two meals - lunch and dinner to the artists and tea also two times from the canteen run by the management. The quantity and quality of the food is variable, depending on the management. Most often, the food is inadequate to satisfy the appetite of young growing children.

iii) Sleep Timings Sleep timings are also very erratic, depending upon the nature of the work being performed by the child artists, though on a general trend most go to bed at midnight after the last show is over, to be woken up at dawn for practise.

iv) Poor Sanitation There are no proper toilets and bathrooms. Make-shift toilets are created on the circus ground near the tents and all the company girls have to share it and the stench around them is unbearable. In general, condition of sanitation in circuses is most pathetic. It also precipitates unhygienic conditions that could lead to diseases. Invariably all the artists voiced their dissatisfaction on the issue of sanitation and hygiene.

v) No Health Care Personnel Another important issue concerning the artists is the lack of any health care personnel to look into their day-to-day health care needs as well as the accidents that are so common in the circuses. The manager or the keeper usually provides medication for common ailments such as fever, cold etc. and looks into the first-aid needs of the artists. For a serious medical condition or an accident during training or performance, the trainer or the manager usually accompanies the patient to the nearest medical help.

The management bears the charges of the treatment during that time, but later deducts it from the salary of the incumbent. However, some managements do bear the medical bill of the artists if a mishap occurs during the performance or training.

Overall, it can be said that the living conditions inside the premises of the circus arena are squalid and deplorable, with no facilities and basic amenities being provided to the circus artists, not even proper sanitation.

vi) High Risk Factor Nature of the activities in circuses is such that the risk factor for the artists is very high as accidents and mishaps during practise sessions and shows are common phenomenon. On top of that, there are no health care personnel employed by the circuses to look into the health care needs of the artists, even at the time of emergency. It was found that the lives of the children was endangered due to the risk factor involved in the circuses, especially those who were involved in items like ring of death, well of death, sword items, rope dance etc. They constituted 10% of the total number of children. Rest 60% fell in the medium risk category while 30% were not involved in any risky items. Moreover, some circuses either fail to or are ignorant about taking the necessary precautions, which further heightens the risk involved.

In fact, the research team witnessed an accident while visiting one of the circuses.

vii) Remuneration Besides paying meagre salaries to the children, the management of some circuses holds back the salaries of the children saying that they would be paid only to their parents when they visit them, which rarely happens. Salary accounts are often manipulated and the loss due to accidents or mishaps is not compensated.

viii) Bound by Contract The child artists are brought to the circuses to be contracted for 3 to 10 years and once the contract is signed/agreed upon by the parents or guardians of the children, these young ignorant children are bound and indebted to the circus management and are unable to break away from the circus, even if they are discontented with their lives in the circus.

ix) Daily Routine hindering their All-round Development In the circus, their daily routine starts with practising even before the sunrise (rigorous training session initially) mostly accompanied with verbal and physical abuse and harsh physical punishments at times, for the slightest error or no error at all. From afternoon onwards until midnight, they are on the stage, performing and enthralling the audience with their vivacity and wit. They cannot share their agony and grievances or raise their voice against the torturous life they are forced to lead. For them, there is no education, no play, no recreation and their life is confined to the circuses without any exposure to the outside

world. All this prohibits them from knowing the other opportunities available, as they are aware of and are exposed to just one aspect of life, that is the aspect they see in the circuses they work in. Due to the cruel and inhuman attitude of the management in some circuses, which imposes restrictions on the children for meeting their folks, and also due to the traveling nature of the troupe, most of the children end up losing contact with their parents, especially those across the border or residing at far off places even within the country. And those fortunate few, who get a chance to meet their parents, do so once or twice a year, either when their parents visit or when they are allowed to go home. Consequently, they are exposed to a world which hinders their psychological, spiritual and socio-economic development, with no knowledge of their rights, duties and scope for a better future and thus, are left with no other option but to continue working in the circuses for the rest of their lives.

Instability in life, due to the circus's nomadic existence, makes it difficult for them to pursue formal education, resulting in a large number of illiterate children and adults in circuses.

16. The employment of the children in circus involves many legal complications and in that respect major complications are as under:

1. Deprivation of the children from getting educated thereby violates their fundamental right for education enshrined under Article 21A of the Constitution.
2. Deprivation of the child from playing and expression of thoughts and feelings, thereby violating the fundamental right to freedom of expression.
3. Competency to enter into contract for working in circus.
4. Violation of statutory provisions of law like Employment of Children's Act, 1938, The Children (Placing of Labour) Act, 1933, The Child Labour (Prohibition and Regulation) Act, 1986, Minimum Wages Act, 1976, The Prevention of Immoral Traffic Act, Equal Remuneration Act, 1976 and Rules made thereunder and the Bonded Labour System (abolition) Act, 1976 read with rules made their under, the Factories Act, 1948, Motor Transport Workers Act, 1961 etc.
5. Existing labour laws and legitimacy of contracts of employment for children.
6. The legitimacy of contracts of employment for children and working conditions.

17. The petitioner has given innumerable instances in the petition of abuse of children in the circuses. All those instances demonstrate under what horrible and inhumane conditions the children have to perform in the circuses.

18. The experiences of the petitioner are only a scratch on the surface and there are many children who are being trafficked regularly into circuses. While it is not the case of the petitioner that circuses should be completely banned and prohibited, there is a strong need to regulate this as any other

industry including ensuring safety gears and other measures as are done in other countries.

19. The petitioner has filed the petition with the following prayers:

1. Issue a writ of mandamus or any other appropriate writ, order or direction, directing the respondents to frame appropriate guidelines for the persons engaged in circuses;
2. Issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to conduct simultaneous raids in all the circuses by CBI to liberate the children and to check the gross violation of all fundamental rights of the children;
3. Issue a writ of mandamus or any other appropriate writ order or direction to appoint special forces in the borders to ensure action and to check on the cross border trafficking;
4. Issue a writ of mandamus or any other writ order or direction applying the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and make intra-state trafficking of young children, their bondage and forcible confinements, regular sexual harassments and abuses cognizable offences under the Indian Penal Code as well as under section 31 of the Juvenile Justice Act.
5. Issue a writ of mandamus or any other appropriate writ order or direction to empower child welfare committee under the Juvenile Justice (Care and Protection of Children) Act, 2000 to award compensation may be awarded to all those victims rescued from the circuses with a time bound rehabilitation package and the State Government to create a fund for the same;
6. Issue a writ of mandamus or any other appropriate writ order or direction to lay out a clear set of guidelines prohibiting the employment/engagement of children up to the age of 18 years in any form in the circuses.

20. This court issued notices to the Union of India and other States and Union Territories. Replies have been filed on behalf of various States and the Union Territories.

21. Shri Gopal Subramaniam, the learned Solicitor General appearing for the Union of India has filed written submissions with the heading "The Indian Child : India's Eternal Hope and Future".

22. Learned Solicitor General has broadened the scope of this petition and has tried to deal with the problem of children trafficking. He submitted that:

1. Trafficking in human beings is not a new phenomenon. Women, children and men have been captured, bought and sold in market places for centuries. Human

trafficking is one of the most lucrative criminal activities. Estimates of the United Nations state that 1 to 4 million people are trafficked worldwide each year. Trafficking in women and children is an operation which is worth more than \$ 10 billion annually. The NHRC Committee on Missing Children has the following statistics to offer:-

a. 12.6 million (Governmental sources) to 100 million (unofficial sources) stated to be child labour; b. 44,000 children are reported missing annually, of which 11,000 get traced;

c. About 200 girls and women enter prostitution daily, of which 20% are below 15 years of age.

2. International conventions exist to punish and suppress trafficking especially women and children.

(Refer: UN Protocol to Prevent, Suppress and Punish Trafficking in Persons also referred as the PALERMO Protocol on Trafficking). Trafficking is now defined as an organized crime and a crime against humanity. The convention being an international convention is limited to cross border trafficking but does not address trafficking within the country. The definition of trafficking is significant:-

" The recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation....".

3. Exploitation shall include at a minimum, the exploitation of the prostitutes of others or other forms of sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or the removal of organs.

4. It is submitted that children under 18 years of age cannot give valid consent. It is further submitted that any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used. Three significant elements constitute trafficking:-

a. The action involving recruitment and transportation;

b. The means employed such as force, coercion, fraud or deception

including abuse of power and
bribes; and

- c. The purpose being exploitation
including prostitution.

5. Internationally, there is a working definition of child trafficking. The working definition is clear because it incorporates the above three elements. In June 2001, India has adopted the PALERMO Protocol to evolve its working definition of child trafficking.

6. The forms and purposes of child trafficking may be:-

- a. Bonded labour;
- b. Domestic work;
- c. Agricultural labour;
- d. Employment in construction
activity;
- e. Carpet industry;
- f. Garment industry
- g. Fish/Shrimp Export;

- h. Other sites of work in the formal and informal economy.

7. Trafficking can also be for illegal activities such as:-

- a. Begging;

- b. Organ trade;

- c. Drug peddling and smuggling;

8. Trafficking can be for sexual exploitation, i.e. a. Forced prostitution;

b. Socially and religiously sanctified forms of prostitution;

- c. Sex tourism;

- d. Pornography;

9. Child trafficking can be to aid entertainment in sports:-

- a. Circus/dance troupes;

- b. Camel jockeying;

10. Trafficking can be for and through marriage.

Trafficking can be for and through adoption. It is submitted that intervention is possible in cases of child trafficking only if fundamental principles are kept in mind. The fundamental principles are the following:-

- a. The child has to perform to the best of his ability. The growth of a child to its potential fulfillment is the fundamental guarantee of civilization;
- b. Empathy for troubled children by adopting non-discriminatory and attitudes free of bias;
- c. Children must be protected in terms of well-being under all circumstances;
- d. Right to freedom from all forms of exploitation is a fundamental right;
- e. Confidentiality of the child in respect of the child's privacy must

be maintained;

- f. Trafficking is an organized crime which could have multiple partners including syndicates.

11. Intervention must be a joint initiative of government and non-governmental organizations which can be, in some cases, potential partners. An effective intervention must in all circumstances lead to effective and enduring protection of children from exploitation, abuse and violence.

23. According to the Solicitor General it is the bounden duty of the police to discharge its obligation. He submitted that the following guidelines should be mandated:

- i. Care must be taken to ensure the confidentiality of the child and due protection must be given to her/him as a witness;
- ii. The detailed interview of the victim should be done preferably by crisis intervention centres/members of the Child Welfare Committee under the Juvenile Justice Act.

There should be adequate breaks and intervals during the interview with a child victim;

iii. If the police employ a child friendly approach to the entire investigation, the possibility of getting all relevant information gets higher. This can be done by having a supportive environment for the child at the police station wherein attention is paid to his needs. This can be done at the police station itself or at any other place co-

managed by police any NGO/CBO. Support persons for the child should be contacted and in their absence, any civil society group working with/for children or members of CWC (whoever the child feels comfortable with) could be asked to the present;

iv. Due care must be maintained to attend the issues like interpreters, translators, record maintaining personnel, audio-video recording possibilities etc.;

v. As far as possible, the same investigation officer must follow up the case from investigation stage to the trial stage;

vi. There should be provision of good and water as well as toilet facilities for the child in the police station and the hospital;

vii. No child should be kept in a Police Station;

viii. Where a special juvenile police unit or a police officer has been designated to deal with crimes against children and crimes committed by children, cases relating to children must be reported by such officer to the Juvenile Justice Board or the child welfare committee or the child line or an NGO as the case may be.

24. It is submitted that Articles 23, 39, 14 and 21 of the Constitution of India guarantee every child to be freed from exploitation of any form. Article 23 prohibits traffic in human beings, 'beggar' and other forms of forced labour.

25. Force, assault, confinement can be dealt with under sections 319 to 329 for simple and grievous hurt, sections 339 to 346 for wrongful restraint and wrongful confinement;

sections 350 to 351 for criminal force and criminal assault;

section 370 for import, export, removal, disposing/accepting, receiving, detaining of any person as a slave; section 361 to 363 kidnapping and abduction; section 365 for kidnapping, abduction for wrongful confinement;

section 367 for kidnapping, abduction for slavery or to subject a person to grievous injury; sections 41, 416, 420 for fraud, cheating by personation; sections 465, 466, 468 and 471 for forgery and using forged documents as genuine;

section 503 and 506 for criminal intimidation. It is submitted that a direction must be issued to the Commissioner of Police, Delhi and the State Governments and Union Territories that their police force are required to be sensitized to the above provisions while dealing with safety and freedom of children.

26. The Juvenile Justice (Care and Protection of Children) Act, 2000 was amended in 2006 by Act 33 of 2006. It is a special legislation for children and defines children as 'a person upto the age of 18 years'. The Juvenile Justice Act is build upon a model which addresses both children who need care and those who are in conflict with law.

27. According to the learned Solicitor General, the Goa Children's Act, 2003 must be viewed as a model legislation.

He submitted that not only does it define child trafficking but also seeks to provide punishment for abuse and assault of children through child trafficking for different purposes such as labour, sale of body parts, organs, adoption, sexual offences of pedophilia, child prostitution, child pornography and child sex tourism. All state authorities such as airport authorities, border police, railway police, traffic police, hotel owners are made responsible under the law for protection of children and for reporting offences against children. It is submitted that until a suitable legislation is enacted, directions of a preventive nature may be issued against the police authorities in all States to protect

the rights of children.

28. Learned Solicitor General submitted that there is blatant violation of Child Labour (Prohibition and Regulation) Act, 1986, Children Pledging of Labour Act, 1933, the Bonded Labour System Abolition Act, 1976, the Factories Act, 1948, the Plantation Labour Act, 1951, the Mines Act, 1952, the Merchant Shipping Act, 1958, the Apprentices Act, 1961, the Motor Transport Workers Act, 1961, the Bidi and Cigar Workers (Conditions of Employment) Act, 1966, the West Bengal Shops and Establishment Act, 1963.

29. Learned Solicitor General submitted that each State Government must constitute committees for the purpose of preventing child labour. It is submitted that there should be an apex committee constituted by each State Government with the following:

- (a) The Chief Secretary of the State;
- (b) Secretary incharge of Child and Women Development;
- (c) Director of Health and Family Welfare;
- (d) Commissioner of Police of the State;
- (e) Two Psychiatrists to be nominated by the Indian Psychiatric Society.

30. The State Government with the assistance of the said committee by a transparent process will constitute committees for each district consisting of health workers, police personnel, factory inspectors and people from the civil society/NGO. The committee will be able to inspect and determine whether there is forced employment of children.

31. All dhabas/restaurants must be prohibited from employing children. It is necessary that this stipulation which already exists must be effectively enforced.

32. Learned Solicitor General submitted that in the Ministry of Family Welfare and Child

Development, a division needs to be created to deal with issues arising out of dissemination of publications which are harmful to young persons, publishing pornographic material in electronic form as well as the enforcement of section 293 of the Penal Code. It is submitted that a further research study must be undertaken on the efficacy of the provisions of the Young Persons Harmful Publications Act, 1956, Section 67 of the Information Technology Act, 2000 and Section 293 of the Penal Code.

33. The Transplantation of Human Organ Act, 1994 makes removal of human organs without authority and commercial dealing in human organs criminally liable.

34. In a brilliant study undertaken by the Government of India in coordination with UNICEF, areas relating to trafficking have been acknowledged. It is submitted that the central government acknowledges the increasing prevalence of trafficking for the purpose of commercial sexual exploitation of children. In a study¹ published by the Department of women and child development, Ministry of 1 Rescue and Rehabilitation of Child Victims Trafficked for Commercial Sexual Exploitation, a Report by UNICEF.

Human Resource Development, Govt. of India, the objectives were:-

- a) To obtain a better understanding of rescue and rehabilitation processes;
- b) To gain a more complete understanding of the involvement of the state, the judiciary, law enforcement agencies, and NGOs engaged in rescue and rehabilitation;
- c) To make recommendations on the need for developing guidelines for rescue and rehabilitation. These guidelines should represent a common denominator of nationally agreed standards in this area as well as take regional variations into account. The following statistics are alarming:-
 - i) There are an estimated two million children, aged between 5 and 15, forced into CSE around the world;
 - ii) Girls between the ages of 10 and 14 years are most vulnerable;
 - iii) 15% of commercial sexual workers in India are believed to be below 15 years old and 25% are estimated to be between the ages of 15 and 18;
 - iv) 500,000 children worldwide are forced into this profession every year.

35. It is submitted that the report dealt with cross border trafficking in the following way:-

"Research on cross-border trafficking has indicated that 5000-7000 young Nepali girls were trafficked into India annually. This research also highlighted the fact that in the last decade, the average age of the trafficked girl has steadily fallen from 14 to

16 years to 10 to 14 years. These findings are supported by studies conducted by Human Rights Watch - Asia in 1995, which stated that the average age of Nepali girls trafficked into India dropped from 14 to 16 years in the 1980s to 10 to 14 years in 1991 despite the introduction of laws designed to combat trafficking of minors. Ghosh's study estimated that Nepali children constitute 20 per cent (40,000) of the approximately 2,00,000 Nepalese commercial sexual workers in India. Young girls are trafficked from economically depressed neighbourhoods in Nepal and Bangladesh to the major prostitution centres in Delhi, Mumbai and Calcutta. Social workers have reported encountering children as young as nine in Kamathipura, a red light area in Mumbai."

36. The promise of marriage, employment is often used for luring young children into sexual trade. The report also talks about the trafficking of children in urban brothels and the regional variations. The report describes how trafficking is undertaken.

37. Trafficking in women and children has become an increasingly lucrative business especially since the risk of being prosecuted is very low. Women and children do not usually come to the brothels on their own will, but are brought through highly systematic, organized and illegal trafficking networks run by experienced individuals who buy, transport and sell children into prostitution.

Traffickers tend to work in groups and children being trafficked often change hands to ensure that neither the trafficker nor the child gets caught during transit. Different groups of traffickers include gang members, police, pimps and even politicians, all working as a nexus. Trafficking networks are well organized and have linkages both within the country and in the neighbouring countries. Most traffickers are men. The role of women in this business is restricted to recruitment at the brothels.

38. The typical profile of a trafficker is a man in his twenties or thirties or a woman in her thirties or forties who have travelled the route to the city several times and know the hotels to stay in and the brokers to contact. They frequently work in groups of two or more. Male and female traffickers are sometimes referred to as dalals and dalalis (commission agents) respectively and are either employed by a brothel owner directly or operate independently. Often collusion of family members forms an integral part of trafficking with uncles, cousins and stepfathers acting as trafficking agents. In March, 1994 Human Rights Watch Asia interviewed several trafficked victims of whom six were trafficked into India from Nepal with the help of close family friends or relatives. In each case, the victim complained of deception.

39. The Suppression of Immoral Trafficking Act was enacted after the Geneva Convention on Immoral Trafficking of Women and Children was signed by India in 1956. In order to have data on the success of rehabilitation strategies, delivery points in rehabilitation strategy would have to be strengthened as would be seen in the later parts of this report. It is submitted that a trafficker never blows the gaff. It is done in silence and quiet. It becomes necessary to involve police authorities by means of acute sensitization to a realm of illegality. Therefore, there has to be a special initiative taken by police with reference to children.

40. The Central Government has evolved the national plan of action to combat trafficking and commercial sexual exploitation of women and children in 1998.

41. It is submitted that there has now been a very careful realization that the plan for rescue and rehabilitation must be through a conceptual map. The said map gives a very good indication of the initiatives and possibly its positive and negative outcomes.

42. Learned Solicitor General submitted that a trafficked child can be brought before the Magistrate under two circumstances:

a) when the raid/search or removal takes place by a police action under section 15 of the ITPA or when the Magistrate herself/himself passes rescue orders;

b) the trafficked child can also be brought before the Magistrate as an accused under section 8A and 8B of the ITPA. The following directions are necessary:- a. Every Magistrate before whom a child is brought must be conscious of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000;

b. He must find out whether the child is below the age of 18 years;

c. If it is so, he cannot be accused of an offence under section 7 or 8 of ITPA;

d. The child will then have to be protected under Juvenile Justice Authority;

e. The Magistrate has a responsibility to ascertain and confirm that the person produced before her or him is a child by accurate medical examination;

f. The definition of a child in section 2K means a juvenile or a child as a person who has not completed 18 years of age;

g. Once the age test is passed under section 17(2) establishes that the child is a child/minor less than 18 years of age, the Magistrate/Sessions Judge while framing charges must also take into account whether any offences have been committed under sections 342, 366, 366A, 366B, 367, 368, 370, 371, 372, 373, 375 and if so, he or she must also frame charges additionally;

h. The child should be considered as a child in the protection of the Child Welfare Act.

i. The child should be handed over to the Child Welfare Committee to take care of the child. The performance of the Child Welfare Committees must be reviewed by the High Court with a committee of not less than three Hon'ble Judges and two psychiatrists;

j. A child must not be charged with any offence under the ITPA or IPC;

k. A minor trafficked victim must be classified

as a child in need of care and protection.

Further, the Magistrate must also order for intermediate custody of minor under section 17(3) of the ITPA, 1956;

l. There should not be any joint proceedings of a juvenile and a person who is not a juvenile on account of section 18 of the Juvenile Justice (Care and Protection) Act, 2002;

m. It is necessary that Courts must be directed that the same lawyer must not represent the trafficker as well as the trafficked minor;

n. Evidence of child should be taken in camera. Courts must protect the dignity of children. The children's best interest should be the priority.

43. Learned Solicitor General submitted that Child Welfare Committees are empowered committees under section 31(1) of the Juvenile Justice Act. However, the standards employed by the Child Welfare Committees are not the same across the country. In order to set up uniform standards, the direction relating to review of Child Welfare Committees must be re-examined. All Superintendents of Jail must report upon a review within 15 days from today whether any person who is a child is in custody of the jail, if so, the said person must be produced immediately before the Magistrate empowered to try offences under the Juvenile Justice (Care and protection) Act, 2000. The said Magistrate must set out a report in relation to the circumstances under which such a child has been lodged in jail to the Chief Justice of the concerned High Court. Thereafter the High Court may forward a report to this Court for passing of appropriate orders in relation to the welfare of the child.

44. Learned Solicitor General submitted that the power of rehabilitation is necessary. The said power has been conferred under section 33(3) of the Juvenile Justice (Care and Protection) Act, 2000. The said provision provides that:-

"..... After the completion of the enquiry if the Committee is of the opinion that the said child has no family or ostensible support, 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 18 years....".

45. It is further submitted that rehabilitation will be the measure of success of the Juvenile Justice (Care and Protection) Act, 2000. Reintegration into society by means of confident and assertive occupations leading to a sense of self-worth will have to be devised. This requires innovative strategies and not any high flown claims to social development.

46. The Juvenile Welfare Board will have no competence to deal with cases of children who are in prostitution or have been trafficked. Such children are to be considered as children in need of care and protection. However, in states where the Child Welfare committees have not been constituted, these matters should be referred to the Juvenile Welfare Board. It is submitted that the book on Trafficking in Women and Children in India edited by Shanker Sen along with P.M. Nair, IPS is a useful document. In a report called "Abolition of Child Labour in India" submitted by the NCPCR to the planning commission, certain useful perspectives are to be found.

47. It is submitted that India is home to 19% of world's children. More than one-third of the country's population around 440 million is below 18 years. India's children are India's future. They are the harbingers of growth, potential fulfillment, change, dynamism, innovation, creativity. It is necessary that for a healthy future, we must protect, educate and develop the child population so that their citizenry is productive. Resources must be invested in children proportionate to their huge population.

48. As far as the total expenditure on children in 2005-

2006 is concerned, it was 3.86% and in 2006-2007 it was increased to 4.91%. It is highly inadequate looking to the population of children.

49. In a report submitted by the Ministry of Women and Child Development, 40% of India's children have been declared to be vulnerable or experiencing difficult circumstances. They are entitled to special protection under Articles 14, 15, 16, 17, 21, 23 and 24 of the Constitution. The concerns of child and the paradigm of child rights have been addressed suitably in various international conventions and standards on child protection including the UN Convention on the Rights of the Child (UNCRC), 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), 1985, the UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990, the Hague Convention on Inter Country Adoption, 1993. India has ratified the UN Convention on the Rights of the Child in 1992. The Convention inter alia prescribes standards to be adhered by all state parties in securing the best interest of the child.

50. Learned Solicitor General submitted that the millennium development goals cannot be secured unless child protection is an integral part of programmes, strategies and plans for their achievement. The newly constituted Ministry of Women and Child Development has rightly remarked that child protection is an essential part of the country's strategy to place 'Development of the child at the Centre of the 11th Plan'. The National Plan of Action for Children articulates a rights agenda for the development of children.

51. Learned Solicitor General further submitted that the existing child protection mechanisms have to be first noticed. The delivery points however need to be strengthened. To review the delivery of these programmes, there must be nodal agencies. Points of responsibility have to be identified and strengthened. The programme for juvenile justice is to enable children in need of care and protection and those in conflict with law to be secured. The central governments provide financial assistance to the state governments/UT administrations for establishment and maintenance of

various homes, salary of staff, food, and clothing for children in need of care and protection of juveniles in conflict with law. Financial assistance is based on proposals submitted by States on a 50:50 cost sharing basis.

52. It is submitted by the learned Solicitor General that in order to give effect to the programme for juvenile justice, it is necessary that nodal points have to be identified. The child welfare committee is one such body, but it is necessary that the working of the child welfare committee must be overseen by either the Executive Chairman of the Legal Services Authority or by the High Court itself. It is also necessary that the financial assistance being provided for children in need and care must result in tangible results to the children whose future is sought to be rehabilitated.

For that purpose, it is appropriate that a Court monitored mechanism is established. For every juvenile home, a District Judge or a Judge nominated by the Chief Justice of the High Court should be a visitor. There must be periodic internal reports which are given to the High Court and just as in case of prisons, juvenile homes must be monitored by courts and their living conditions must also be carefully examined.

53. It is also submitted by the learned Solicitor General that the point of responsibility for overseeing the conditions in the juvenile home must also be shared by the District Magistrate of each district. It is necessary that there should be dual reporting - one to the Judicial Section of the High Court; and the other to the District Magistracy and onwards to the State Government. Each State Government must open a Juvenile Justice Cell which will receive periodic reports of juvenile homes, the number of children, the status of children, the manner of rehabilitation and the current status. The State Government must also ensure that therapeutic help as well as psychiatric assistance wherever necessary is offered to the juveniles on a top priority basis. District Collectors must submit their reports to the Secretary of the Department concerned who in turn must report to the Chief Secretary. The Chief Secretary must be constructively responsible for the administration of the programme for juvenile justice and also must supervise the monetary spending and the manner in which the money spent has been duly accounted. Thus a certification programme for spending monies based on central schemes must be introduced. This certification must be by an independent authority that will ensure that the monies allocated have in fact been spent for the benefit and welfare of the children. If the home is situated within a panchayat area, then the chairman of the panchayat or the zila parishad must be also made responsible for certifying that all the monies which were intended for the home in terms of grants or subventions have been duly utilised.

54. It is further submitted by the learned Solicitor General that the Integrated Child Protection Programme for Street Children is also a scheme by which NGOs are supposed to run 24 hour shelters and to provide food, clothing, shelter, non-formal education, recreation, counseling, guidance and referral services for children. Considering the vulnerability of the children, all NGOs must be directed to be registered with the concerned Collector. There must be a database of every NGO including details of all the functionaries of the NGO with full particulars including their addresses. In order to enable the enrolment in schools of street children, vocational training, occupational placement and to mobilize preventive health services including reduction of drug and substance abuse, a nodal point is necessary. The nodal point must be either a Sub Divisional

Magistrate/Executive Magistrate whose work will be countersigned by a subordinate Judge appointed by the District Judge of the District. Similarly, database must be maintained in relation to the children, their parentage, present status and the present condition of their educational qualifications and whether they are capable of vocational training. It is important that occupational therapists must be able to assess on the basis of modern IQ and aptitude tests about the way in which such children can be taken forward to mainstream living by offering vocational guidance. Offering children under difficult circumstances, relevant support is an obligation and should not be a matter of charity fortuitousness in terms of magnanimous dispensation.

55. Learned Solicitor General also gave suggestions as under:

Child-line services are provided for children in distress: These should be catalogued and there should be a central registry which will provide information about the status of the child-line services at the local level. It should be the District Magistrate who must be responsible for the effect running of the child-line service. All District Magistrates in the country must post on the website their child-line service number and must give effective publicity to the services available and invite members of civil society to report any child in distress at numbers.

Shishu Griha to promote in-country adoption:

Details of the working of the said scheme need to be collected and a database must be maintained in respect of orphans/ abandoned / destitute infants or children upto 6 years. The adoptive parents must be obliged to give reports to the District Judge who will in turn examine whether the adoptive parents have taken care of the child failing which adequate court-monitored measures may be necessary.

Schemes for working children in need of care and protection: This scheme is very important. Children who are engaged as domestic labour, working at roadside dhabas and mechanic shops have to be rescued and a bridge education has to be provided including vocational training.

This must be undertaken again by identifiable points of responsibility. It is necessary that an Executive Magistrate must be allocated a certain area to be covered where children are rescued. This should be undertaken by a District Magistrate dividing his district in suitable divisions where such Executive Magistrates can rescue working children. They need to be rehabilitated. It is important that rescue will be effective only when there is scope for rehabilitation. It should not happen that in the name of rehabilitation children are put in detention homes or remand homes. That would be an act of cruelty.

56. Learned Solicitor General further gave suggestions including Pilot Project to combat the trafficking of women and children for commercial sexual exploitation as under:

Pilot Project to combat the trafficking of women and children for commercial sexual exploitation: This is a source and destination area for providing care and protection to trafficked and sexually abused women and children. Components of the scheme include networking with law enforcement

agencies, rescue operation, temporary shelter for the victims, repatriation to hometown and legal services, etc. Central Adoption Resource Agency (CARA): It is an autonomous body under the Ministry of Women and Child Development to promote in-country adoption and regulate inter-country adoption. CARA also helps both Indian and foreign agencies involved in adoption of Indian children to function within a regulated framework, so that such children are adopted legally through recognised agencies and no exploitation takes place.

National Child Labour Project (NCLP) for rehabilitation of child labourers: Under the Scheme, project societies at the district level are fully funded for opening up of Special Schools/Rehabilitation centers provide non-formal education, vocational training, supplementary nutrition, stipends, etc. to children withdrawn from employment.

The Ministry of Women and Child Development has actually in an outstanding report identified the shortcomings and gaps in existing child protection institutions. The reasons for limitations in effective implementation of programmes have been properly identified. The reasons are as follows:

Lack of Prevention: Policies, programmes and structures to prevent children from falling into difficult circumstances are mostly lacking. This pertains both to policies to strengthen and empower poor and vulnerable families to cope with economic and social hardship and challenges and thus be able to take care of their children, as well as to efforts to raise awareness of all India's people on child rights and child protection situation.

Poor planning and coordination:

- i) Poor implementation of existing laws and legislations;
- ii) Lack of linkages with essential lateral services for children, for example, education, health, police, judiciary, services for the disabled etc;
- iii) No mapping has been done of the children in need of care and protection or of the services available for them at the district, city and state levels;
- iv) Lack of coordination and convergence of programmes/services;
- v) Weak supervision, monitoring and evaluation of the juvenile justice system.

Services are negligible relative to the needs:

- i) Most of the children in need of care and protection, as well as their families do not get any support and services;
- ii) Resources for child protection are meagre and their utilization is extremely uneven across India;

iii) Inadequate outreach and funding of existing programmes results in marginal coverage even of children in extremely difficult situations;

iv) Ongoing large scale rural urban migration creates an enormous variety and number of problems related to social dislocation, severe lack of shelter and rampant poverty, most of which are not addressed at all;

v) Lack of services addressing the issues like child marriage, female foeticide, discrimination against the girl child, etc;

vi) Little interventions for children affected by HIV/AIDs, drug abuse, militancy, disasters (both manmade and natural), abused and exploited children and children of vulnerable groups like commercial sex workers, prisoners, migrant population and other socially vulnerable groups, etc;

vii) Little interventions for children with special needs, particularly mentally challenged children.

Poor infrastructure

i) Structures mandated by legislation are often inadequate;

ii) Lack of institutional infrastructure to deal with child protection;

iii) Inadequate number of CWCs and JJBs.

iv) Existing CWCs and JJBs not provided with requisite facilities for their efficient functioning, resulting in delayed enquiries and disposal of cases.

Inadequate human resources

i) Inappropriate appointments to key child protection services leading to inefficient and non-responsive services;

ii) Lack of training and capacity building of personnel working in the child protection system;

iii) Inadequate sensitization and capacity building of allied systems including police, judiciary, health care professions, etc;

iv) Lack of proactive involvement of the voluntary sectors in child protection service delivery by the State UT Administrations;

v) Large number of vacancies in existing child protection institutions.

Serious service gaps

- i) Improper use of institution in contravention to government guidelines;
- ii) Lack of support services to families at risk making children vulnerable;
- iii) Overbearing focus on institutional (residential care) with non-institutional (i.e. non-residential) services neglected;
- iv) Inter-state and Intra-state transfer of children especially for their restoration to families not provided for in the existing schemes;
- v) Lack of standards of care (accommodation, sanitation, leisure, food etc.) in all institutions due to lower funding;
- vi) Lack of supervision and commitment to implement and monitor standards of care in institutions;
- vii) Most 24-hour shelters do not provide all the basic facilities required, especially availability of shelter, food and mainstream education;

viii) Not all programmes address issues of drug abuse, HIV/AIDS and sexual abuse related vulnerabilities of children;

ix) None of the existing schemes address the needs

of child beggars or children used for begging;

- x) Minimal use of non-institutional care options like adoption, foster care and sponsorship to children without home and family ties;
- xi) No mechanism for child protection at community level or involvement of communities and local bodies in programmes and services;

xii) Serious services and infrastructure gaps leading to few adoptions;

xiii) Cumbersome and time consuming adoption services;

xiv) Lack of rehabilitation services for old children not adopted through regular adoption processes;

xv) Aftercare and rehabilitation programme for children above 18 years are not available in all states, and where they do exist they are run as any other institution under the JJ Act, 2000.

57. It is further submitted by the learned Solicitor General that the above needs to be addressed by interventional orders of this Court in the exercise of its extraordinary jurisdiction under the Constitution. Points of implementation must be identified.

58. Learned Solicitor General further submitted that each State Government must identify an officer who is responsible for implementation of schemes in relation to children. There must be a parallel linkage between a point of contact of the Collector/Executive Administration with a point in Legal Aid i.e. the Executive Chairman of the State Legal Services Authority and a point in the NGO Sector/Civil Society. Similarly, points must be identified in each Zila Parishad and Panchayat Samiti and Gram Panchayats. In fact, the Presiding Officers of the gram Nyayalayas may also be encouraged to identify children who are vulnerable and who need protection. The Integrated Child Protection Scheme is presently in place. It seeks to institutionalize essential services and strengthen structures;

it seeks to enhance capacities at all levels; it seeks to create database and knowledge base for child protection services;

it needs to strengthen child protection at family and community level. The guiding principles are neatly formulated in this scheme. These must be implemented.

The adoption programme will be governed by the following guiding principles:

i. Best interest of the child is paramount;

ii. Institutionalization (e.g. placement into residential care) of the child should be for the shortest possible period of time;

iii. All attempts should be made to find a suitable Indian family within the district, state or country;

iv. The child shall be offered for inter-country adoption only after all possibilities for national adoption, or other forms of family based placement alternatives such as placement with relatives (kinship care), sponsorship and foster care arrangements have been exhausted;

v. All institutions should disclose details about children in their care and make sure that those free for adoption are filed and recorded with the State Adoption Resource Agency (SARA) and CARA,

with all supporting documentation of authorization of such adoption from CWC;

vi. Inter-state coordination to match the list of Prospective Adoption Parents (PAPs) with that of available children should be done by SARAs;

vii. No birth mother/parent(s) should be forced/coerced to give up their child for monetary or any other consideration;

viii. Adoption process from the beginning to end shall be completed in the shortest possible time;

ix. Monitoring, regulating and promoting the concept and practice of ethical adoptions in the country should be ensured;

x. Agencies involved in the adoption process should perform their duties in a transparent manner, following rules of good governance and adhering to the professional and ethical code of conduct. Those agencies shall be reporting to and will be subject to rigorous auditing and supervision by responsible State bodies.

59. The most outstanding feature of this scheme which needs to be implemented on a full-time and firm basis is the government civil society partnership. This will involve active involvement of the voluntary sector, research and training institutions, law college students, advocacy groups and the corporate sector. It should be the duty of the Health Secretary of each state government including under the chairmanship of the Health Secretary, Government of India to have a blueprint for implementing the Government - Civil Society initiative. It is necessary that there must be a 6-

monthly strategy plan which must be prepared by the state government and also by the central government in this regard.

60. The ICPS programmes are now brought under one umbrella and are as follows:

a) Care, support and rehabilitation services through child-line;

b) Open shelters for children in need in urban/semi-urban areas;

c) Family based non-institutional care through sponsorship, foster care, adoption and aftercare.

61. It is necessary that poor families must be discouraged from placing their children into institutional care as a poverty coping measure. Institutionalized children have to be re-integrated into families. The following portion of the sponsorship scheme is relevant:-

"3.1 It is submitted that this can be monitored by a representative of the Comptroller and Auditor General/Accountant General of each State as well as the Health Secretary incharge of Child Development in each State."

62. The scheme shall provide support for foster care through the Sponsorship and Foster Care Fund available with the District Child Protection Society. The Child Welfare Committee either by itself or with the help of SAA, shall identify suitable cases and order placement of the child in foster-care. Once the Child Welfare Committee orders the placement of the child in foster care, a copy of the order shall be marked to the DCPS for release of funds and to SAA for follow up and monitoring. The SAA shall periodically report about the progress of the child of the Child Welfare committee and DCPS.

63. In view of the directions suggested, the Child Welfare Committee must directly come under the supervision of the District Judge/Judge of the High Court, it is submitted that the above implementation must also be overseen by a Court-monitored mechanism.

64. There must be an annual report by CARA. The said report must be scrutinized by a Secretary incharge of family and social welfare. On 9th September, 2009, an office memorandum was issued by the Ministry of Home Affairs.

65. The provisions of the Right of Children to Free and Compulsory Education Act, 2009 are material. By virtue of Section 3 of the Act, every child of the age of 6-14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. The Central Government has notified the Act in the Gazette on 27th August, 2009 and the Act has been brought into force with effect from 1st April, 2010. It may also be noted that Chapter 6 of the Act has special provisions for protection of the right of children. The National Commission for Protection of Child Rights has already been constituted. The said Commission now receives a statutory status by virtue of this Act. In view of the performance of the present National Commission for Protection of Child Rights, which has taken pioneering efforts, it is expected that on a close interface between the National Commission for Protection of Child Rights, the State Governments and the Ministry of Women and Child Development, positive outcomes should actually be worked out.

66. It is, therefore, necessary that a coordinated effort must be made by the three agencies, namely, the Commission, the Ministry and the State Governments.

Learned Solicitor General submitted that the recommendations be implemented by the concerned agencies. In the State/Union Territory, the responsibility must be vast either on the Chief Secretary or a Secretary Incharge of Children, Women and Family Welfare. It would be open to the State Government in appropriate cases to nominate a special officer for the said purpose not lower than the rank of a Secretary to the State Government. Each State must issue a circular effectively indicating how the recommendations will be implemented. We accept the submissions of the learned Solicitor General and direct that the said circular shall be issued within 4 weeks from today and a compliance report be filed by the Chief Secretary of each State to this Court.

67. From the above comprehensive submissions made by the learned Solicitor General it is abundantly clear that the Government of India is fully aware about the problems of children working in various places particularly in circuses.

It may be pertinent to mention that the right of children to free and compulsory education has been made a fundamental right under Article 21A of the Constitution Now every child of the age of 6 to 14 years has right to have free education in neighbourhood school till elementary education.

68. We have carefully mentioned comprehensive submissions and suggestions given by the learned Solicitor General and others. We plan to deal with the problem of children's exploitation systematically. In this order we are limiting our directions regarding children working in the Indian Circuses. Consequently, we direct:

(i) In order to implement the fundamental right of the children under Article 21A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today.

(ii) The respondents are directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the Care and Protective Homes till they attain the age of 18 years.

(iii) The respondents are also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification.

(iv) The respondents are directed to frame proper scheme of rehabilitation of rescued children from circuses.

(v) We direct the Secretary of Ministry of Human Resources Development, Department of Women and Child Development to file a comprehensive affidavit of compliance within ten weeks.

69. This petition is directed to be listed for further directions on 19th July, 2011.

.....J.

(DALVEER BHANDARI)

(A.K. PATNAIK) New Delhi;

April 18, 2011