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## Supreme Court declares Prostitution as a Profession

Palash Varyani<sup>a</sup> Pratishta Shrivastava<sup>b</sup>

<sup>a</sup>Nirma University, Ahmedabad, India <sup>b</sup>Nirma University, Ahmedabad, India

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*Prostitution is the act of providing sexual services for a fee, generally in the form of money. Prostitution is seen differently in different communities due to culturally defined ideals. Prostitutes have been considered part of a recognised profession in certain civilizations, while they have been shunned, hated, and punished with stoning, imprisonment, and death in others.<sup>1</sup> India, despite being a signatory to numerous international agreements on women's rights and possessing a constitution that prohibits gender discrimination and exploitation, as well as a plethora of related legislation, has failed to adequately protect women's human rights, particularly those of sex workers.<sup>2</sup> This reflects the prejudice law itself has for sex work. The authors have attempted to comprehend sex work, its various aspects, and its legal status in India. For many years, sex workers and their children have been one of the most neglected groups. Recently, the Supreme Court gave them the much-needed attention they deserved. This article will examine major judicial decisions regarding sex work over the years and would shed light on the legality of prostitution in India.*

**Keywords:** *prostitution, exploitation, women's rights, ideals, culture.*

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<sup>1</sup> 'Social work and prostitution' (FSF IHCE) <<https://www.fsf-ihce.ch/social-work-and-prostitution/>> accessed 05 June 2022

<sup>2</sup>Geetanjali Misra, Ajay Mahal & Rima Shah, 'Protecting the Rights of Sex Workers: The Indian Experience' (2000) 5 (1) The President and Fellows of Harvard College, 88-115 <<https://www.jstor.org/stable/4065224>> accessed 05 June 2022

## INTRODUCTION

Prostitution has traditionally been thought of as a disgrace to society. People linked with the sector are seen with disdain and prejudice, as though they are infecting the otherwise pure and well-intentioned members of the good community. There are still a lot of misconceptions and disinformation on the issue, the most common of which is that prostitution is prohibited in India. The recent Supreme Court judgment on the profession and how it can impact the industry is certainly worth looking into as it could throw some light on the subject and can help to bust the myths around the legality of prostitution in India while also helping to improve the lives of people who work in it. This article tries to explain the current legal standing of sex work in India. There have been a lot of cases before the recent judgment pertaining to sex work. The basic human rights of sex workers are infringed on a daily basis in this country and therefore, there is a need to give utmost attention to their plight.

## SCOPE AND DEFINITION OF SEX WORK

Oxford Dictionary defines sex work as, “paid employment in the sex industry, comprising prostitution and pornography. The term is used to emphasize the commonality between work in this industry and other, more conventional occupations.” Carol Leigh coined the word "sex work", to start a movement to redefine the way people viewed sex work. It recognized sex work as work, rather than a status. They rejected the word “prostitution”, as it had connotations of criminality due to which they were denied health, legal and social services by the State. Sex workers are the adults who consensually give sexual services in exchange for money or goods, regularly or occasionally. The word 'consensually' is significant in this definition since it determines if the service supplied was voluntary or coerced. Consent is an important aspect of any sexual activity, but it has less relevance in sex work. The legal structure in many countries likewise fails to give any protection; rather, it criminalizes sex work, leading to the exploitation of women. Forced sex work is prohibited in all nations, although voluntary sex work is permitted and regulated as a profession in some. Forced sex work involves the abuser using coercion or other forms of undue influence to get sexual favours from the victim. The most vulnerable individuals are children, women, and

transgender people. Forced sex employment or sexual slavery is a result of human trafficking, child trafficking, and domestic abuse. Children, particularly orphans, who are poor and destitute are forced to engage in the sex business to support themselves. Parents would sometimes sell their daughters to get rid of them and make money. Teenage females are sexually, physically, and psychologically abused as a result of this. Moreover, since transgender persons are not given jobs, they are forced to engage in unlawful sexual activities, subjecting them to more sexual abuse. Domestic violence victims are often drawn into such jobs as a means of escaping their abuser. Abuse can sometimes escalate to the point where an intimate partner compels the victim into forced prostitution.

There is a grey area when it comes to the voluntary sex business. Prostitution is a popular way for women, particularly those from disadvantaged areas, to make quick money. However, they may be subjected to dominance and exploitation by members of the sex business, who exert indirect control over their will and choices. In prostitution, this muddles the idea of free consent. Therefore, a clear distinction between voluntary sex work and forced sex work is crucial.

## **RIGHTS OF PROSTITUTES IN INDIA**

### *Is prostitution legal in India?*

India is a country where prostitution is legal but with certain limitations. While addressing the question 'Is prostitution legal in India?' there is some ambiguity. Because prostitution is not completely outlawed by the Indian constitution, it is written clearly about a few acts linked to prostitution that are penalised by law, such as running brothels, solicitation, trafficking, and pimping under the Immoral Traffic (Prevention) Act (1956<sup>3</sup>). The act characterizes prostitution as the sexual maltreatment of people for business purposes and brothel as any spot utilised for sexual abuse or maltreatment for business purposes. The act doesn't condemn prostitution or prostitutes fundamentally, yet generally rebuffs acts by outsiders working with prostitution like brothel-keeping, residing off profit, and procuring, even where sex work isn't coerced. It is

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<sup>3</sup> The Immoral Traffic (Prevention) Act, 1956

ambiguous, and prostitution laws reflect dualism in general. On the one hand, the legislation makes it unlawful to own and operate a brothel, including imposing penalties and fines, while on the other hand, it makes it permissible to be a prostitute.

## LANDMARK JUDGMENTS RELATED TO RIGHTS OF PROSTITUTES IN INDIA

**BudhadevKarmaskar case**<sup>4</sup> The Supreme Court of India declared with certainty in the **BudhadevKarmaskar case** that sex workers are human beings with a right to life under Article 21 of the Indian constitution, and that no one has the right to harm or murder them. The verdict also attracted attention to the plight of sex workers, underlining that many women are forced to engage in prostitution due to their financial and economic burdens, rather than for pleasure.

**Gaurav Jain v Union of India**<sup>5</sup>, in this case, the Court issued broad guidelines for the rescue and reintegration of prostitutes and their children into society. It claimed that prostitution-related women should not be considered perpetrators, but rather victims of their adverse socioeconomic circumstances. It placed a strong emphasis on empowering women economically through self-employment and vocational training. The court ordered that juvenile homes should be established for the youngsters in order to assure their rehabilitation and protection.

## HOW PROSTITUTES ARE BEING MISTREATED AND THE NEED FOR CHANGES IN THE EXISTING SYSTEM

Even after the existence of laws and judgments favouring the prostitutes, they are still being mistreated in myriad ways. The fear of mistreatment and humiliation forces such women to go to local, unqualified doctors, and in a way, they are being denied proper healthcare facilities and this poses a greater risk to their health and safety. Most women who are trafficked never had the privilege of education and even their children struggle to attend and stay in school, they are treated differently by teachers who resent having them in their classes, and their

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<sup>4</sup> *Budhadev Karmaskar v State Of West Bengal* (2011) Criminal Appeal No. 133/2010

<sup>5</sup> *Gaurav Jain v Union of India & Ors.* (1997) Writ Petition (Crl.) No. 745-54/1950

dropout rate remains high as they live in a very hostile environment. These women internalize their marginalized position and they start to believe that they don't deserve better because they believe that they are inferior, they avoid hospitals and schools and this way of treatment starts to feel normal to them.

Women in sex work are entitled to their rights in the political, social, economic, and civil spheres of their lives. They too have the right to livelihood and freedom from gender-stereotyped notions about a woman's chastity. All this will only be possible when discrimination is removed from all spheres of a sex worker's life. Stigma and shaming are real. Reducing stigma not only requires policy and legal change but also cultural change. As a community, society needs to work towards anti-discrimination pathways and funding for rights-based sex worker organizations. However, these steps alone are not enough, we need to work towards destigmatizing them and society needs to come together for this.

### **THE LEGALITY OF SEX WORK**

The act of prostitution is not illegal in India. However, some of the activities like soliciting services of prostitution in public, carrying out prostitution in hotels, being the owner of a brothel, pimping, indulging in prostitution by arranging a sex worker, and arrangement of a sexual act with a customer are punishable under certain provisions.<sup>6</sup> Immoral Traffic(Prevention) Act 1956, also known as SITA, prohibits prostitutes from commencing their business in public. The objective of the Act was to maintain the decorum of society and rescue girls and women from illegal trafficking. But it fails in recognizing the plight of male and transgender victims. It ignores the actual situation of sexual violence and the causes behind it. The blatant assumption of the fact that sex is immoral is responsible for the ill and unfair treatment of sex workers in this society. Sex work is seen as something that cannot be talked about in the drawing-room, rather should be done in secrecy. The Act guards this notion of society.

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<sup>6</sup> Immoral Traffic (Prevention) Act, 1956

Moreover, there have been several instances where the police have arrested and exploited sex workers under this Act. The constitutional validity of this Act was challenged in the *State of Uttar Pradesh v Kaushalya*<sup>7</sup> in 1964. The High Court of Allahabad held that the Act was constitutional and in line with the major objective for which it was framed.

In the subsequent years, the opinion of various high courts changed and the problems of SITA became more visible. In *Arnesh Kumar v State of Bihar*<sup>8</sup>, the Supreme Court held that “Offences punishable under Immoral Traffic (Prevention) Act, 1956 particularly offence under Section 5<sup>9</sup> of the Act, i.e. inducing persons to carry on prostitution under the veneer of ostensibly lawful business activities like health spa, etc. (as in the present case) require to be dealt with the utmost sensitivity and the gravity and social impact of such offences involving exploitation of women from economically weaker sections of society ought to be borne in mind whenever an investigation is undertaken in such cases. Resort to the less intrusive mode of investigation through a notice under Section 41A<sup>10</sup> of the Code of Criminal Procedure in such cases by ignoring the gravity and far-reaching social consequences of such offences, the vulnerability of the victims of sexual exploitation to threats, intimidation, or inducement and the possibility of recurrence of such organized crimes amounts to complete negation of the restrictions contained in clauses (a) to (e) of section 41(1)(b)(ii)<sup>11</sup> Cr.P.C. exercise of such discretion.”

In *Unknown vs State of West Bengal*<sup>12</sup>, Calcutta High Court held that sex workers exploited for commercial sex could not be tried as an accused until and unless there was substantial evidence to show that she was a co-conspirator. The court gave several guidelines to the investigating officers as well. In September 2020, the Bombay High Court in the case of *Kajal Mukesh Singh and Ors v State of Maharashtra*<sup>13</sup> ordered that prostitution was not regarded as a criminal offence under the Immoral Traffic (Prevention) Act 1956. It said, “there

<sup>7</sup> *State of Uttar Pradesh v Kaushalya* (1964), AIR 416

<sup>8</sup> *Arnesh Kumar v State of Bihar & Anr.* (2014) Criminal Appeal No. 1277/2014

<sup>9</sup> Immoral Traffic (Prevention) Act, 1956, s 5

<sup>10</sup> Code of Criminal Procedure, 1973, s 41A

<sup>11</sup> Code of Criminal Procedure, 1973, s 41(1) (b) (ii)

<sup>12</sup> *Unknown v State of West Bengal* (2019) C.R.M No. 10431/2018

<sup>13</sup> *Kajal Mukesh Singh and Ors v The State of Maharashtra* (2019) Criminal Writ Petition No. 6065/2019

*is no provision under the law, which makes prostitution per se a criminal offence or punishes a person because he indulges in prostitution,” The court also noted, “what is punishable under the Act is sexual exploitation or abuse of a person for commercial purpose and to earn the bread thereby. And where a person is carrying on prostitution in a public place or when a person is found soliciting or seducing another person as defined under the Act.”<sup>14</sup>*

## **ANALYSIS OF THE RECENT JUDGMENT OF THE SUPREME COURT**

On 26<sup>th</sup> May 2022, the Supreme Court In a significant order recognised sex work as a “profession” whose practitioners are entitled to dignity and equal protection under the law, SC has directed that police should neither interfere nor take criminal action against adults and consenting sex workers.<sup>15</sup> The court observed that “it need not be gainsaid that notwithstanding the profession, every individual in this country has a right to a dignified life under article 21 of the constitution”<sup>16</sup>

“Sex workers are entitled to equal protection of the law, criminal law must apply equally in all cases, on the basis of ‘age’ and ‘consent’. When it is clear that the sex worker is an adult and is participating with consent, the police must refrain from interfering or taking any criminal action.”<sup>17</sup> The 3-judge bench led by Justice L. Nageswara Rao directed an order which was passed after invoking special powers under Article 142<sup>18</sup> of the constitution. Article 142 provides discretionary power to the Supreme Court as it states that the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it.

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<sup>14</sup> ‘Prostitution is not a criminal offence’: Bombay HC orders release of 3 sex workers’ (*The Hindu*, 26 September 2020) <<https://www.thehindu.com/news/cities/mumbai/prostitution-not-a-criminal-offence-bombay-hc-orders-release-of-3-sex-workers/article32701646.ece>> accessed 03 June 2022

<sup>15</sup> Krishnadas Rajagopal, ‘SC recognises sex work as a ‘profession’ (*The Hindu*, 25 May 2022) <<https://www.thehindu.com/news/national/supreme-court-recognises-sex-work-as-a-profession/article65461331.ece>> accessed 04 June 2022

<sup>16</sup> ‘Voluntary sex work “is not illegal”’: SC’ (*NDTV*, 27 May 2022) <<https://www.ndtv.com/india-news/voluntary-sex-work-is-not-illegal-recommends-supreme-court-panel-3012936>> accessed 04 June 2022

<sup>17</sup> ‘Sex work is a profession: SC’ (*Prameya News*, 26 May 2022) <<https://www.prameyanews.com/sex-work-is-a-profession-sc/>> accessed 04 June 2022

<sup>18</sup> Constitution of India, 1950, art.142

## MAJOR POINTS OF THE JUDGMENT

**On Brothels** - The bench ordered that sex workers should not be arrested or penalised or harassed or victimised” whenever there is a raid on any brothel, “since voluntary sex work is not illegal and only running the brothel is unlawful”.<sup>19</sup> Now, these types of statements given by the Supreme Court of India leave out many grey areas that need to be addressed. It is still not clear whether prostitution is completely legal in India or not because according to the judiciary, prostitution is legal but brothels are illegal. If brothels would not be operating then where will these prostitutes work? As prostitutes are not allowed to solicit or promote themselves in any manner, the brothels help them with a regular source of income. But by making brothels illegal, the sex work would become unorganized. This question is left unanswered by the Supreme Court.

**Sex workers and their children** - the court held that a child of a sex worker should not be separated from the mother merely on the ground that she is in the sex trade. “Basic protection of human decency and dignity extends to sex workers and their children” Further if a minor is found living in a brothel or with sex workers, it should not be presumed that the child was trafficked.<sup>20</sup> The child should not be separated from his mother. This would go a long way toward ensuring that the lives of sex workers' children are not wrecked by the authorities who are supposed to safeguard them. The Supreme Court, on the other hand, should issue more specific and stringent directions in order to better the lives of these youngsters. Given the fact that they might witness abuse on a regular basis due to the environment they come from, their mental health is of utmost concern. The trauma they might endure should be given more attention. Therefore, the court should order the legislature to provide adequate shelter houses for these children, much as it did in the case of Gaurav Jain v Union of India<sup>21</sup>, where the Court set rules for rehabilitation centres.

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<sup>19</sup> Krishnadas Rajagopal (n 15)

<sup>20</sup> ‘Sex work legal, police can’t punish them: SC’ (*The Pioneer*, 27 May 2022)

<<https://www.dailypioneer.com/2022/page1/sex-work-legal-police-can-t-punish-them-sc.html>> accessed 04 June 2022

<sup>21</sup> Gaurav Jain (n 5)



**Medico-Legal care** - the court ordered the police to not discriminate against sex workers who lodge a criminal complaint, especially if the offence committed against them is of a sexual nature. Sex workers who are victims of sexual assault should be provided with every facility including immediate medico-legal care. “It has been noticed that the attitude of the police to sex workers is often brutal and violent. It is as if they are a class whose rights are not recognised,” the court said, calling for sensitisation.

**On Media** - The court said media should take “utmost care not to reveal the identities of sex workers, during arrest, raid and rescue operations, whether as victims or accused and not to publish or telecast any photos that would result in disclosure of such identities”. The media, in order to gain TRP, compromises the personal identity of the sex workers and the sex workers have to bear the brunt of the media’s actions. They are often persecuted and are looked down upon by the general public. The court has strictly ordered the media to take utmost care while dealing with the issues involving sex workers.<sup>22</sup>

**Direction to the government** - The Supreme Court has directed that the government should consult with sex workers or their representatives before making any policy decisions, including planning, devising, and executing any policy or program for sex workers, or drafting any changes to sex work legislation.

**Awareness drives** - The Supreme Court has also directed that governments should run public awareness campaigns and educate sex workers about their rights, the legality of their profession, the police's responsibilities, and what is forbidden and authorised under the law.

## **WHAT WOULD HAPPEN IN INDIA IF THE CENTRE OBEYS ALL ORDERS OF THE COURT?**

- Equal legal protection shall be provided to sex workers.
- If a sex worker reports a criminal/sexual or another form of crime, the police will take it seriously and will abide by the law.
- If a brothel is raided, no sex workers shall be arrested, fined, harassed, or victimised.

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<sup>22</sup> Krishnadas Rajagopal (n 15)

- Any sex worker who is sexually assaulted shall be provided with the same services as a sexual assault survivor, including immediate medical treatment.
- All sex workers shall be treated with respect by police, who will not verbally or physically abuse them, subject them to violence, or compel them into any sexual conduct.

The Supreme Court's decision is a positive step forward. It ridicules sex-work stereotypes and restores sex workers' dignity. It shows how far we've come from the days when prostitution was outlawed by the colonial authority to now when the judiciary has granted it a legitimate standing. It's fascinating to observe how the judiciary's perspective of sex work has improved in recent years.

## CONCLUSION

Sex work has long been regarded as sinful and indecent. The reason for this is due to gender preconceptions around sex and female honour. Previously, wealthy men kept these prostitutes as mistresses. And no one ever questioned that man's character, yet his mistress was always painted as a villain. She was accused of wrecking a couple's marriage and was branded as a fraud. This trope has persisted to the present day, with women who offer their bodies for sex in exchange for money being viewed as filthy, indecent, characterless, and antisocial members of a respectful and prosperous society. It is because of such notions that laws like SITA were enacted, which dehumanized sex workers. However, in recent years, the judiciary has provided some optimism. In 2013, Justice Verma Commission said that there is a difference between women who are trafficked for commercial sex and mature, consenting women who engage in sex work of their own will<sup>23</sup>. Later on, consensual sex work was elevated to a respectable standing. And this year's decision defined its legal status by referring to it as a profession. The next stage should be the creation of appropriate law that not only defines sex workers as employees but also provides sex workers with workplace rights. If the court has recognized this to be a profession, the place where it occurs should be made safe as well. The

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<sup>23</sup> R Jagannathan, 'Verma reports big miss: legalising commercial sex work' (*First Post*, 5 February 2013) <<https://www.firstpost.com/living/verma-reports-big-miss-legalising-commercial-sex-work-614041.html>> accessed 05 June 2022

brothels which are prone to be filled by human trafficking victims must be regulated. The illegal status given to brothels makes them vulnerable to more human rights violations by the middlemen and the authorities. The victim of these are ultimately women, which defeats the whole purpose of the rules. In spite of the fact that the court has granted some relief, the majority of them remain unanswered and ignored. It is, however, as necessary to put this recent pronouncement into action. Therefore, the Centre now needs to come up with practical solutions to regulate voluntary sex work in the country.