

Recourse against arbitral award U/S 34 of the arbitration and conciliation act, 1996: An analytical appraisal

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Abstract

It is an incontrovertible that the process of arbitration is governed by the law of seat of the arbitration. Therefore, in case of international commercial arbitration having the seat of arbitration in India, and in case of domestic arbitration (both parties are Indian), section 34 under Part I of the Arbitration and Conciliation Act of 1996 (hereinafter referred as 1996 Act) lays down the provisions under which applications could be filed to set aside arbitral awards.

This article is an attempt to critically analyse section 34 of the Arbitration and Conciliation Act, 1996 in the light of recent amendment of 2015 to the Act and judicial pronouncements.

Keywords: Arbitration, Award, Judicial pronouncement, amendment

1. Introduction

Application for setting aside the arbitral award: section 34

It is an incontrovertible that the process of arbitration is governed by the law of seat of the arbitration. Therefore, in case of international commercial arbitration having the seat of arbitration in India, and in case of domestic arbitration (both parties are Indian), section 34 under Part I of the Arbitration and Conciliation Act of 1996 (hereinafter referred as 1996 Act) lays down the provisions under which applications could be filed to set aside arbitral awards.

It is to be noted that the underlying philosophy of section 34 of the 1996 Act strives to bring a balance between the party autonomy and judicial interference into an arbitral process. Thus the section envisages a position whereby an arbitral award can be challenged for the purpose of setting aside the same at the first instance without much delay^[1].

Commenting on the nature of Sec. 34, Supreme Court (SC) in *Indu Engg & Textiles Ltd v. D.D.A.*^[2] has observed that, an arbitrator is a judge appointed by the parties and as such an award passed by him is not to be lightly interfered with. The conclusion of an arbitrator on facts, even if erroneous in the opinion of the court cannot be interfered with. Where the view of the arbitrator is a plausible view and cannot be ruled as one which it is impossible to accept, the court should not substitute its own view in place of that of the arbitrator. But this does not mean there is no check on the arbitrators conduct. In order, therefore, to assure proper conduct of proceedings, the law allows certain remedies against an award. These remedies can be obtained through a court of law having jurisdiction over the matter.

(i) Incapacity Of Party: [S. 34 (2)(a)(i)]

The present section enunciates that an arbitral award may be set aside by the court only when the party making application furnishes the proof that the other party suffers from some incapacity. Thus, if a party to arbitration is not capable of looking after his own interests and is not represented by a person who can protect his interests, the award will not be binding on him and may be set aside on his application. For

instance, if a minor, or a person of unsound mind is a party, he must be properly represented by a guardian, otherwise the award would be liable to be set aside.

(ii) Invalidity of an agreement: [S. 34 (2)(a)(ii)]

The validity of an arbitration agreement can be challenged on any of the grounds on which the validity of the contract may be challenged. In cases where the arbitration clause is contained in a contract, the arbitration clause will be invalid if the contract is invalid. If the arbitration agreement is invalid, the reference there under and consequently the award on the basis of such reference would be invalid and can be set aside.

(iii) Absence of notice, unable to present case: [S. 34 (2)(2)(iii)]

The present section states that an arbitral award may be set aside by the court only if the party making the application furnishes the proof that the party was not given a proper notice of the appointment of an arbitrator, or that the party was not given proper notice of the arbitral proceedings, or that the party was forced for some reason unable to present his case.

Section 12 of the 1996 Act gives a party the right to challenge the appointment of an arbitrator on the ground if the party is not given notice of the appointment of an arbitrator^[3]. Thus, it is essential that the parties be given proper notice of the arbitral proceedings in order to file statements of claim or defence as required by section 23.

Thus, the failure to give notice to the party on various accounts eventually lead to the setting aside of the arbitral award as it thwarts the observance of the principles of natural justice^[4].

(iv) Award beyond scope of reference: [S. 34(2)(a)(iv)]

It provides that an arbitral award is liable to be set aside if it deals with a dispute which is not contemplated by agreement, or is not falling within the terms of the reference, or it contains a decision in matters beyond the reference. Further, the proviso to the said section provides that if the decision in respect of the matter outside the tribunal's jurisdiction can be separated from the decision on matters within its jurisdiction, then only that

part of the arbitral award which contains decisions on matters outside its jurisdiction will be set aside.

There is a distinction between disputes as to the jurisdiction of the arbitrator and dispute as to which the jurisdiction should be exercised. The court can interfere in the former type of situation where there has been a challenge to the jurisdiction of the arbitrator^[5].

Further, the 1996 Act provides for the enlargement of reference and it is to be prominently noted that the scope of reference becomes enlarged when the parties file their statement putting forth claims not covered by the original reference^[6]. As discussed above, section 16 marks the stages at which objections to jurisdiction should be raised.

Where it appears that a part of the award is upon a matter not referred and such part can be separated from the other part without affecting the decision of the matter referred, the court can modify the award accordingly. In connection with the requisites of a valid award that the award should not go beyond the submission and that if it does and the excess part cannot be separated, the whole of the award becomes void^[7].

In *Olympus Superstructures (P) Ltd. v. Meena Vijay Khaitan*^[8], M. Jagannadha Rao J. stated that, it may be argued on one side that the time limit set in clauses 2 and 3 of section 16 are mandatory and do not permit the question to be raised at a later point of time even under section 34. And opposite view could be that these being jurisdictional issues, the fact that they were not raised earlier could not preclude the question from being raised under section 34 as consent, express or implied, could not confer jurisdiction.

(v) Illegality in composition of tribunal or in procedure: [S. 34 (2) (A)(V)]

As per the provision, an arbitral award may be set aside by the court only if the party making the application furnishes proof that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the in the absence of agreement as to procedure, the procedure prescribed by the Act was not followed. Thus, the said section requires that the composition of the Arbitral tribunal and the procedure which is required to be followed by arbitrators, should be in accordance with the agreement. In absence of such agreement, it should be in accordance with the procedure prescribed in Part 1 of the Act^[9].

In this regard it is significant to discuss section 28 of the 1996 Act which provides that domestic arbitration shall be carried out in accordance with the substantive law for the time being in force in India^[10]. Further, the said section provides that in an international commercial arbitration having the seat of arbitration in India, the arbitral tribunal shall decide the dispute in accordance with the rules designated by the parties as applicable to the substance of the dispute^[11]. Unless otherwise agreed by the party, any designation by the parties of the law or legal system of a given country shall be construed as directly referring to the substantive law of that country and not to its conflict of laws rules^[12]. It is provided further that failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers appropriate given all the circumstances surrounding the dispute^[13].

In *ONGC Ltd. v. Saw Pipes Ltd*^[14], the award was held to be violative of sub-section 2 and 3 of section 28 of the 1996 Act. Hence, the award was set aside under sub-section 2 of section

34. The said section provides that the arbitral tribunal can decide the matter according to its own good sense (*ex aequo et bono*) or on the basis of amicable settlement (*amicable compositeur*) but only if expressly authorized by the parties. Also, sub-section 3 of the said section provides that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract and after taking into account the usage of the trade applicable to the transaction.

(vi) Arbitrability of dispute: [S. 34(2)(B)(I)]

The existence of an arbitrable dispute is a condition precedent for the exercise of power by an arbitrator. Thus accordingly, as per the section an arbitral award may be set aside by the court if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force^[15]. Generally almost all matters in dispute, not being of a criminal nature, may be referred to arbitration^[16].

(vii) Public policy S. 34 (2) (b)(ii)

The present section provides that an application for setting aside an arbitral award can be made if the arbitral award is in conflict with the public policy of India. Further, the explanation of clause (b) of sub-section 2 of section 34 provides that without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81. Thus, it necessarily indicates that an award obtained by suppressing facts, by misleading or deceiving the arbitrator, by bribing the arbitrator, by exerting pressure on the arbitrator etc, would be liable to set aside^[17].

Parties have autonomy to enter into contracts, when autonomy is outweighed by the public interest, the court will refuse to enforce the contract^[18]. The concept has been taken to connote larger public interest or public good. Thus, it undoubtedly covers the policy of law and indicates that whatever would tend to abstract public justice or violate a statute, whatever is against good morals is against public policy^[19].

In *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*^[20] Court held that the term “public policy of India” should be given wider interpretation. The award could be set-aside on the ground of public policy if the award is made in contravention to:

- Fundamental policy of India
- Interest of India
- Justice or morality; Or,
- If it is patently illegal.

The Court also held that the term “Public Policy” is not defined under the Act. It has to be constructed in the context it has been used and its definition may vary from generation to generation. In Arbitration Act this term has to be given meaning in the light and principal underlying Arbitration and Conciliation Act, 1996, Contract Act and Constitution of India.

While delivering the judgment in *ONGC* case, the two judges’ bench bypassed the ruling of the three judges Bench of Supreme Court in the *Renusagar* case^[21]. While the Bench in *Renusagar* case held that the term ‘public policy of India’ was to be interpreted in a narrow sense, the Division Bench went ahead of the prior precedent and expanded the same to such an extent that arbitral awards could be reviewed on their merits.

The SC in *SAW Pipes*, expanded the concept of public policy

and held that, the award would be contrary to public policy if it is "patently illegal" which a step was backward in laws relating to alternate dispute resolution in the era of globalization.

Some critics have argued that, the interpretation given to public policy in SAW Pipes "will cause unnecessary delay in the resolution of disputes" [22]. They also suggest that losing parties will challenge awards as contrary to the public policy of India, perhaps on spurious grounds, and that such challenges, "even if unsuccessful, can delay enforcement for several years" [23].

Moreover, as per the *ONGC* case, the award must be in accordance with the agreement of the parties and the agreement of the parties must lie within the parameters prescribed by the non-derogable provisions of Part I. If the award does not meet the said criteria, it may be set aside under section 34(2) (a) (v) read in conjecture with section 28(1) (a).

Thus, *ONGC's* case modifies and expands the purview of the doctrine of "Public Policy" which was delimited by *Renusagar's* case. It has rightly set the clock back to the pre-1996 era wherein delay in the arbitral awards had become the order of the day. It has further added one more head of "Patent Illegality" under the doctrine of "Public Policy", provided that the illegality goes to the root of the matter or is as unfair and reasonable as it shocks the conscience of the court. Contrarily, if the courts have not modified the doctrine, it would have failed in its duty of preventing subversion of societal goals and endangering public good [24].

Thus, recognition or enforcement may be refused if the award is in respect of a matter which is contrary to the public policy. What has to be shown that there is some element of illegality or the enforcement of the award would be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public [25].

Amendment of 2015 to Sec. 34

Explanation 1 to the term 'public policy of India' substituted in Section 34(2) (b):

Arbitral award shall be treated as an award in conflict with the public policy of India only where making of the award was induced or affected by fraud or corruption or was in violation of provisions of confidentiality (section 75) or admissibility of evidence of conciliation proceedings in other proceedings (section 81); or is in contravention with the fundamental policy of Indian law; or it is in conflict with the most basic notions of morality or justice.

Explanation 2 inserted in Section 34(2) (b):

The test as to whether the award is in contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Insertion of new sub section (2A) in Section 34:

This provision gives an additional ground of patent illegality to challenge an arbitral award arising out of arbitrations other than international commercial arbitrations.

Insertion of new sub section (5) in Section 34:

An application for setting aside of award under this section is to be filed after issuing prior notice to the other party.

Insertion of new sub section (6) in Section 34:

A period of one year has been prescribed for disposal of an application for setting aside an arbitral award.

Critique on Sec. 34

- Section 31 (3) requires reasons to be given in the award (except in cases where parties otherwise agree that reasons

need not be given or the award is one by settlement), no adequate provision is made in Section 34 in this behalf, if reasons are not given in the award [26].

- The ground of misconduct was incorporated under the old Act of 1940 in sec.30 (a) – '*the arbitrator must have misconducted himself or the proceedings*'. The ground is absent in 1996 Act.
- The period of three months after passing of award u/s 34 (3), leads to undue delay to arbitral proceedings. The period may be reduced to 45 days, subject to further extension by court.

2. Conclusion

The comprehensive analysis of section 34 of the 1996 Act suggests that the power of judicial review can be exercised by the court only in accordance with said section and no other, as it is explicitly mentioned in the language of the said section that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3) [27]. But as observed above that the courts have tried to stretch their fangs in the garb of judicial review by expanding the scope of the doctrine of public policy so as to include the patent illegality in it and expanding the extent of judicial review of the international commercial arbitral awards ignores the needs of the international mercantile community.

The courts must keep in mind while deciding objections under this section that the intention of the legislature in repealing the 1940 Act and substituting it by the 1996 Act was primarily to attach finality to arbitration proceedings and interference by the courts was intended to be curtailed drastically [28].

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Dispute of enforcement of foreign arbitral awards in India and its impact on international trade

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Abstract

With the promotion of International Trade among different countries apart from presence of agreement, a credence has to be established among the parties that in case any dispute arises, in spite of having variance in the domestic laws of both the parties, the dispute will be resolved on the basis on principle of justice. Arbitration is considered as a step towards privatization of such justice. Arbitration clauses are most common in international commercial contracts under which parties come into a private agreement for settlement of any kind of dispute which will be based on the law opted by the parties. The agreement further covers the number of arbitrators to form tribunal, procedure for appointment and removal of arbitrator and competence of tribunal to rule on its own jurisdiction. Since in International trade parties involve are from different nations with different domestic laws, there was a need for a uniform law that could be followed by each and every Country. Therefore to bring such uniformity Geneva Convention was passed in 1927 especially for the enforcement of the foreign award which was followed up by the New York Convention 1958. India has also ratified New Convention under Arbitration and Conciliation Act 1996 for enforcement of Foreign Awards. The New York Convention was introduced in 1996 Act so as international traders do not suffer problem while enforcing the awards and they can get easy Judicial Remedy but from the time of enactment of 1996 Act the scenario has been opposite. Due to various Judicial Pronouncements and the framework of the 1996 Act especially Part II of the act, it has become a frantic job for International Traders to enforce the award in India or get any remedy.

Therefore the article will deal with the major loopholes in Arbitration Laws of India for enforcing of foreign awards in past decades, the reformative steps taken with 2015 Ordinance and its effect on the International Trade and Commercial relations among countries.

Keywords: International Trade, impact on international trade, principle of justice

1. Introduction

1.1 History & development of enforcement of foreign award laws

Before the enactment of the Arbitration and Conciliation Act 1996 Act in India, there were 3 regulations for enforcement of the arbitration awards in India. The enforcement of domestic award was regulated under The Arbitration Act 1940. For enforcement of the foreign awards there were two different regulations based on conventions firstly it was Execution of Foreign Arbitral Awards which was based on Geneva Convention and the other was Foreign Awards (Recognition and Enforcement Act) 1961 New York Conventions.

I) Geneva Convention

Geneva Convention was a multilateral treaty which was brought into effect after the First World War. Geneva Convention comprised of Geneva Protocol on Arbitration Clauses of 1923 (hereinafter referred as 1923 Protocol) and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (hereinafter referred as 1927 Convention). 1923 Protocol and 1927 Convention was supplementary to each other for making it possible to enforce an award in contracting state other than where the award was rendered ^[1]. For the enforcement of the award under the convention, it was required for both the contracting states to be a party to the convention. For the enforcement of the Award under the convention the Award must be recognized as final "i.e. award is not subject to appeal or opposition and the award must not be against the "public policy and principle of Law"

II) New York Convention.

In later stage of Geneva Convention, it was realized that the convention was not conclusive to the speedy enforcement of foreign awards which was the requirement of International trade. One of major loopholes in Geneva Convention was, before the enforcement of the award, the matter would have become final in the country where it was rendered. Therefore it effectively prevented the execution of awards on basis that the award was subject matter of litigation, which act as a hindrance in the arbitration process ^[2].

Realizing the interest of developing International trade, it was important to further the means of obtaining the enforcement in one country of international arbitral award rendered in other country. In 1954 International Chamber of Commerce proposed a draft convention which was adopted by The United nation Economic and Social Council (ECOSOC) in 1955. Finally after the recommendations of number of governments and non-government organization, ECOSOC in 923rd Plenary meeting 1958 adopted a new International Convention on the recognition and enforcement of Arbitral Award i.e. The New York Convention. Further Article VII (2) of the New York convention cease the effect of the Geneva Convention ^[3].

III) Difference between Geneva and New York Convention

New York Convention provides for recognition and enforcement of arbitral award, whether or not made in the territory of a contracting state ^[4]. Unlike the Geneva Convention, under New York convention recognition and enforcement of the award can be sought even if none the

contracting state is the state where the recognition and enforcement of award is rendered [5]. Therefore New York convention has widened its area of operation as compare to Geneva Convention. However Article 1(3) of the convention permits the contracting state to limit the jurisdiction states for recognizing and enforcing of award.

IV) The Foreign Award (Recognition and Enforcement Act 1961)

The Foreign Award Act was passed to implement and give effect to the New York Convention. The act aimed at providing a mechanism for speedy referral of disputes to arbitration between the contracting parties and for the speedy enforcement of resultant foreign arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such award is sought.

V) Arbitration, and Conciliation Act 1996 and uncitral Model Law

The 1940 Act consolidated and amended the law relating to arbitration under the Indian Arbitration Act 1899 and 2nd Schedule to the code of Civil Procedure, 1908. The arbitration act was criticized for its mechanisms as it allowed too much judicial intervention. It was pointed out by Supreme Court in the case of *Guru Nanak Foundation v. Rattan Singh and Sons* [6].

Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep”.

Therefore Law Commission of India, representatives of trade associations, arbitration bodies and arbitration experts also favored amendment to the arbitration laws and accordingly the Arbitration and Conciliation Act, 1996 (hereinafter referred as 1996 Act) was enacted. Meanwhile The United Nations Commission on International Trade Law adopted the Uncitral Model Law on International Commercial Arbitration in 1985. The general assembly recommended that all states given due consideration to the Model Law for the sake of uniformity of the law of arbitral procedure and the needs of International Commercial Arbitration practice. Therefore need was felt for improvement and harmonization of national laws which were inappropriate for resolving international commercial arbitration dispute. The Model law was intended to reduce the risk of such possible frustration, difficulties or surprise. Based on these recommendation 1996 act was modified and was further divided into four parts 1) domestic arbitration 2) Foreign Awards 3) Conciliation 4) Supplementary Awards

1.2 Enforcement of award under 1996 act.

The 1996 act talks about both domestic and foreign award, Domestic award is the one which is made where the arbitration is seated in India and both the parties are India whereas the foreign award is one which is made when the proceeding is outside India. Normally a domestic award is challengeable under section Sec.34 of the 1996 Act, whereas there are no provisions for challenging the foreign awards under 1996 Act. Under the 1996 Act, the enforcement of foreign award can be

resisted by the on the following grounds a) Invalidation of agreement b) No proper appointment of arbitrator C) the decision taken is beyond the subject of arbitration d) Any failure in composition of arbitral authority or arbitral procedure with law of the country.

I) Award cannot be Challenge on Merit

With the above limited ground given for challenging the enforcement of foreign award in India under Sec. 48(1) of the 1996 Act, it is clear that notwithstanding anything given in Indian Contract laws, no proceeding can be initiated against the foreign award for nullifying that award. Further the enforcement of foreign awards cannot be challenge on Merits. This has been a major issue from the time of enactment of 1961 Foreign Award Act, the same was pointed by Supreme Court in *balco case* [7].

“...In the 1961 Act, there is no provision for challenging the Foreign Award on merits similar or identical to the provisions contained in Sections 16 and 30 of the 1940 Act. The Indian Law has remained as such from 1961 onwards”.

Further the court held:

“...Section 48(1)(e) cannot be interpreted to mean that, by necessary implication, the foreign awards sought to be enforced in India can also be challenged on merits in Indian Courts. The provision only means that Indian Courts would recognize as a valid defense in the enforcement proceedings relating to a foreign award, if the Court is satisfied that the award has been set aside”

II) Award Enforcement for only Notified Countries

The second requirement for enforcing any foreign award in India is that country where the award has been issued must be notified by the Indian Government to be a country to which the New York Convention applies [8] as given under Sec. 44 (b) of 1996 Act. But what if the award is made in a country which has not been notified by the country to come under the New York Convention, this question was dealt in the case of *Transocean Shipping Agency Pvt Ltd v Black Sea Shipping & Ors* [9] in which the award was made in Ukraine which was the part of USSR that time. However when the dispute arose between the parties, Ukraine got disintegrated from USSR and Ukraine become a separate country which was not notified by Indian Government. Therefore the issue aroused that whether the award can be enforceable in India despite the fact Ukraine has not been notified by Indian Government under New York Convention. Both the Bombay High Court and Supreme Court of India held that creating a new political entity do not make any detrainment for enforceability of the award rendered in a territory which was initially notified and hence award was upheld. Though this is very common issue in foreign award, when one country enforce the award let's say under New York Convention in the country where it is rendered but because of the reason the country where the award is rendered has not ratified the convention, party who wants to enforce the award remains remedy-less.

III) Public Policy

Further the court can refused the enforcement of the award if a) The subject matter of the difference is not capable of settlement by arbitration under Indian Laws b) the enforcement of the award is contrary to the public policy of India The term “Public policy” is mentioned under Article V (2) (b) of the New York

Convention. "Public Policy" never meant international Public Policy but Public Policy with regard to that country where the award has to be enforced. Prof Berg an authoritative commentary on International Arbitration stated:

"...In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award: the invalidity of the arbitration agreement, the violation of due process, the award extra or ultra petita, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the nonbinding force of the award, the setting aside of the award in the country of origin, and the violation of public policy"^[10].

What does it mean by public policy? This question has become an important issue in the field of arbitration as it is one of the gateways through which judicial intervention can take place in arbitral proceeding for restraining the enforcement of foreign award. Public Policy is an ever shifting and a vague concept; defining it in words is a vigorous task. In the words of Judge Burrough.

"Public Policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but only when other points fail"^[11].

Under 1996 Act, Section 34 and Section 48(2) (b) both deal with the concept of Public Policy. Section 34 and Section 48 talks about setting aside arbitral award if it is in conflict with the public policy of India and challenging the enforcement of foreign award on the basis of public policy of India, respectively. Whether there is any difference in the scope of public policy in both the provisions has been a matter of deliberation? This question was raised in *Shri Lal Mahal v. Progetto Gano SPA*^[12]. The case dealt with the scope and ambit of the term Public Policy under Section 48(2) (b) and how it is different from the 'Public Policy' referred to in Section 34.

In its judgment in *Shri Lal Mahal's* case, Supreme Court held that when it comes to section 34 of the Act a wider meaning and ambit of "Public Policy" has to be taken, whereas under Section 48(2) (b) a narrower scope of the term "Public Policy" has to be deemed.

Supreme Court first time set the grounds for Public Policy in *RENUSAGAR Power Co. Ltd v. General Electric Co*^[13]. (Herein after referred as Renusagar Case) the term "Contrary to Public Policy" under section 48 was interpreted as meaning any enforcement which could be contrary to

- (i) Fundamental policy of Indian law;
- (ii) The interests of India;
- (iii) Justice or morality

But in later Supreme court was of the view that the concept of Public Policy has to be given a more wider view as what has been given in Renusagar case reason being Public Policy is a matter of public good and public interest therefore Supreme Court invoked the concept of Patent Illegality which was applied in *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd* (hereinafter referred as *SAW Pipe* case)^[14]. According to this concept, to determine whether any act is against public policy the court should go to the root of the matter and the act should not be "so unfair and unreasonable that it shock the conscience of the court". This decision of Supreme Court was highly criticized, as patent illegality simply means finding error in law for which court has to go into the merits of the case which is never a ground for challenging an award under Indian

Arbitration.

The decision of *Saw Pipes* had a obstructive effect on International Trade bodies because Supreme Court while giving the concept of Patent illegality didn't exclude foreign award therefore the principles of patent illegality was applicable to foreign awards in the same manner as it was for domestic award specially after the *Bhatia International v Bulk Trading S.A & Anr*^[15] (Hereinafter referred as *Bhatia International* Case) (Discussed later). In *Bhatia international* case Supreme Court allowed the applicability of Part I of the 1996 Act in International Commercial Arbitrations therefore a foreign award was allowed to challenge or enforce under Part I of the 1996 Act. This point was clearly mention in *Venture Global Engineering v Satyam Computer Services*^[16] case which Supreme Court extended its decision of *Bhatia International* and *Saw Pipes* and held that Part I is applicable in foreign awards and therefore challenge or enforcement of foreign awards can be done under Part I

To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to foreign awards".

These decisions of Supreme Court made the International Traders agitated, the reason being these decision of Indian Court Increased the Judicial Intervention and made Judicial Procedure more-lengthy and time taking process for remedy. Further having an ambiguous definition of Public Policy and increasing the ambit of public policy created problem for International Trades while enforcing of awards as it become easy for the opponent parties to challenge the enforcement of award and followed up by lengthy court procedure which was an unfriendly practice for International Trade and against the intent for introducing arbitration and New York Convention for enforcement of awards.

IV) **Bhatia vs. balco Case**

In Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc.^[17] (hereinafter referred as *BALCO* Case), the issue before the Supreme Court was whether Indian courts have the Jurisdiction over international commercial arbitration when the seat of arbitration is outside India. The Constitutional Bench of the Supreme Court overruled its own decision in *Bhatia International* Case of while arriving at the judgment. In *Bhatia International* case as discussed above Supreme Court held that the Indian courts have the jurisdiction even when the seat of arbitration is outside India. The rationale behind the decision was that in Section 2(2) of The Arbitration and Conciliation Act, 1996 the term "only" is not used like it has been used in unictral model law; therefore, the legislative intent of both the provisions was different. However, the Apex Court in *BALCO* case rejected this argument and held that the term "only" in Model Law is used just to in Section 2(2) of The Arbitration and Conciliation Act 1996. Also If we go through to the legislative history of The Arbitration and Conciliation Act 1996 then it is clear that the current is adopted from UNICTRAL MODEL LAW, 1985. Starting with the scope of the said act According to Sec 2(2) of the act, Part I of the act

shall apply where the seat of arbitration is in India, this section can be directly referred to Article 1(2) of the UNICTRAL MODEL LAW according to which the provisions of this Law, except Articles 8, 9, 35 and 36 apply only if the seat of arbitration is in the territory of this State. Therefore if we relate both i.e. Section 2(2) of the said Act and Article 1(2) UNICTRAL MODEL LAW the legislative intent of both i.e. Section 2(2) of The Arbitration and Conciliation Act, 1996 and Article 1(2) of the UNICTRAL MODEL LAW is same as to limit the jurisdiction of the Courts in the arbitral matters whose arbitral seat is outside its local territory. The above decision was supported by *Reliance Industries and Anr. v. Union of India* ^[18]. That Part I will not apply in cases where seat of arbitration is outside India. Further taking reference of the case *Dozco India P. Ltd. v. Doosan Infracore Ltd.* ^[19] the Court differentiated between the literal meanings of 'seat' and 'venue of arbitration'. Taking the reference of Bhatia's case, it was held that 'venue of arbitration' is that place which is chosen for the reason of convenience to the parties. The seat of arbitration, on the other hand, indicates the law of proceedings of the arbitration or the curial law of arbitration.

Therefore via BALCO case Court somewhat tried to restore the confidence of the International Traders in Indian Judiciary system for enforcing or challenging of awards. The Impact of case that since Part I of the 1996 Act cannot apply in cases where seat of arbitration is outside India or International Commercial Arbitration therefore any enforcement of the foreign award has to be done as per Part II i.e. New York convention of the 1996 Arbitration act under Sec. 48. But even after the decision the ambiguity of Public Policy that arose in Saw pipes Case and Venture Global Case still exist. "Public Policy" is still undefined and the repercussions of that is that there is unnecessary challenging of awards and therefore Traders are unable to enforce their awards in India. Also BALCO case only have the prospective effect and any contract which has been formulated before BALCO is governed by the law laid down in Bhatia International case.

1.3 Arbitration Ordinance 2015

In 2015 Union Cabinet introduced Arbitration and Conciliation Ordinance, 2015 (hereinafter referred to as 2015 Ordinance). Keeping in mind increasing trade market in India and in best interest of International Traders there were several changes brought in 2015 Ordinance like resolving the conflict of BALCO case and Bhatia case, reducing the ambit of patent illegality and public policy.

I) Definition of Court for International Commercial Arbitration (ICA)

Prior to 2015 Ordinance, the term "Court" under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Arbitration Act) referred to the principal Civil Court of original jurisdiction in a district. As per Section 2(1)(e) of the 2015 Ordinance, the definition of "Court" for the purposes International Commercial Arbitration has been changed to mean the High Court in exercise of its original civil jurisdiction. Also for the purpose of filling application for enforcement of foreign award under Section 47 and 56 of the Arbitration Act, the definition of "Court" for International Commercial Arbitration has been changed to mean High Court in exercise of its original civil jurisdiction as well. Therefore the 2015 Ordinance, only with regard to International

Commercial Arbitration, under Section 47 and Section 56 provides exclusive jurisdiction to High Court.

II) Eliminating "Patent Illegality" as a criteria for setting aside Arbitral Award under Section 34 (Insertion of Sub Sec. 2A in the Ordinance)

As per the 2015 Ordinance, an arbitral award arising out of an arbitration other than in International Commercial Arbitration, may be set aside if the award is vitiated by "patent illegality" appearing on the face of the award. Therefore arbitral awards given in International Commercial Arbitrations cannot be set aside on the ground of patent illegality

III) Clarification on what constitutes Public Policy under Section 48 and Section 57

According to Section 48(2) of the Arbitration Act, the court can refuse to enforce an arbitral award if such enforcement of the award is contrary to the public policy of India. In Renusagar Case, the Court held that the enforcement of a foreign award would be refused on the ground that it was contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality

The 2015 Ordinance has clarified the meaning of public policy by inserting Explanation 1 to Section 48 along the lines of the Renusagar Judgment. It provides for only 3 conditions under which an award can be said to be in conflict with the public policy of India, they are:

- i. The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81, or
- ii. It is in contravention with the fundamental policy of Indian Law, or
- iii. It is in conflict with the most basic notion of morality or justice.

2. Conclusion

With spreading of Global Market and International Trade between the countries, pertaining to International Trade there is always being focus on strengthen the substantial laws but one other hand there is always being less focus on the procedural aspects one which is arbitration laws which is the core dispute resolution system in International Trade Law. Laws for Enforcement of Foreign Awards is one such laws. Above we have read that how still these laws are having many disparities in despite being enacted for two decades. Be it the languid approach of Judiciary or framers of the legislature, these loopholes in the laws of enforcement of awards have directly affected the International Trade relation of India as international traders are reluctant be in relation with those nations where they are doubtful about recourse or remedies in case of disputes. Knowing the fact that under International Trade Law, Arbitration is the only procedural aspect via which parties can resolve their disputes and seek remedy, it is required for a nation to have a well framed and effective arbitration laws. Arbitration Ordinance 2015 has shown the positive lean towards a better and strong arbitral award laws which directly positive impact of International Trade in India.

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Farmer's suicides in India and judicial view

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Abstract

The farming is very ancient way of occupation in the world. The farmer occupies very pivotal position in the agricultural activity. The farmer is a backbone of any country whether it is developed or developing country may be. The importance of farmers in national development cannot be ignored or separated and in our country around sixty percent of people depend upon the agricultural and allied activities and same percent of national income is generated from this sector. In spite of this the farmers in some part of country have under tremendous strains to due to various reasons like failure of monsoons, heavy debts, poor demand for their produce in market, substandard life styles in villages, heavy competition from fellow farmers from other countries, genetically modified crops, and neglect of successive governments for their welfare. The farming activity is considered as gambling activity as it depends upon various factors like timely arrival of monsoons, generation of investment capital, livestock availability etc., Some segment of farmers due to failure of their crops have attempting suicides across the nation and to stop this tendencies some organizations have approached various judicial authorities. My paper deals with historical perspectives of farmer's suicides, legal aspects of suicides, landmark judgments on suicides and farmers suicide and judicial stand matters etc.

Keywords: farmer, suicide, genetically modified crops, judiciary, embarking, Public Interest Litigation, Commission, statutory status, preventive measures, budget

Introduction

"When tillage begins, other arts follow. The farmers, therefore, are the founders of human civilization"- Daniel Webster ^[1]

The farmer is a backbone of any country whether it is developed or developing country may be. Mahatma Gandhi the father of the nation's rightly remarked that if you want to see the India you should go the village and when the village is full of happiness then only we can see the country is in happiness. The importance of farmers in national development cannot be ignored or separated and in our country around sixty percent of people depend upon the agricultural and allied activities and same percent of national income is generated from this sector. In spite of this the farmers in some part of country have under tremendous strains to due to various reasons like failure of monsoons, heavy debts, poor demand for their produce in market, substandard life styles in villages, heavy competition from fellow farmers from other countries, genetically modified crops and neglect of successive governments for their welfare.

Historical Perspectives

In view of above reasons they have committing suicides across the country. The National Crime Records Bureau of India in its report of 2014 points out that there were 5650 farmers have ended their life by committing suicides, the highest number of farmers suicide took place in 2004 around 18241 farmers have committed act of suicides, which is 1.4 to 1.8 percent in one lack population ^[2]. This speaks of precarious condition and position of farmers in our country. The farmers suicides are not a new phenomenon which is very much seen in country since British rule, The high land taxes of 1870s, payable in cash regardless of the effects of frequent famines on farm output or productivity, combined with colonial protection of usury, money lenders and landowner rights, contributed to widespread penury and frustration among cotton and other farmers, ultimately leading to Deccan Riots of 1875-1877 ^[3-4]. The

British government enacted the Deccan Agriculturists' Relief Act in 1879, to limit the interest rate charged by money lenders to Deccan cotton farmers, but applied it selectively to areas that served British cotton trading interests ^[5].

Legal Aspects of Suicide

The Constitution of India under part third guarantees fundamental rights which are available to all its citizens and the article 21 provides due process of law and right to livelihood. The part III rights are enforceable rights and in addition to these the part IV which are enforceable rights which are popularly called the Directive Principles of State Policy also mandates the State under article 43 to provision for just and humane condition of work, under article 48 organisation of agriculture and animal husbandry. Taking into consideration many schemes have been initiated by the respective governments but those are not meeting the growing demands of farmers.

Before going to embarking upon the apex court stand on the farmers suicide it is high time to know the meaning of suicide, the world famous Merriam Webster Dictionary defines suicide as the act or an instance of taking one's own life voluntarily and intentionally especially by a person of years of discretion and of sound mind. In other words we can say that ending of one's own life on any reason. By act of suicide the persons is completely absolved of liabilities. If a suicide attempt results in failure the law comes into the picture the person attempted to committed suicide is liable for criminal proceedings for his act. The Indian Penal Code of 1860 under Section 309 prohibits attempt to commit suicide, which reads as follows, "Whoever attempts to commit suicide and does any act towards the commission of such offence, shall he punished with simple imprisonment for a term which may extend to one year or with fine, or with both. The above sections has received wide interpretations from different courts in India whether citizens

have right to suicide or not.

Landmark judgments on Suicide

For the first time in country, the Bombay High Court in *Maruti Shripati Dubal v. State of Maharashtra* [6]. The Constitutionality of Section 309 is questioned by the petitioner and the Bombay High Court opined that the above sections ultra vires to the Constitutional principles and struck down the punishment for attempt to suicide.

In *Smt. Gian Kaur v. State of Punjab* [7], the apex court of the land the Supreme Court of India in full bench held that right to suicide is not available under the Constitution of India and section 309 which is available under the statute is within the purview of the Constitution of India and it is reversed the decision of earlier case.

In *Nikil Soni v. Union of India and Others*, the Rajasthan High Court on 10th August, 2015 held that even religious based suicides have not allowed in our country as it violates the constitutional principles.

Farmers Suicides and Judicial Stand

In 2006 in *Sanjeev Bhatnagar v. Union of India and Others*, The Supreme Court of India has issued notices to the Government of India and the governments of Karnataka, Andhra Pradesh, Maharashtra and Kerala on the issue of farmer suicides. A public interest litigation (PIL) before the court is seeking its intervention in reviewing the country's agriculture policy in the face of the increasing number of farm deaths due to poverty and indebtedness. A three-judge bench comprising Chief Justice Y K Sabharwal and Judges C K Thakker and Markandey Katju The court asked the respondents to give reasons as to why adequate preventive measures were not being put in place to end the suicides [8].

In another case, *S. Sundareshan v., Union of India*, the Supreme Court declined to entertain a public interest litigation raising the issue of farmers' suicide in the country and seeking direction for the Centre to implement the recommendation of an expert body to fix minimum support price (MSP) for all agricultural products.

The Court held that "We are not supposed to go into the policy matters. It is for the government to see and take decision," a bench of Chief Justice T S Thakur and Justices AK Sikri and R Banumathi said. The bench said the public interest litigation petitioner has to go before an appropriate authority and make representation.

"These are matters which are between people and the government," the bench observed while wondering at the outset as to "what are we supposed to do for farmers' suicide. What is government supposed to do?" Realizing that the bench was not inclined to issue any direction, advocate P V Yogeshwaram, appearing for scientist S Sunderesan, preferred to withdraw the PIL in which directions were sought for implementation of recommendations of National Commission of Farmers (NCF). The Commission headed by noted agricultural scientist M S Swaminathan had in 2006 come out with a report dealing with several issues including that of farmers' suicide and had proposed slew of measures to check it. The Commission had suggested that there was a need to improve implementation of Minimum Support Price (MSP) and arrangements to be put in place for crops, other than paddy and wheat. It had also said that MSP should be at least 50 per cent more than the weighted average cost of production [9].

In *Jana Vignaya Vedika V. Governments of Telangana State and Andhra Pradesh*, recently the High Court of Judicature slammed both Telangana State and Andhra Pradesh. The High Court also sought the response of both governments on measures taken by them. The bench, which was hearing a Public Interest Litigation petition seeking government to take steps to prevent farmer suicides, and it is held that "you are not taking serious this issue. You are just paying compensation only there are no welfare measures taken by you to prevent suicides of farmers. You have to find facts reasons for agrarian crisis. Why don't you form a committee to find the reasons and solutions," said the bench.

Conclusions and Suggestions

In spite of intervention from different courts there is dearth of stoppages of farmer suicides across in country more particularly in the Central part. The Central and State governments should sincerely initiate concrete steps for putting full stop to the farmers death for which purpose I am proposing following few suggestions.

1. The Minimum Agricultural Prices Commission should be made as statutory status not only to recommend the minimum prices for agricultural produce but it also should regularly monitor conditions of farmers and their market conditions.
2. The banking establishments should liberally provide agricultural loans with low rate of interest and the repayment of loan period should be flexible basing upon the weather and other conditions.
3. The farmer right to livelihood should be given status of fundamental right by amending the constitution.
4. The farmer rehabilitations centres should be established to give counselling to grief stricken farmers.
5. The central and state governments should prepare and present a separate budget for farmers in annual budgetary process.

If we not take proper measures the precarious farmers may continue to commit suicides in days to come and the status of nations among the world countries diminish and it would automatically effect on socio-economic status of the country. I hereby consider that if the farmers weep it is considered as entire country is weeping.

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Awareness on legal rights of women: A study of Kalaburagi district

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Abstract

The women need legal rights because to get protection from the harassment, marriage dowry, divorce, domestic violence, rape and from other violence. Women in the independent India have more rights than their counterparts in many other countries of the world. But most of our women are not very much conscious of these rights. Uneducated rural women do not have any awareness of right the constitution of India has guaranteed Equality, Liberality, and Dignity to the women of India. Illiteracy and Ignorance, Customs like child marriage and dowry. Law as an instrument of social change ought to achieve equilibrium by orderly regulating socio-economic relationship and obliterating societal irritants. Law ought to adopt, adjust and supplement the needs of the society and it is supposed to generate, activate and accelerate ordered social change, objectives such as, To know about the various laws related to women, To give relevant information about their rights and duties. Woman has always been ignored in the Indian society from the time immemorial and such gender discrimination is becoming more and more obvious in the present day society which claimed to be civilized one.

Keywords: legal rights, RULE of law, women and society

1. Introduction

The women need legal rights because to get protection from the harassment, marriage dowry, divorce, domestic violence, rape and from other violence. Women in the independent India have more rights than their counterparts in many other countries of the world. But most of our women are not very much conscious of these rights. Uneducated rural women do not have any awareness of right the constitution of India has guaranteed Equality, Liberality, and Dignity to the women of India. The women rights under the personal laws are inferior to those of men. the concept of that "Women is much a human being as a man and thus entitled to some freedom rights and responsibilities "it's to yet find universal acceptance in spite of the assertion that women have complete and equal rights with men in every respect by the international bill of human rights, legislation is important but the implantation machinery at all levels has to be sensitized and responsible to women needs.

Awareness and knowledge of women's rights to equality in the society at large women must be innovated in a much bigger way in the judicial and laws enforcement process whether as judicial officer's lawyers or police. The constitution vision of gender justice can be realized only a set of multiple stogies which include more affirmative action. The struggle for legal equality has been of the major concerns the women's movement all over the world whether in the internal situation of her position in the parental or matrimonial home or in the external situation of acquiring education skills professions employment ect all these involve the law.

Due to legal equality women get respect and responsibility now we see that women are working outside homes in various offices, colleges, factories, ect. legal equality has enable some women's to hold dignified position but legal equality is all that is sufficient today the law grants immense power to the women she has the rights or equal status in the social, cultural, economical, and political fields. But what was lacking it was the world of her own disbelieves and ignorance which always

kept her as the shadow of her men. As such the first step towards up gradation is to educate and make her conscious of her position and status.

Though education in India is free and compulsory yet she is not able to permit her children, especially the girls, to attend the school the irony of the situation is that in spite of the of the protection provided by the law, she remains unprotected.

The legal system is reflections of the social attitude towards women it is not responsive to her plight. The laws enacted for the protection of women suffer from various shortcomings. The attitude of the courts in interpreting these laws is conservative rigid and traditional. The enforcement of these laws is so poor that the offenders seem to have lost all fear of authority. They grow bolder because they are not caught so they think that they can indulge in crime with impunity, there is no death of crimes, even very brutal ones against women which made to the front page of the newspaper and stirred the con science of the nation. But the public outers that followed did not help the long arm of law to dispense justice to the victims.

The majority of women is still grouping in the dark and has not yet realized fully their rights and responsibilities. This automatically results in their lesser part in all national activities as independent citizens. The reason may be mentioned in a brief as follows.

- a) Illiteracy and Ignorance
- b) Customs like child marriage and dowry.
- c) High maternal mortality service etc. A heavy toll of female lives in the earlier reproductive age of 15 and 34.... greater deaths occur among females even between the age of 35 and 54 than in believed. This is the main cause adverse sex ratio for women in India
- d) Repeated pregnancies and deliveries lastly, if she has to fight for her rights. She should now about her rights and legal protection.

Given to her this study is taken up to know the awareness about legal rights of women.

2. Nature of the Study

Law as an instrument of social change ought to achieve equilibrium by orderly regulating socio-economic relationship and obliterating societal irritants. Law ought to adopt, adjust and supplement the needs of the society and it is supposed to generate, activate and accelerate ordered social change. The law can play a significant role in altering preconceived stereotypes as well as in altering discriminatory practices by the use of sanctions.

The prosperity and growth of a nation depends on the status and development of its women as they not only constitute nearly half of its population but also influence growth of the remaining half "awareness about women's legal rights among women : a study of Kalaburgi district" which is the title of the study which is related in Kalaburgi district.

3. Review of Related Study

Before exploring new phenomenon, it is necessary to look into various aspects already studied as research is a continuous process and it must have some continuity with earlier facts. The knowledge gathered in the past should be consolidated to keep it on records for future use it is like consulting the maps of previous explorer for future direction. This chapter attempt to present a brief resume of research findings related to objectives of the present study.

- 1) Dhar (2009) comments that 40 percent of the world's child marriages take place on India, resulting in various cycle of gender discrimination, illiteracy and high infant and maternal mortality rates. She also says gender discrimination is the reason for the high maternal mortality rate. The need of the hour is the respect for the rights women and children, quality education, a decent standard of living, protection from abuse, exploitation and violence and employment of women.
- 2) Ramakrishna (2008) asserts that we talk about freedom and education of women. But every day in some part of our world, women are being brutalized. They are being raped and mutilated. Like inequalities in wealth. The description of women's rights varies from place to place. Even the most basic of human rights not to be violated sexually or otherwise are violated and many violations are committed against May women.
- 3) Habib (2008) cites the study conducted by the social science research council of the planning ministry in support of his view. It is revealed that more than 90 percent of adolescent girls and women in Bangladesh were being sexually abused in their workplace, but many of cases are not reported.
- 4) Kapadia (2007) studied the occurrence of physical violence experience by young married women at the hands of their husband. This study also examines linkages between gender role expectations and physical violence in two low-income setting in Maharashtra. their analysis of two low-income settings indicate two patterns of initiations of physical violence in young married women i.e. within six months of marriage and after the birth of the first child. Their study highlights a critical social as a main trigger for physical violence against women.
- 5) Fuller (2008) explain that the violence against women. Has been increased in the xenophobic violence that swept across South Africa at the begging of the year 2008. moer than 50 people have died. Hundreds were injured and

thousands were displaced. Sexual violence against women in South Africa as a means to control and punish women was committed in large number. Men rape South Africa women as a means of controlling them or curbing their preference to choose foreign men. Also they are subject to all sorts of physical assault.

- 6) Bhave (2007) states that in Bangalore on May 21. 2001, Rinki, a newly married nineteen-year house wife allegedly to tortured and set on fire by anil (her husband) and his family members. This heinous murder was a familiar example of dowry harassments.
- 7) Behera (2006) Observe that in all societies, to a greater or lesser degree, women are girls are subject to physical, sexual and psychological abuse that cuts across lines of income, class and culture.

4. Methodology

Under this heading the various methods employed in collecting and analyzing the data are discussed. After careful consideration, the method which suits best the purpose of present study are streamlined and adopted with suitable modification. However, the aims and objectives of the study and the limitations of the researcher are also kept in view, while deciding the method of Inquiry. In the following section a brief note will be given on the various methods, tools and techniques employed in collecting and analyzing the data pertinent to the present study. Methodology is paramount importance in any scientific enquiry as the validity of the facts primarily depends upon the system of investigation. The various aspects concerning the methodology have been described under the following heads.

4.1 Objective of the Study

- 1) To know about the various laws related to women
- 2) To give relevant information about their rights and duties
- 3) To realize the laws relating to women's protection
- 4) To bring awareness and knowledge of women's rights to equality
- 5) To enable them to enjoy equalities men of the same status
- 6) To know more about women's exploitation.

4.2 Hypotheses

Following hypotheses are formulated for the present study.

1. Women are less aware about their legal rights.
2. The constitutional provisions and security measures are out of their reach and the existing legislation is inadequate.
3. By creating knowledge about laws among women's.
4. There is no significant difference about the awareness of women's general rights.

4.3 Tools and Techniques

Keeping in view the type of respondent, nature of data required and limitations of times, interview scheduled was preferred to the questionnaire method. In recent year interview schedule is more frequently used in research owing to the convenience and accuracy it guarantees. It is also considered as an important method to collect data for the study of relationship and testing the hypotheses.

The schedule was constructed keeping in view the aims and objectives of the study. Interview does not require any significant changes and as such was used as the main tool of data collection. The schedule is mostly structured and so designed as to elicit relevant data under different section as

shown below 1) Personal and family background 2) Educational Background.

4.4 Sampling Method

A sample is small specimen or a separated part of the whole population representing its general qualities, as far as possible. It is smaller set of values selected from the population, reflecting characteristics. The sampling technique is a procedure for the selection of a sample from the population, in this study I want to use the sampling method which is most important. Because when we take a problem for study or research than the whole problem we can't study for that it is use full to use this method. In this study, want to show about the legal rights of women. For this study I have chosen both Rural and Urban areas in Kalaburgi District. The 40 respondent constituting the study sample will interviewed personally and individually with the help of the schedule as individual is believed to be the most convenient unit of study in the field.

4.5 Data collection Techniques

The collection of data refers to a purposive gathering of information relevant to the subject matter of the study of the units under investigation. Statistical data may be classified into primary and secondary depending upon the nature of data and mode collection. Primary data means original observation collected by the researcher as his agents for the first time for any investigation and used by them. Secondary data means data collected by others and used by others (newspapers and books journals periodical and internet ect)

4.6 Data Processing

After the data collection the field schedules will be checked by carefully and all the entries will be edited properly. Then the article table will be made and other the artificial and interpretation of the data had to be done and the results will be obtained accordingly.

5. Importance of the Study

Woman has always been ignored in the Indian society from the time immemorial and such gender discrimination is becoming more and more obvious in the present day society which claimed to be civilized one. The women folk of which is claimed to be a civilized one. The women folk, of which is the present candidate happens to be a member, is miserably shocked by the treatment, behaviour and status that met with by the women folk from the male dominated the society. The governments of India have made repeated attempts through their policy declaration, from time to time, for the fulfillments of women in the country as a whole. several legislation have been added to the various statue books which are exclusively aiming at the solution of the women's problems, but they could not achieve the desire goals, due to maladministration, improper or total non-implementation of such measures.

In a society where about half of the population and three- fifth of the females (1991) are illiterate, orthodox and tradition bound, beliefs and practices cannot be snuffed out overnight. Nor it is easy to create a strong public opinion against their practices. Legislation, of course, does make some impact but it can only be introduced very cautiously and in stage. And, social legislation cannot root out the social evils. If a law is enacted but not properly implemented it only creates contempt for the law. The implementation of social laws requires the

support and the co- operation of the public. So, this all made me to choose the topic for my article.

6. Analysis and Interpretation of Data

Table 1: Educational Status

S. No.	Opinion	Frequency	Percentage
1.	Literate level of Education	30	75%
	Primary Education	15	
	Higher secondary Education Above.	08	
2.	Illiterate	10	25%
	Total	40	100%

The table 1 which gives the clear picture of statistical data of the educational status. As the study while is the comparative study of a rural areas. The educational level which is very good at the urban level then of the village. The total literate respondents are 30 out of 40 with 75% in that the most of people who got education till the primary level and very much people who are educated till the primary and secondary level. Illiterate Respondents are very less when we compare o literate rate, as it is 10 out of 40 with 25%.

Table 2: Occupational of Respondents

S. No.	Particulars	Frequency	Percentage
1.	Main	25	62%
2	Subsidiary	15	37.5%
	Total	40	100%

It is assumed that the main occupations are either the government private or the jobs outside the home. While subsidiary occupations are assumed to be the works with the family such as sewing weaving, papad, making running kirani store attached to home selling of pickles, papads, serving as maid servants and fetching of water for other etc.

As in comparative study in rural and urban areas. The most of people who are engaged in the main occupation then of subsidiary occupations. in main occupation there is few members who are government servant and remaining members who work in private and do jobs outside the home and the frequency is 25 out of with 62% but the subsidiary occupation there are 15 out of 40 with 37.5%.

Table 3: Legal Equality, Women Get Respect and Responsibility

S. No.	Particulars	Frequency	Percentage
1.	Yes	33	82.5%
2.	No	07	17.5%
	Total	40	100%

Table 3 Suggest that by the legal equality. Women get respect and responsibility. As 33 out of 40 with 82.5% of women's are in favor to this and 7 out of with 17.5% are against to this. By the legal equality the women who can stay equal to men in every field according to their consideration.

Table 4: Equal Remuneration Act-1976

Sl. No	Particulars	Frequency	Percentage
1.	Yes	24	60%
2.	No	16	40%
	Total	40	100%

Table 4 shows the clear picture about the equal remuneration act-1976. In this matter 24 out of 40 with 60% says that they know this act. But the discrimination is made unequal in giving wages particularly in rural Area. Then also they don't approach to the labor officer but they don't do see this 16 out of 40% with 40% say that they don't know about this act.

Table 5: Reservation for Women's in the Local Govt.

Sl. No	Particulars	Frequency	Percentage
1.	Yes	13	32.5%
2.	No	27	67.5%
	Total	40	100%

Table 5 Suggests the reservation of women's in local government. As per 13 out of 40 with 32.5% women's about this but with of women's who don't know about this i.e. 27 out of 40 with 67.5% only the urban women's who are knowing about this but rural women's who are unaware of this.

Table 6: Laws relating to Sexual Harassment

Sl. No	Particulars	Frequency	Percentage
1.	Yes	12	30%
2.	No	29	70%
	Total	40	100%

Law relating to sexual harassment is one that the respondents of rural and urban areas women's don't know. With regard to this only 12 out of 40 with 30% Respondents known about this law and 28 out of 40 with 70% of respondents don't know this law. This is one of the important laws for the working women are who working in the various fields.

Table 7: The maternity Benefit Act-1961

Sl. No	Particulars	Frequency	Percentage
1.	Yes	11	27.5%
2.	No	29	52.5%
	Total	40	100%

Table 7 Executes the maternity benefit act-1961. Here 11 out of 40 with 27.5% response was that they know about this Act. As, we compare other side 29 out of 40 with 52.5% respondents who are large in number don't known about this Act. Only half of urban area people know about this don't the rural people who totally don't know about this Act.

Table 8: favor of the Prohibition of dowry act-1961

Sl. No	Particulars	Frequency	Percentage
1.	Yes	26	65%
2.	No	14	35%
	Total	40	100%

Table 8 says the Respondents 26 out of 40 with 65% were favoring the prohibition of dowry act- 1961. But 14 out of 40 with 35% were against to prohibition of dowry act-1961. This is so because there is no use of implementing of the dowry law, as the dowry is increasing day by day.

7. Results and discussion

First of all relating to the group of Respondents,45% were the age of years, 42.5% were the age of 18-30 years, 42.5% were the age of 30-50 years, and only 12.5% were age of group of

above 50 years, while in the matter of educational level the literate women who consist of 62.5% in that most of respondents who completed their education till the primary education and illiterate respondents are of 37.5% Regarding to the occupation 62.5% of respondents were in the occupation and remaining 37.5% of respondents were in the subsidiary occupation. The dowry prohibition act-1961 57.5% of them said yes and 42.5% said that they don't know about this act. In the maternity benefit act 1961. Only 27.5% were known and 52.5% of them don't know about this act. The Equal remuneration act-1976, in this 60% of them knows about this. But they in the general form rather than of legal form. 40% of them don't know about this Act in general form or in the legal form. Regarding to sexual harassment, only 30% of them and in same way 70% of them don't know about this act. In the matter of reservation for women's in the local govt 32.5% said that they know this Act and 67.5% of them said they don't know about this Act.

8. Suggestion

1. There is a need of creating socialization, social awareness and motivation among women on was footing basis.
2. There must be a need for change in social attitude.
3. There is need for spiritual revolution.
4. To amend the existing law, create special court to tackle promptly the problems relating to women.
5. Consciousness must be created in favor of women through powerful mass media T.V, radio and Cinema.
6. To create awareness of their rights and duties.
7. To put up remedial measures to bring up women's participation in political process.
8. Give Education to women especially to rural women.
9. To create consciousness about the legal rights of women which the constitution as given.
10. Awareness and knowledge of women's rights to equality has to be created among women's.

9. Findings

1. The rural women who are illiterate, poor, Ignorant of laws, and rules and Regulations.
2. The majorities of women are still groping in the dark and have not yet realized fully their rights and responsibilities.
3. Educated women's of urban areas are also unaware of their rights.
4. They don't know the constitutional provisions which as given to them.
5. Most of our women are not very much conscious of the rights.
6. Gender discrimination are more obvious in the society.
7. Women's who are unaware of the government facilities relating to the development.
8. Enforcement of these laws is inadequate.

10. Conclusion

It is true the central and the state government have undertaken various legislative and other measures for promoting the welfare of women. We cannot, however, say that the intended purpose of the government is fulfilled and the targeted persons have received all the benefits. The educated, middle class and upper caste women of towns and cities have taken relatively greater advantage of these measures, whereas the vast mass of uneducated lower class and lower caste women of the rural

areas are not even aware of most of these welfare measures. The deficiencies involved in the measures and the inefficient implementation of the developmental programmes by the indifferent bureaucrats have come in the way of the success of these measures. In spite of these shortcomings, the awareness of women regarding this measure is slowly growing. After the lapse of a few centuries the society is becoming slowly aware of the historic necessity of providing women a respectable position in society and paying special attention to the problems haunting them.

Lastly majority of the women being illiterate, ignorant and poor are unaware of the rights and status. They consider their legal process being costly, time consuming. And long Tradition, customs, social taboos and women own submissiveness are still the millstones hanging around the women.

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Judicial activism for combating the problem of child labour in India: A critical analysis

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Abstract

The framers of the Indian Constitution were fully aware of the problem of child labour. They incorporated some specific provisions to prohibit child labour in Part III and IV of the Constitution dealing with the Fundamental Rights and Directive Principles of State Policy. Article 24 of the Constitution prohibits the employment of children below the age of 14 years in any factories or mines or in other hazardous employment. Article 45 states that the State shall endeavor to provide free and compulsory education until they complete the age of 6 years. Not only the Constitutional provision had looked out the problem of child labour, but different Acts had been enacted to minimize the exploitation of child labour these laws have been amended, repealed and revised from time to time. By these amendments many safeguards are provided to protect children, like minimum age, working hours, health and medical examination, wage and leave, place of environment and physical conditions etc. were prescribed. But it was found that the existing legal framework for the regulation of child labour is dispersed and patchy. Even then it remains anomaly on the said above issues. To meet this gap a significant legislative attempt to prohibit and regulate child labour was made in 1986. The Child Labour (Prohibition and Regulation) Act, 1986 was enacted by the Parliament with an objective to prohibit the engagement of children in certain employment and to regulate the working conditions of work of children in certain other employment. The legislature by enacting the laws to control the problem of child labour had performed its role but the Judiciary had played an important role in this area. In addition to the legislations, the Supreme Court had shown its concern for child labour by bringing occupations or process under the Court's order by the direct applications of constitutional provisions. Some of the leading cases wherein the Apex court had enlarged the scope of their powers and had taken the issue of child labour and directed the states to implement the guidelines framed by the Apex Court for the welfare of the child labour.

Keywords: Child Labour, Art 24, Indian Constitution, Supreme Court, Art 45, Child Labour (Prohibition and Regulation) Act, 1986

Introduction

Our written constitution guarantees social justice, liberty and equality to all its citizens. For achieving these objectives, we have three organs of government, the legislature, the executive and the judiciary. Each of these is supreme within the sphere allotted to it. To interpret the spheres and enforce the rule of law, an independent authority is absolutely essential and this is furnished by the Courts of Justice. The Supreme Court of India, as the apex court has been assigned a very important role, and constituted as a guardian of the constitution which is the yardstick of ground norms for other legislation.

Our constitution accords a dignified and crucial position to the judiciary. It is the greatest unifying and integrating force of our country. The Supreme Court is at the apex of a well-ordered and well-regulated judicial structure of the country. It expounds and defines the true meaning of law. It is the ultimate interpreter of the constitution and this puts a second brake on the legislature and the executive, the first being the political check of the people themselves. The constitution puts an obligation on every organ of the state, including the judiciary, to usher in a new social order in which justice-social, economic and political and equality of status and opportunity prevail. The final burden of interpreting these elastic provisions is upon the Courts. Courts are to contribute to law's growth without overstepping the boundaries of the system; in other words, how to reconcile tradition and convenience or the claims of stability

and those of changes. It is the duty of the judiciary to recognize the development of the nation and to apply established principles of the positions which the nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of community and act as a clog upon the legislative and executive departments rather than as an interpreter. Indian judiciary is charged with the duty of holding the balance even between a state or states and the union and between the state and the citizens, and sometimes between the state and the individual. It has to hold the scales even in the legal combat between the rich and the poor, the mighty and the weak without fear or favour. The role of judiciary in India has been quite significant in promoting the child welfare. Mr. Justice Subba Rao, the former Chief Justice of India, rightly remarked.

“Social Justice must begin with child unless tender plant is properly nourished; it has little chance of growing into strong and useful tree. So, first priority in the scale of social justice should be given to the welfare of children.¹ Supreme Court has played an important Role to control the problem of child labour and has shown its concern for child labour by bringing occupations or processes under the courts order by the direct application of constitutional provisions. Human Rights jurisprudence in India has a constitutional status and sweep;

¹ Subha Rao, J., Social Justice and Law, Delhi: National Publishing House, 1974, p.4.

Article 21 of the Constitution can be termed as 'Magna Carta' of human rights. This Article guarantees right to life and liberty to every human being. Right to life and liberty is a cherished and prized right under the Constitution.

Supreme Court replaced the liberal concept of Article 21 taken in *Maneka Gandhi v. Union of India*², and *Francis Coralie Mullin v. Union Territory of Delhi*³, held that Article 21 included protection of health and strength of workers, men, women and tender age of children against abuse. According to the court, the opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity and educational facilities are included in Article-1.

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

In this research paper an attempt has been made to assess the judicial response to the child labour welfare as an effective instrument to improve the status of children in accordance with the spirit of the constitution.

Child Labour Welfare and the Philosophy of Locus Standi

The liberalization of the concept of locus-standi, to make access to the court easy, is an example of changing attitude of the courts. It is generally seen that all the working children come from the families which are below the poverty line and there are no means to ventilate their grievance that their fundamental rights are being breached with impunity. Keeping in view the pitiable conditions of the child labour, the apex court has shown its generosity by relaxing the concept of locus-standi. The court has shown its wisdom by ensuring the philosophy by public interest litigation and tries to give relief in some of the cases as follows.

In *People Union for Democratic Right v. Union of India*⁴ known as *Asiad Case*. This case is an epoch-making judgment of the Supreme Court of India, which has not only made significant contribution of labour laws, but also has displayed a creative attitude of judges to protect the interests of the child workers. The court has given a new dimension to several areas, such as locus standi, public interest litigation, and enforcement of labours, minimum wages and employment of children. The Facts of the case were that the Non-Governmental Organization addressed a letter to the Supreme Court annexing the report of social activists regarding the conditions under which the workmen engaged in various *Asiad* projects. Pointing reference was made in that report that there was violation of Article 24 of the constitution and of the provisions of the *Employments of Children Act, 1938*, viz., children below the age of 14 years was employed in construction work of various projects. With regard to allegation of the provisions of *Employment of Children Act, 1938*, the Delhi Administration and Delhi Development Authority took the stand that no complaint in regard to the violations of the provisions of that Act at any stage received by them. They also took stand that, the Act was not applicable in case of construction work, since construction industry was not covered in the schedule of the Act. The Supreme Court pointed out that this was a sad and deplorable omission which must be immediately set right by every state government by amending

the Schedule so as to include construction industry. This could be done in exercise of the powers conferred under section 3A of the *Employment of Children Act, 1938*. The Supreme Court hopes that every state government will take the necessary step in this behalf without any undue delay, because construction work is clearly a hazardous occupation and it is absolutely essential that the employment under the age of 14 must be prohibited in every type of construction work. That would be in consonance with convention 59 adopted by the International Labour Organization and ratified by India. But apart altogether from the requirement of Convention No, 59 we have Article 24 of the Constitution, which provides that no child below the age of 14 years shall be employed to work in any factory or mine, or engaged in any other hazardous employment.

The Supreme Court held that Construction work is clearly a hazardous occupation and it is absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work. This is a constitutional prohibition which, even not followed up by appropriate legislation, must operate proprio vigore.

In *Labourers Working on Salal Hydro Project v. State of Jammu and Kashmir and others*⁵ Justice Bhagwati observed that construction work is a hazardous employment and therefore under Article 24 of the Constitution, no child below the age of 14 years can be employed in construction works by reason of the prohibition, enacted in Article 24 and this constitutional prohibition must be enforced by the Central Government.

In this case honorable Supreme Court also agreed that child labour is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed to augment their meager earnings. And child labour is an economic problem, which cannot be solved by mere legislation. Because of poverty and destitution in this country it will be difficult to eradicate child labour, so attempts should be made to reduce if not to eliminate child labour because it is essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development in the country. They must concede that having regard to the prevailing socio-economic conditions it is not possible to prohibit the child labour altogether and in fact; any such move may not be socially or economically acceptable to large masses of people. That is why Article 24 limits the prohibition against employment of child labour only to factories, mines or other hazardous employments such as construction work.

The Supreme Court also suggested that whenever the Central Government undertakes a construction project which is likely to last for some time, the Central Government should provide that children of construction, workers which are living it or near the project site should be give facilities for schooling because it is absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development of the country. We must concede that having regard to the prevailing socio-economic conditions, it is not possible to prohibit child labour altogether and in fact; any such move may not be socially or economically acceptable to large masses of people.

² AIR, 1978, SC 597

³ (1981) 1 SCC. 608.

⁴ AIR 1982 SC 1473.

⁵ AIR 1984 SC 177.

So we can say that literacy (absence of) is a main cause of child labour.

Prohibition of Traffic in Human Beings and Forced Labour

As regards the true scope and meaning of traffic in human beings and other forms of forced labour, the court has specifically pointed out that Article 23 of the Constitution has been intended to protect the individual not against the state but also against other private persons. It prohibits traffic in human beings and beggar and other similar forms of forced labour practiced by anyone else. This stand has been taken by the court to protect the fundamental rights of the citizen in some of the cases where individual dignity is more important than other thing in life. Some of these cases behind on this statement are as follows.

In *Bandhua Mukti Morcha v. Union of India*⁶ the petitioner was an organization solely devoted to the cause of bonded labourers in the country. The petitioner made a survey of some of stone quarries in Faridabad District near Delhi and discovered that a number of labourers from different states of the country were working in those stone quarries under inhuman and intolerable conditions and the majority of them were bonded labourers. A letter was addressed to one of the judges of the apex court containing signatures and thumb marks of the alleged bonded labourers. The petitioner alleged violations of the provisions of the Constitution and non-implementation of the laws relating to the labourers working in these stone quarries. It was revealed that all these workers were bonded labourers who were not permitted to leave the job. Most of the labourers complained that they got very little wages from the mine lesse or owner of the stone crushers because they were required to purchase explosives with their own moneys, the report concluded by saying that these workmen, “presented a picture of helplessness, poverty and extreme exploitation at the hands of moneyed people” and they were found living a most miserable life and perhaps beasts and animals could lead more comfortable life than these helpless labourers”.

The preliminary objection raised by the respondents related to the maintainability of the petition under Article 32 of the Constitution. The court expressed surprise over the manner in which the State Government showed its urgency to raise this objection so as to avoid an enquiry by the court as to whether the workman are living in bondage and under inhuman condition. Sounding a note of caution, Justice Bhagwati observed, “The Government and its officers must welcome Public Interest Litigation, because it would provide them an occasion to examine whether the poor and down trodden are getting their social and economic entitlements or whether they can continue to remain victims of deception and exploitation at the hands of strong and powerful sections of the community”. The court expressed surprise by saying that if a complaint is made on the behalf of workmen that they are held in bondage and living in miserable condition, it is difficult to understand how such a complaint can be thrown out on the ground that it is not violative of the fundamental right of the workmen.

Giving a new interpretation to the term “appropriate proceeding” contained in Article 32(1) Justice Bhagwati observed that, “there is no limitation in regard to the kind of proceeding envisaged in clause (1) of Article 32 except that the proceeding must be, ‘appropriate’ and this requirement of

appropriateness must be judged in the light of the purpose for which the proceeding is to be taken namely, enforcement of a fundamental right. The learned Judge continued by saying that the framers of the Constitution did not lay down any particular form of proceeding for enforcement of a fundamental right. They also did not stipulate that such proceeding should confirm to any rigid pattern or formula because they knew that in a country like India where there is so much poverty, ignorance, illiteracy, deprivation and exploitation, any instance on a rigid formula of proceeding for enforcement of a fundamental right would become self- defeating. In view of this position, the court observed that a simple letter by a member of the public acting with bonafide can be legitimately regarded as appropriate proceedings.

From the above observation it is concluded that a social organization who observed the miserable condition of the bonded labourer working in stone quarries in Faridabad approach to the apex court in the form of sending a letter which was treated as writ petition and the apex court had considered their petition and directed the state government to properly implement the provisions related to the Bonded Labour System (abolition) Act 1976 i.e. identify them, release and rehabilitate the bonded labourers.

The judgment of the Supreme Court shows that the public interest litigation is acquiring new dimensions for ensuring accountability of the public authorities towards the poor and deprived. In fact, the state or public authority should welcome this move because it is primarily intended to correct wrong or to redress injustice done to the poor and weaker sections of the community where welfare should be paramount considerations of the state or public policy.

In *Neerja Chaudhary v. State of Madhya Pradesh*⁷ this case was on behalf of a group of bonded quarry workers in the early 1980s. A letter was sent to the Supreme Court referring to an article written by the petitioner. The reporter had visited three of the villages in Madhya Pradesh, after the court had released bonded labourers on the petition filed under *Bandhua Mukti Morcha*. She found that the released bonded labourers were not rehabilitated, they had neither land nor work and they were facing immense hardship at the verge of starvation, and they express their desire to return to their place of work as bonded labourer. All the seventy-five released bonded labourers from these villages were from tribal communities and they had not been rehabilitated six months after their release. The Supreme Court stated that it was imperative that the freed bonded labourers are properly rehabilitated after their identification and release. The Supreme Court also ruled that ‘it is the plainest requirements of Articles 21 and 23 of the Constitution that bonded labourers must be identified and released and on release they must be suitably rehabilitated. Any failure of action on the part of the State Governments in implementing the provisions of the Bonded labour System (Abolition) Act was the clearest violation of Article 21 and Article 23 of the Constitution.’

Child Labour Welfare and Right to Education

The abolition of the child labour is preceded by the introduction of compulsory education; compulsory education and child labour are interlinked. Article 24 of the constitution bars employments of child below the age of 14 years. Article

⁶ AIR 1984 SC 802.

⁷ AIR 1984 SC1099.

45 is supplementary to article 24 for if the child is not being employed till the age of 14 years he must be kept in some educational institution. And the judiciary plays an important role in the making as education as a fundamental right and the Judiciary gives a good judgment on the cases as follows.

In *M.C. Mehta v. State of Tamil Nadu and others*⁸ in this case the honorable Supreme Court observed that working conditions in the match factories are such that they involve health hazards in normal course and apart from the special risk involved in the process of manufacturing, the adverse effect is a serious problem. Exposure of tender age to these hazards requires special attention. We are of the view that employment of children with match factories directly connected with the manufacturing process holding of final production of match sticks or fireworks should not at all be permitted as Article 39(f) prohibits it.

The Court further observed that the spirit of the constitution perhaps is that children should not be employed in factories as childhood is the formative period and in terms of Article 45 they are meant to be subjected to free and compulsory education, until they complete the age of 14 years. Children can, therefore, be employed in the process of packing but packing should be done in an area away from the place of manufacture to avoid exposure to accident.

Honorable Court further observed that the state (in this case Tamil Nadu) is directed to enforce provisions relating to facilities for recreation and medical and attention may be given to ensure provision of a basic diet during the working period to workers including children and medical care with a view to sound physical growth.

The Court also opined that compulsory insurance scheme should be provided for both adult and children employees for a sum of Rs 50000 by taking into consideration the hazardous nature of this employment.

In *J.P. Unni Krishnan. v. State of Andhra Pradesh*⁹ the Supreme Court was approached by the petitioners to reexamine the correctness of the decision rendered by a Division Bench comprising of Kuldip Singh and R.M.Sahai JJ in *Mohini Jain v. State of Karnataka*¹⁰ The petitioners running medical and engineering colleges in the states of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu, contended that if Mohini Jain's verdict was implemented and followed by the State Government, they would have to close down their colleges. The Supreme Court was approached to ascertain the precise position of the decision and its implications.

In Mohini, Jain the Supreme Court held that every citizen has a right to education under the Constitution. The State is under the constitutional obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligations through state owned or State recognized educational institutions. When the State Government grants recognition to the private educational institution it creates an agency to fulfill its obligation under the Constitution. The students are given admission in recognition to their right to education under the Constitution. Charging capitation fee in consideration of admission to educational institutions was thus held to be patent denial of a citizen's right to education under the Constitution.

⁸ AIR 1991 SC 417.

⁹ AIR 1993 SC 2178.

¹⁰ AIR 1992 SC 1858.

The Supreme Court Observed:

“The Preamble promises and the directive principles are mandate to the State to eradicate poverty so that the poor of this country can enjoy the right to life guaranteed under the Constitution. The State Action or inaction which defeats the constitutional mandates is per se arbitrary and cannot be sustained. Capitalization fee makes the availability of education beyond the reach of the poor. The State Action in permitting capitation fee to be charged by State recognized educational institution is wholly arbitrary and as such violation of Article 14 of the Constitution”

In Unni Krishan Case the right to education came to be more elaborately explained and engrafted to Article 21 of the Constitution. The first question in this case was whether right to education is a fundamental right under Article 21 of the Constitution. The Supreme Court declared Article 21 as the heart of fundamental right which has received expanded meaning from time to time and there is no justification as to why it cannot be interpreted in the light of Article 45 wherein the State is obligated to provide education upto 14 years of age. The education brings excellence; it enriches the mind and illuminates the spirit. It prepares a child for a good citizenship. It liberates from ignorance, superstitious, prejudices and ultimately unfolds the vision and truth. Justice Mohan Observed:

“...in educational institutions which are the seed-beds of culture, where children in whose hands quiver the destinies of the future, are trained. From their ranks will come out when they grow up statesman and soldiers, patriots and philosophers, who will determine the progress of the land.”

While declaring the children's right to education as fundamental right under Article 21 of the Constitution the apex Court clarified that the fundamental rights and directive principles are supplementary to each other. Supreme Court reiterated its previous views that fundamental rights are empty vessels into which generation must pool its contents in the light of experience. Directive Principles supply life and blood to fundamental rights.

Another question to be determined by the apex court was whether a citizen has a right to establish educational institution as a part of his right guaranteed to him by Article 19(1) (g) of the Constitution. The Supreme Court held that a citizen of this country may have a right to establish an educational institution but no citizen, person, or institution has a right much less than fundamental right, to affiliation or recognition, or to grant-in-aid from the State. Therefore, there is no fundamental right under Article 19(1) (g) to establish an educational institution. The establishment of educational institutions is not a trade, business or a profession or occupation as stipulated in Article 19(1) (g) of the Constitution.

Child Labour Welfare and Judicial Activism

The judiciary has almost brought a revolution in the life of child workers in India. It has always to endeavor to expand and develop the law so as to respond to the hope and aspirations of people who are looking to the judiciary to give life and content to law. The judicial institutions in India have played a significant role not only for resolving inter-disputes but also to act as a balancing mechanism between the conflicting pulls and pressure in the society. It has virtually played a vital role in the task of providing political, social and economic justice to the poor child workers in this country. No efforts seem to have

been spared by the Indian judiciary to uphold the cause of the poor workers. The courts have always interpreted and applied the law so as to promote the cause of justice and to meet the hope and aspiration of the children as per the mandates of the constitution. Some of the cases are as follows.

In *Rangangam, Secretary, District Beedi Workers Union v. State of Tamil Nadu and others*¹¹ in this case the Supreme Court opined that tobacco manufacturing was indeed hazardous to health. Child Labour in this trade should therefore be prohibited as far as possible and employment of child labour should be stopped either immediately or in a phased manner that is to be decided by the State Government but it should be within a period not exceeding three years.

In *M.C Mehta v. State of Tamil Nadu*¹² is a landmark ruling relating to abolition of child labour. In this case, the court exhaustively reviewed the relevant constitutional provisions, I.L.O. Conventions and various legislative provisions on child labour. While upholding its earlier stand to consider primary education as a fundamental right as desired by the Article 45 in *J.P. Unni Krishnan v. State of Andhra Pradesh* the Court also recognized the importance of Article 41 which speaks about right to work within the lights of the economic capacity and development of the State, with reference to employment to adult members in the family of child labourers.

However the Court realized the very large number of child force in the fireworks and matchsticks, carpet weaving, glass, slate, diamond polishing and precious stones polishing industry etc., would strain the resources of the State and declined to issue any directions to the State to provide compulsory employment to adult members of the family in lieu of the child workers. In case the adult member i.e., parent /guardian get employment he shall withdraw his child from employment. For the operation of its on child labour philosophy the Supreme Court has issued 'Ten Commandments' to the States concerned, which may be summed up as follows:

(1) To conduct a survey on child labour in the hazardous industries which has to be completed within six months from the day of delivering the instant judgment? (The judgment was delivered on 10th Dec. 1996).

(2) To start with work could be taken regarding the most hazardous employment to rank its first priority to be followed by comparatively less hazardous and so on. For this the court has identified some industries for priority action.

(3) The employment to be given as per directions could be detailed to other assured employment which would not require generation of much additional employment.

(4) The employment so given could as well as industry where the child is employed a public undertaking and would be manual in future, shall be one which is nearest to the place of residence of the family.

(5) Where alternative employment is not possible as aforesaid the parent/guardian of the laid off child be paid Rs 25000/- (i.e. Rs20000 by the employer and Rs 5000 by the appropriate government towards Child Labour Rehabilitation-cum Welfare Fund) and entitled for income on the fund every month. The employment given to the adult or payment made would become inoperative if the child is not sent for education.

(6) On discontinuation of the employment of the child, his education would be assured in suitable institution with a view

to make a better citizen. It is an obligation under Article 45 of the Constitution and it is the duty of the Inspectors (appointed under Section 17 of the Act, 1986) to see that this call of the Constitution is carried out.

(7) It was also directed to create a separate cell in the Labour Department of the appropriate Government. The executive head of the District was asked to keep a watchful eye on the Inspectors to implement this 'Judicial Scheme' apart from monitoring by the higher officials at Secretary Level in the Government.

(8) The Secretary, Ministry of Labour, Government of India was asked to appraise the Supreme Court within one year about the compliance of the said direction.

(9) It was also directed to implement the penal provisions of the 1986 Act, where employment of child labour prohibited by the Act is found.

(10) In the case of non-hazardous jobs the Inspectors shall have to see that the working hours of the children are not more than four to six hours a day and the child should receive education at least two hours each day and the cost of education should be borne by the employer.

In *Bandhua Mukti Morcha v. Union of India*¹³ while reiterating the above directions as feasible inevitable' in this case, the Court realized that poverty is the mother of child labour and held that 'the child labour, therefore, must be eradicated through well planned, poverty focused alleviation, development and imposing trade sanctions in employment of children etc. The Court emphatically expressed that the financial implication would be such as to provide a damper, because the money after all would be used to build up a better India. In this context it is worth pointing out that poverty as such has not stood in the way of other developing countries from taking care of child labour. The Court rightly reminded the policy makers that" As many countries of Africa like Zambia, Ghana, ivory Coast, Libya, Zimbabwe, with income levels lower than India have done better in these matters (removed children from labour force and establishment of compulsory education).

This shows that cause of child labour problems to persist is really not dearth of resources, but lack of real zeal". It is submitted that the judiciary in India within its limits directed the State, what to do for the abolition of child labour through its scheme. The judicial wisdom reflects the anxiety and anguish for their restoration of childhood to the children which is their natural right.

In *People's Union for Civil Liberties v Union of India and others*¹⁴ in this case some children procured for labour were subsequently killed or caused to be missing by the Procurer. On filing Public Interest Litigation by a Non -Governmental Organization the Supreme Court observed that after accepting enforcement of Mr. Rajinder Sachar, a learned counsel appearing for the petitioner that the parents of the children are entitled to compensation and the counsel in support of his contention relied on Justice Verma's observation in *Nilabati Behara v. State of Orissa* that a claim in public law for compensation for contravention of Human Rights and fundamental freedoms, the protection of which is guaranteed in the Indian Constitution is an acknowledged remedy for the enforcement and protection of such rights and such a claim

¹¹ (1992) 1SCC 221.

¹² (1996) 6 SCC 756.

¹³ AIR 1997 SC 2218.

¹⁴ (1998) 8 SCC 485.

based on strict liability made by resorting to a constitutional remedy provided for the enforcement of Fundamental Rights is distinct from and in addition to the remedy in private law for tort resulting from contravention of Fundamental Rights. The defense of sovereign immunity being in-applicable and alien to the concept of guarantee of Fundamental rights, there can be no question of such a defence being available in the Constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of Fundamental Rights guaranteed under the Constitution, when that is the only practicable mode of redress to the contravention made by the state or its servants in the purported exercise of their powers and enforcement of the Fundamental Right is claimed by resort to the remedy in public law under the Constitution by recourse to Article 32 and 226 of the Constitution.

In *Raj Kumar Tiwari v. State and ors*¹⁵ in this case the petitioner-employer was imposed Rs 20000 as penalty for employing a child alleged to be below the 14 years of age. He challenged this order contending that before imposing penalty no enquiry was held. The High Court, although found that an inquiry was indeed held, set aside this impugned order on the ground that for the applicability of section 14 of the Act it is sine qua non that the person/child employed must be one who has not completed 14 years of age. According to the court the impugned order itself dictated that the child was of 14 years old and not below 14 years of age. The petition was, thus allowed on this ground and the impugned order was set aside.

It is submitted that there is a lot of difference between the expression "a person who has not completed 14 years of age" and "a person who is 14 years old". While the former would mean a person who has completed 14 years of age and is in his 15th year, the latter phrase would mean a person who has completed 13 years of age and is in his 14th year. In the absence of exact date of birth to calculate whether the person has completed 14 years of his age, the court could have upheld the order of the lower court being the fact finding court. It is may seldom that an employer is punished by the Court for employing a child. And this is a major contributing factor for the continued employment of children by unscrupulous employers.

In *Hemendera Bhai v State of Chattisgarh*¹⁶ in this case the petitioner facing a criminal proceeding under Section 482 of the Criminal Procedure Code and Section 14 of the Child Labour (Prohibition and Regulation) Act 1986. The learned counsel of the petitioner submitted that the learned magistrate without taking cognizance of the offence alleged against him criminal proceeding which did not have any reasonable cause and therefore he prayed that the criminal proceeding should be quashed. For supporting his argument the learned counsel of the petitioner relied on the two decision of the apex court in which cognizance taken by magistrate has been analyzed.

In *D. Lakshminarayan's v. Narayana*¹⁷ the apex court held that the expression "taking cognizance by the magistrate has not been defined in the code. The ways in which such cognizance can be taken are set out in clause (a), (b) and (c) of the Section 190(1). Whether the magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which case is sought to

be instituted, and the nature of the preliminary action, if any taken by the magistrate. Broadly speaking, when on receiving a complaint, the magistrate applies his mind for the purpose of criminal proceeding under Section 200 the succeeding Sections in Chapter XV of the Code of Criminal Procedure, 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1) (a). If instead of proceeding under chapter IX he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the Police under Section 256 (3), he cannot said to have taken cognizance of any offence.

In *Pepsi food Ltd and another v. Special Judicial Magistrate and others*¹⁸ the apex court held that, summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course is not the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set in to motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law appropriate thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would not that be sufficient for the complainant to succeed in bringing charge to the accused. It is not that the magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the evidence before of the accused. The magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witness to elicit answers to find out the truthfulness of the allegations or to otherwise and then examine if any offence is prima-facie committed by all or any of the accused.

In the present case, it is clear from the order sheet maintained by the learned magistrate that he has not applied his mind to the facts of the case and the law appropriate to the present case. He has not even stated that he had perused, or read the charge sheets, which, which has to be treated as a complaint filed by the Inspector under Section 16 of the Act. The apex court had held that in the aforesaid two judgments that the magistrate has to apply his mind to the facts of the case and the law applicable to the case, which the learned magistrate has failed to do so in this case. Thus, he has not taken cognizance against the petitioners and therefore, the criminal proceedings initiated against the petitioner are liable to be quashed.

The next contention raised by the learned counsel of the petitioner is that Section 3 of the Act is not applicable to the facts and circumstances of the present case and no case under Section 3 of the Act is made out against the petitioner.

Section 3 of the Act says that no child shall be employed or permitted to work in any of the occupations set forth in Part A of the schedule or in any workshop wherein any processes set forth in part B of the Schedule is carried on.

From the facts of the case and document produced before this court it is submitted that workers who are supplied raw materials for making Bidis taking the raw materials from the firm after giving undertaking that they themselves would make Bidis and if they roll Bidis in their respective houses taking the assistance of their children, the firm cannot be held responsible since the firm has no control or supervision over the work of those workers who take raw material to their houses for making

¹⁵ 2003 III LLJ 1045.

¹⁶ 2003 II LLJ 645.

¹⁷ AIR 1976 SC 672.

¹⁸ AIR 1998 SC 128.

Bidis. It is further stated that in the reply that the raw material was supplied only to those workers whose names are entered in the Register maintained by the firm. The remuneration is also given only to them. It is not possible for the firm to have any control or supervision over the Bidi making job being done at the house of workers according to their convenience. The firm has no knowledge or information as to whether the workers who make the Bidis at their house take the help of any of their family members or children in the said job. If they take any such help, the firm cannot be held responsible for the same. Thus, it cannot be said that the firm is the employer of the child labourer and Section 3 of the Act has not been contravened by the firm.

The High Court has given their judgment that petitioner impugned in this petition. Criminal proceeding against him pending before the trial magistrate and initiated under Section 14 of Child Labour (Prohibition and Regulation) Act, 1986. The High Court allowed the petition quashing the said proceedings for several reasons. The first was that the trial magistrate has not applied his mind to the facts and the law applicable to the present case.

Second was that the firm had not employed the child as labourer in any workshop where its Bidi making was carried on. The workers were supplied raw materials and they rolled Bidis in their respective houses taking assistance of their children. The firm had no control or supervision over the work of those workers.

In *Narender Malav v. State of Gujarat*¹⁹ in this case a Public Interest Litigation was filed to the apex court related to the issues of child labour in the salt mines of Gujarat. The court requested the amicus curiae and a non-governmental organization, SEWA, to enquire and investigate the issue of child labour, the welfare and well-being of salt mine workers and their families in the Saurashtra and Kutch areas of the State of Gujarat, particularly with reference to education facilities for their children and availability of an adequate /proper housing and medical facilities and to report to the court within three months.

The court requested the amicus curiae and the representative of the Non –Governmental Organisation to interact with the empowered committee for the purpose of ascertain the measures taken by various agencies for the welfare of salt workers and their families and to suggest ways and means to improve these conditions. The court directed the state government through the Assistant Labour Commissioner to provide all the assistance for this purpose.

In *Anant Construction Co v. Govt Labour Officer and Inspector*²⁰ in this case question is whether the Inspector appointed as per Section 17 of the Child Labour (Prohibition and Regulation) Act 1986 have the power to pass an order holding that the labour employed by the appellant were below the age –limit prescribed under the Act and to also direct the appellant to pay compensation.

The appellant was carrying a construction business in 1997. The Inspector being Respondent (1) here in, visited the construction site of the appellant and issued a notice to the appellant for explanation within seven days with regard, to the employment of child labour (three persons to be exact) on the construction site. The appellant relied upon two certificates

certifying that child labourers were in fact about the age of 14 years when the labour was employed. The inspector demanded the appellant to have a deposit of Rs 20000 per child, as compensation and if he failed then action will be taken against him.

Aggrieved with this order, the appellant had filed before the High Court a writ petition under Article 226 of the Constitution. In his writ petition the appellant had submitted that the inspector did not have jurisdiction to decide the dispute related to the age factor of the child but was bound to refer the dispute for decision to the prescribed medical authority as per Section 10 of the Act. The High Court did not agree with the contention raised by the appellant and dismissed the petition and upheld the quantum of penalty.

Finally the appellant appeal to this court and the apex court has observed Section 16(2) of the Act which prescribes the procedures related to the offence.

“16 Procedure related to Offence-(1) any person, police officer or inspector may file a complaint of the commission of an offence under this Act in any court of competent jurisdiction.

(2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.

(3) No court to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offences under this Act.

Therefore under this section jurisdiction of the Inspector to file a complaint with regard to any offence under the Act does not extend to the trying of the complaint which as sub-section (3) of the Section 16 specifically provides only court not inferior to the Metropolitan Magistrate or a Magistrate of the first class.

Besides, Section 16(2) does not make the production of certificate mandatory. Infact it is open to persons proceeded against under the Act to raise a dispute as to the age of the person employ.

“10 Dispute as to age –If any question arises between an Inspector and an occupier as to the age of any child who is employed or is permitted to work by him in an establishment, the question shall in the absence of a certificate as to the age of such a child granted by the prescribed medical authority, be referred by the inspector for decision to the prescribed medical authority.

Relied on the Rule 17 of the Child Labour (Prohibition and Regulation) Rules, 1988 the respondent provides that:

Rule 17(1) deal with the obligation on the part of young person’s to produce the certificate of age from the appropriate medical authority and does not pertain to the obligation of the employer. If the employer may, on reasonable material, raise a dispute before the Inspector regarding a child’s age, the Inspector can only refer the dispute to the prescribed medical authority under Section 10 of the Act. Therefore, the impugned order of the Inspector being without jurisdiction, his order and the order of the High Court are set aside and the appeal is allowed. The appellant set free at liberty without any cost.

In *Bachpan Bachao Andolan vs. Union of India and others*²¹ in this case the Petitioner 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 activities that are undertaken in these circuses deprive the

¹⁹ 2004 (10) SCALE 12.

²⁰ (2006) 9 SCC 225.

²¹ (2011) 5 SCC 1.

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. After detailed research and enquiry, the Petitioner found that organized crime of trafficking of children for Indian circuses, particularly from Nepal is rampant. 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. Children are frequently physically, emotionally and sexually abused in these places. There is violation of the Juvenile Justice Act and all International treaties and Conventions related to Human Rights and Child Rights where India is a signatory.

The employment of children in circus involves violation of several Fundamental and Statutory Rights, namely, right to education; right to freedom of expression; competency to enter into contract for working in circus; existing labour laws and legitimacy of contracts; and all statutory provisions dealing with child labour.

Solicitor General appearing for the Union of India broadened the scope of this petition and submitted a detailed report dealing with the problem of trafficking in children.

The Supreme Court discussed the issue of trafficking, factors that cause trafficking, available legislations, India's obligations under International and Regional Instruments, National Plans and Policies to combat human trafficking, and existing child protection mechanisms.

The court issued the following directions to the Central Government regarding children working in the Indian circuses:

- (i) Issue suitable notifications prohibiting the employment of children in circuses within two months from the date of the order in order to implement the fundamental right of the children under Article 21A of the Constitution of India.
- (ii) Conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children are to be kept in the Care and Protective Homes till they attain the age of 18 years.
- (iii) 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) Frame proper scheme of rehabilitation of rescued children from circuses.

In *Bachpan Bachao Andolan vs Union of India*²² in this case Hon'ble Supreme Court while hearing a Public Interested Litigation has directed the following guidelines to Central Government in case of missing children.

- (i) In case of complaint with regard to any missing children; made in a police station, the same should be reduced into a First Information Report and appropriate steps should be taken to see that follow up investigation is taken up immediately thereafter.
- (ii) In case of every missing child reported; there will be an initial presumption of either abduction or trafficking, unless, in the investigation, the same is proved otherwise.
- (iii) Whenever any complaint is filed before the police authorities regarding a missing child, the same must be entertained under Section 154 Cr.P.C. However, even in respect of complaints made otherwise with regard to a child,

who may come within the scope of Section 155 Cr. P.C., upon making an entry in the Book to be maintained for the purposes of Section 155 Cr. P.C., and after referring the information to the Magistrate concerned, continue with the inquiry into the complaint.

(iv) The Magistrate, upon receipt of the information recorded under Section 155 Cr. P.C., shall proceed, in the meantime, to take appropriate action under sub-section (2), especially, if the complaint relates to a child and, in particular, a girl child.

(v) Each police station should have, at least, one Police Officer, especially instructed and trained and designated as a Juvenile Welfare Officer in terms of Section 63 of the Juvenile Act. Special Juvenile Officer on duty in the police station should be present in shifts.

(vi) Para-legal volunteers, who have been recruited by the Legal Services Authorities, should be utilized, so that there is, at least, one paralegal volunteer, in shifts, in the police station to keep a watch over the manner in which the complaints regarding missing children and other offences against children are dealt with.

(vii) The State Legal Services Authorities should also work out a network of NGOs, whose services could also be availed of at all levels for the purpose of tracing and reintegrating missing children with their families which, in fact, should be the prime object, when a missing child is recovered

(viii) Every found/recovered child must be immediately photographed by the police for purposes of advertisement and to make his relatives / guardians aware of the child having been recovered / found

(ix) Photographs of the recovered child should be published on the website and through the newspapers and even on the T.V. so that the parents of the missing child could locate their missing child and recover him or her from the custody of the police.

(x) Standard Operating Procedure must be laid down to handle the cases of missing children and to invoke appropriate provisions of law where trafficking, child labour, abduction, exploitation and similar issues are disclosed during investigation or after the recovery of the child, when the information suggests the commission of such offences.

(xi) A protocol should be established by the local police with the High Courts and also with the State Legal Services Authorities for monitoring the case of a missing child.

(xii) Definition of Missing Children: Missing child has been defined as a person below eighteen years of age, whose whereabouts are not known to the parents, legal guardians and any other person who may be legally entrusted with the custody of the child, whatever may be the circumstances/causes of disappearance. The child will be considered missing and in need of care and protection within the meaning of the later part of the Juvenile Act, until located and/or his/her safety/well-being is established.

(xiii) In case a missing child is not recovered within four months from the date of filing of the First Information Report, the matter may be forwarded to the Anti-Human Trafficking Unit in each State in order to enable the said Unit to take up more intensive investigation regarding the missing child.

(xiv) The Anti-Human Trafficking Unit shall file periodical status reports after every three months to keep the Legal Services Authorities updated.

(xv) In cases where First Information Reports have not been lodged at all and the child is still missing, an F.I.R. should be

²²Writ Petition (Civil) no. 75 of 2012, decided by Supreme Court on 10.05.2013.

lodged within a month from the date of communication of this Order and further investigation may proceed on that basis.

(xvi) Once a child is recovered, the police authorities shall carry out further investigation to see whether there is an involvement of any trafficking in the procedure by which the child went missing and if, on investigation, such links are found, the police shall take appropriate action thereupon

(xvii) The State authorities shall arrange for adequate Shelter Homes to be provided for missing children, who are recovered and do not have any place to go to. Such Shelter Homes or After-care Homes will have to be set up by the State Government concerned and funds to run the same will also have to be provided by the State Government together with proper infrastructure. Such Homes should be put in place within three months, at the latest. Any private Home, being run for the purpose of sheltering children, shall not be entitled to receive a child, unless forwarded by the Child Welfare Committee and unless they comply with all the provisions of the Juvenile Justice Act, including registration.

Conclusion

It is borne out from discussion in the aforesaid research paper that the role of judiciary in India has been quite significant in promoting child labour welfare. The study discloses that judiciary has always given a lead to save the child workers from exploitation and improve their working conditions. The chapter has been divided into four parts. The first part deal with the child labour welfare and philosophy of locus standi wherein the judiciary have relaxed the rule of locus standi for the benefit to the child workers by entertaining their problems and giving them relief despite the limitations of locus standi. The observation made by the judiciary in some of the cases which shows that it is always committed to the cause of the child workers. When a legal wrong or legal injury is caused to the child workers by their employers, the judiciary has come forward to help them despite the locus standi issue. In other words the courts have always liberalized the rule of locus standi to meet the challenges of time and provide justice to the child workers. The efforts made in this direction are quite evident from the decisions discussed above. First case i.e. People For Union Democratic Rights (Asiad Case) (1982) in this case supreme court pointed out that there should be prohibition on children below the age of 14 years working in a construction site which is considered to be dangerous for their health and childhood. And they suggested it is the duty of the government to ensure the education of children of parents working in a construction site. Second case i.e. Labourer Working on Salal Hydro Project (1983) in this case the apex court had directed the Governments to provide a facilities of schooling to the children of construction workers who are going to take part in the project either undertaken by the Central Government for a considerable period of time. The crux of the judgement is that absence of literacy is the reason which the court pointed out in this case.

The second part of this chapter talks about the forced labour or traffic in human beings because it violates the dignity of the person by forcing them the person against his/her wishes or violate the right to life and liberty this point has been taken in some of the cases i.e. Bandhu Mukti Morcha Case (1984) in where court emphasized that when the allegations revealed that the workers were being held in bondage without basic amenities like shelter, drinking, water or two square meals a

day, it was violation of the fundamental rights as in this country everyone has right to live with dignity and free from exploitation. In another case Neeraja Chaudhary (1984) the court point out it is very sad that the bonded labourers who were released in earlier judgement (Bandhu Mukti Morcha) has not been rehabilitated as direction given by the Court to the State Governments. Any failure of action on the part of the state government in implementing the provisions of the Bonded labour (Abolition) Act would clearly be violative of Article 21 and 23 of the Constitution and this stand taken by the judiciary for protecting the rights of the workmen (including children) working in construction project.

The third parts of the chapter talks about to provide education to children for better child hood and this is considered to be fundamental rights in some of the cases i.e. M.C Mehta's case (1991) in where the Court has observed that the children in terms of Article 45 are entitled to get free and compulsory education till they complete the age of 14 years. In another case J.P Unnikrishnan case in where the court pointed out that right to education in the context of Article 21 and says that every child has the right to receive education and the impact is of this case is that the legislature has made an amendment in Article 21 in the part III of the Constitution.

The Last part deals with the judicial activism in where the judiciary has given directed the states that it is their duty to create an environment where the child labour can have opportunities to grow and develop in a healthy manner with full dignity in consonance of the mandate of the Constitution.

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The Supreme Court has cleared the customary law inhibitions on the inheritance rights of women in Nigeria

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Abstract

The paper reflects on the Supreme Court opinion in some cases in which the apex court declared the customary laws and practices which denies women inheritance rights as repugnant to natural justice, equity and good conscience; and unconstitutional and evaluates the implication of these pronouncements for protection of women's rights in Nigeria. This is particularly important, because these views have provided further normative and thematic platforms for the actual enforcement and execution of the non-discrimination provisions of the Constitution and the National Gender Policy. In spite of the constitutional provisions on non-discrimination and the national gender policy, the protection of inheritance rights of women has remained an unresolved issue in some Nigerian communities under the customary law. The legislative provisions remained mere declarations and intentions without enforcement and execution. This contribution commends the judicial pro-action and court based advocacy in these cases for the protection of women's rights in Nigeria. It therefore calls for judicial sustainability of this emergent judicial activism and sustained thematic actions in the protection of women's rights.

Keywords: Supreme Court, Customary Law, Inheritance Rights of Women, Nigeria

Introduction

The need for gender equality and equity in socio-economic relations has remained a burning issue in national agenda. This is because of the gender apartheid against women in the society. Women are generally considered inferior to men and discriminated against in so many ways (Oputa, CA, 1989; Ukhum CE, 2005; Ogugua VC Ikpeze, 2009; Worugji, INE, 2011; Mlambo-Ngecuka P, 2014 & 2015; Nwufo, CC & Okoli, CK, 2016)^[1]

In some communities, women cannot own property nor do they have any formal property rights. The customary law in some places does not recognise the concept of matrimonial property as the woman is regarded as part of the estate of the man. They cannot inherit property including their husband's property (Fisher, BAO, 1997; Nwoye KN, 2000; Edu, OK, 2004; Ogugua, VC Ikpeze, 2009; Worugji INE, 2011; Worugji, INE & Ugbe, RO, 2013; Nwufo, CC & Okoli, CK, 2016)^[2]. It is in response to these and some other practices that some well-meaning gender activists sponsored and presented to the National Assembly in 2010 certain Bills to domesticate the international conventions and declarations aimed at promoting and enforcing gender equality and non-discrimination in socio-economic relations in Nigeria. Prominent among these is the Gender and Equal Opportunities Bill is yet to be passed by the National Assembly. It is within this context of reactions against cultural authoritarianism (Ukhum CE, 2005) and gender discrimination against women that this contribution analyses the Supreme Court opinions in some cases and their implications for the protection of women's right in Nigeria. The Supreme Court declarations of focus are in *Anekwe v. Nweke* (2014)^[3] and *Ukeje* (2014)^[4] respectively. Apart from the introduction, the paper starts by highlighting the legal and policy framework upon which the protection and

enforcement of women's right in Nigeria is advocated. It further sets out the background and the judgements in the cases under reference; and discusses same within the context of their implications for the protection of women's rights in Nigeria. There is no doubt that the Supreme Court opinions in these cases, to a great extent, provides further legal anchor for effective judicial pro-action and advocacy in the protection of inheritance rights women as well as a further platform and legitimacy for continued advocacy for gender equality and non-discrimination generally. The paper therefore calls for the sustainability of the emergent court based advocacy in the protection of women's rights in Nigeria.

Legal and Policy Framework

Apart from the international and regional declarations, conventions and norms for the promotion, protection and implementation of human rights of women, the Nigerian Constitution is replete with provisions on gender equality and protection of women's rights. There is also the National Gender Policy and other laws directed towards the promotion and protection of women's rights and gender equality in Nigeria. These include the Child Rights Act and the Violence Against the Persons (Prohibitions) Act, 2015.

Specifically, Section 17(1) of the Constitution of the Federal Republic of Nigeria (as amended) provides that "the state social order is founded on ideals of social objectives, freedom, equality and justice". Subsection (2) maintains that "in furtherance of social order (a) every citizen shall have equality of rights, obligation and opportunities before the law"; and Subsection (3) provides that

"The state shall direct its policies towards ensuring that-All citizens, without discrimination on any ground whatsoever,

have the opportunity for securing adequate means of livelihood...”

Even though these provisions are not enforceable, they provide the plank for the promotion of human rights and the direction of state policy on protection of human rights generally. Women’s rights are, no doubt, human rights (Boutros-Ghali, B. 1995; Okagbue I, 1996) ^[5].

Besides these policy strides, the fundamental rights provision of the Constitution in Section 42, provides the right to freedom from discrimination. Section 42(1) provides thus:

a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

- (a) be subjected either expressly by, or in the political application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject: or
- (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of their communities, ethnic groups, place of origin, sex, religious or political opinions.

Subsection (2) emphasizes that:

No citizen of Nigeria shall be subjected to any liability or deprivation merely by reason of the circumstances of his birth.

Better still, Section 43 of the said Constitution also guarantees the right to acquire and own property anywhere in Nigeria. This applies to all, irrespective of sex or circumstances of birth. These provisions are justiceable and also provide the legal basis upon which violations of women’s rights generally could be challenged. Moreover the Constitution is the *grundnorm* in Nigeria and any other law inconsistent with it is void to the extent of that inconsistency (see Section 14(3) Evidence Act, 2004).

Furthermore, Nigeria as part of its commitment to the promotion and protection of women’s rights, has formulated the National Policy on Women, 2000 and the National Gender Policy 2006 respectively (Federal Ministry of Women Affairs and Social Development). These National Policies draw heavily from the international initiatives relating to women in development and aims at ensuring, among other things, the elimination of all forms of discriminations against women. The National Gender Policy (NGP) 2006 in its introductory paragraphs emphasizes that:

Promoting gender equality is now globally accepted as a development strategy for reducing poverty level among women and men, improving health and living standards and enhancing efficiency in public investment. The attainment of gender equality is not only seen as an end in itself and human right issue, but as a prerequisite for the achievement for sustainable development.

It has been repeatedly emphasised that the opportunity for securing adequate means of livelihood cannot be achieved and sustained when the women folk are discriminated against and denied rights to property under the customary law as practiced in some communities (Boutros-Ghali B,1995).

Although customary law and practice is a major source of law in Nigeria, but the application of any customary rules and practices within the legal system is dependent upon their being

in consonance with natural justice, equity, good conscience, and public policy; and not in conflict with any written law for the time being in force (see Section 14 (3) Evidence Act, 2004 & Section 1(3) of the 1999 Constitution, as amended). Moreover, section 21 of the Constitution is emphatic that the state shall protect, preserve and promote the Nigerian culture which enhance human dignity and are consistent with the fundamental objectives provided in it. In effect a customary law and practice that discriminates against and disinherits women, without any equivocation, cannot be said to enhance human dignity and consistent with the fundamental objectives thus cannot be a valid law.

The fundamental rights provisions of the Constitution and the National Policy on Gender as well as the international human rights standards ratified by Nigeria, generally provide the anchor upon which judicial protection of women’s rights in Nigeria stands. Moreover, the justice, equity, good conscience and public policy of the present time, is not only in favour of reforming the customary laws and practices but greatly insisting on the protection of women’s rights in the society ^[6]. The need for Nigeria to also ensure the elimination of discriminations against women as assumed under international treaties to which they have acceded, cannot be over-emphasized. It must be emphasised that Nigeria has ratified all the international and regional instruments on women’s rights including the CEDAW.

Non-discrimination against women and gender equality cannot be achieved without the active participation and involvement of the judiciary no matter the elegance of legislation and policy. Legislative provisions are mere declarations of policy and intentions. The actual enforcement and execution of such provisions are dependent on the existence of certain human institutions. This is where the court becomes relevant. It is through the active participation of the courts that the issue of protection of women’s rights can be taken beyond law making and policy formulation. The judiciary in some other African countries have also relied on their national Constitutions and influenced by the international human rights standards to protect women’s rights in their national jurisdictions (see Chinkin C, 1999; Rehman Javaid, 2010 & Commonwealth Human Rights Law Digest, 2010) ^[7]. It is within this context that the call for judicial pro-action for the protection of women’s rights in Nigeria is being advocated.

It is of note however that in Nigeria, except where there is a will, the extent to which the courts have interfered to guarantee the protection of inheritance rights of women has depended largely on the customary law applicable in the various communities (Nwoye KN, 2000; Edu OK, 2004; Ogugua VCI, 2009; Muna Ndulo, 2011; Worugji, INE & Ugbe RO, 2013) ^[8]. This has remained so, in spite of the constitutional provisions on non-discrimination, the national policy on gender equality and equity and the fact that Nigeria has ratified the international conventions in favour gender equality and non-discrimination generally. The inhibitions of the customary laws and practices in the protection and enforcement of women’s rights has remained prevalent in spite of the international human rights law and the Constitution, largely due to the patriarchal nature of the society (Edu OK, 2004; Ukhum CE, 2005; Muna Ndulo, 2011; Nwufu, CC & Okoli, CK, 2016) ^[9]. It is against this background that the Supreme Court judgements under review that insists on gender equality and non-discrimination are of considerable importance. These cases

border on protection and enforcement of women's right of inheritance in family relations.

It must be noted that the protection of rights of inheritance is an aspect of protection of property rights. Lack of property rights for women under the customary law is one of the fundamental challenges hindering active participation of women in economic development. And it has been emphasised that the continued denial of the property rights to women has great negative implications for the progress, development and wellbeing of the nation (Boutros- Ghali B, 1995; Jack B, 1997; Ogugua V.C.Ikpeze, 2009; Worugji INE, 2011; Worugji INE & Ugbe RO, 2013; Nwufo, CC & Okoli, CK, 2016) ^[10]. It is against this that the continued need to guarantee property rights to women under the customary law and non-discrimination against women generally that the two Supreme Court judgements are welcome developments in law. The backgrounds of and some extracts from the judgements under review are set out hereunder.

The Facts of the Cases and Extracts from the Judgements

(1) Onyibor Anekwe & ors v. Mrs Maria Nweke (2014)

This is an appeal against the concurrent judgement of the High Court, Awka, Anambra State and the Court of Appeal, Enugu. The Respondent/ Plaintiff in this case, at the High Court, challenged the action of the Appellants/ Defendants in attempting to disinherit her of her deceased husband's property in her matrimonial family on the ground that she has six female children without a single male child. The Appellants/ Defendants in their oral testimony at the court maintained that she is not entitled to inherit the property in issue under the customary law. They stated categorically that the reason why their custom forbid the respondent from entitlement to inheritance of any land or landed property in her matrimonial family was the fact that she has six female children without a single male child.

The Supreme Court while upholding the concurrent judgements of the lower courts in favour of the respondent was unanimous in condemning and declaring the customary law in this case as repugnant to natural justice, equity and good conscience. For emphasis, Ogunbiyi J.S.C who read the lead judgment maintained thus:

I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilisation. It is punitive, uncivilised and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning.

It is indeed much more disturbing especially where the counsel representing such perpetrating clients, though learned appears comfortable in identifying, endorsing and also approving of such a demeaning custom (LPELR-22697(SC) pp 36-37).

Similarly, I.T Muhammad J.S.C., invoking natural law argument puts it thus:

It battles one to still find in a civilised society which cherishes equality between the sexes, a practice that disentitles a woman (wife in this matter) to inherit from her late husband's estate, simply because she had no male child from the husband. This practice I dare say, is a direct challenge to God the Creator who bestows male children only; female children only (as in this matter) or an amalgam of both males and females, to whom He likes. He also has the sole power to make one barren. There is nothing virtually one can do if one finds oneself in any of the situations. To perpetuate such a practice as is claimed in this matter will appear anachronistic, discriminatory and unprogressive. It offends the rule of natural justice, equity and good conscience. That practice must fade out and allow equity, equality, justice and fair play to reign in the society (LPELR-22697 (SC) p 38).

In similar vein, Nwali Sylvester Ngwuta, J.S.C maintained:

My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, and the hand that rocks the cradle.

The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realities of today's world. Children, male or female, are gifts from the creator for which parents should be grateful.

The custom of Awka people of Anambra State pleaded on and relied upon by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished (LPELR-22697 (SC) p42).

In the words of Ariwoola J.S.C., still adopting the natural law appeal puts it thus:

In the oral testimony, the appellants had stated that the reason why their custom forbid the respondent from entitlement to inheritance of any land or landed property in her matrimonial family was the fact that she "has six female children without a single male child". By this, it meant that the said six female children of this respondent were denied their entitlement to inherit their father's property simply because of their gender. There is no doubt, this custom pleaded and canvassed by the appellants against the respondent, is to say the least repugnant to natural justice, equity and good conscience. It is even barbaric. One wonders whether it was the respondents making what sex the pregnancy that her late husband made with her will come out with. Indeed such a custom that discriminates against female children is a challenge on God Almighty who is the maker and producer of children. He (God) alone determines what pregnancy will produce, what type of sex- male or female. It will therefore be inhuman and injustice to discriminate against a female child on her father's property or a widow on the ground that she has only female children for her late husband (LPELR 22697 (SC)p 44).

There is no doubt that their Lordships in this case, without any equivocation, applying the repugnancy test declared any custom which disinherits a woman property rights in a family as repugnant to natural justice, against the will of God and also not in keeping with modern days realities. The court went further to caution lawyers who propagate the sustenance and enforcement of such customary laws and practices in any society, instead of condemning such retrogressive practices.

(2) Mrs Lois Chituru Ukeje & anor v. Gladys Ada Ukeje (2014)

The respondent in this case is one of the four children of one Lazarus Ukeje who died intestate. The case originated from the Lagos High Court. When Lazarus Ukeje, an Igbo man, died without a Will, Gladys Ada Ukeje his daughter, instituted an action against Lois Chituru Ukeje (the deceased's wife and the plaintiff's step mother) and Enyinnaya Lazarus Ukeje (the deceased's son and plaintiff's half-brother) before the Lagos High Court. The defendant/appellants in this case had applied for and obtained a letter of administration in respect of the estate of Lazarus Ukeje to the exclusion of the plaintiff/Respondent. The plaintiff, in the main, sought to be included among the persons eligible to be entitled and to administer the estate of Lazarus Ukeje, the deceased.

The Court upheld the plaintiff's claim and declared the Igbo customary law which excluded female children from inheritance as unconstitutional. Dissatisfied with this judgement, the defendants appealed to the Court of Appeal. The Court of Appeal upheld the decision of the high court, whereupon the defendants/appellants then proceeded to the Supreme Court. The Supreme Court in a unanimous decision confirmed the decisions of the two lower courts which had declared unconstitutional the Igbo customary law of inheritance which excludes female children from eligibility to inherit the property of their fathers.

The Supreme Court, in the words of Rhodes-Vivour, JSC, who read the lead judgement, while acknowledging that what was in issue is largely the paternity of the respondent declare thus:

agreeing with the High Court, the Court of Appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting in her late father's estate is void as it conflicts with section 39 (1) (a) and (2) of the 1999 Constitution as amended. This finding was affirmed by the Court of Appeal. There is no appeal on it. The finding remains inviolate. ... No matter the circumstances of the birth of a female child, such a child is entitled to inheritance from her late father's estate. Consequently the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42 (1) and (2) of Constitution, a fundamental right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution (2014) LPELR-22724(SC) pp32-33).

Concurring with this finding, Ogunbiyi, JSC re-emphasised the unconstitutionality of the custom thus:

The trial court I hold did rightly to declare unconstitutional the law that disinherit children from their deceased father's estate. It follows, therefore, that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefits of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 as amended ((2014) LPELR-22724(SC) p37).

The Implications for Protection of Women's Rights

The Supreme Court opinions in these appeals are quite commendable. They have provided stronger judicial and thematic platforms for the protection of women's rights and inheritance rights of women in particular. The opinions have finally settled the contention over the inheritance rights of women under the customary law. It has become clear and settled that any customary law and practice which disinherits a woman is repugnant to natural justice, equity and good conscience and also in conflict with section 42 of the Constitution and therefore unconstitutional. This covers widows and other female children of the family. It does not matter whether the female child is born out of wedlock. The Supreme Court emphasized that this finding of the lower courts in favour of women in this regard is "inviolable".

The Supreme Court applying the repugnancy test in Anekwe's case emphatically stated that any culture that disinherits a daughter from her father's estate or wife from her husband's property is repugnant to natural justice and that the perpetrators of the culture and custom should be punitively and decisively dealt with to serve as a deterrent. It went further to express its worries about 'counsel representing such perpetrating clients, though learned, appear comfortable in identifying, endorsing and also approving of such a demeaning custom.'

The Supreme Court in Anekwe's case has not only given further impetus to the use of repugnancy test in dealing with issues of customary law and practices which impugn on women's rights and gender equality generally but has also tacitly cleared the uncertainty in the application of this test by an earlier Supreme Court opinion in *Mojekwu v. Iwuchukwu* (2004). In *Mojekwu's* case, the Supreme Court while reaffirming that the court will not in validate and enforce a customary law and practice which is repugnant to natural justice, equity and good conscience, maintained that the Nnewi native law and custom of *Oliekpe* which disinherits women was not repugnant to natural justice, equity and good conscience. Thus the Court of Appeal in that case was wrong in making such a finding and reaching the conclusion that the custom of *Oliekpe* is repugnant to natural justice. It cautioned that the court should be cautious in declaring such customary laws repugnant to natural justice based merely on the repugnancy principle influenced by what it considered to be extraneous considerations.

Similarly, in applying the constitutionality test the Supreme Court in the Ukeje's case emphasised that:

No matter the circumstances of the birth of a female child, such a child is entitled to inheritance from her late father's estate. Consequently the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42 (1) and (2) of Constitution, a fundamental right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution ((2014) LPELR-22724(SC) 32-33)

In effect, the opinions have given tacit legitimacy and validity to the pathway being charted by the Court of Appeal in some earlier cases, where it declared the customary laws and practices which discriminate against women repugnant to natural justice, equity and good conscience; and also void as it is in conflict with section 42 (1) and (2) of the Constitution ^[11]. The two tests can therefore be used simultaneously or

alternatively to question the validity of any customary laws and practices that impugn on women's rights.

On the thematic side, these judgements have provided a further platform and legitimacy for continued advocacy and awareness creation activities and campaign against gender discrimination and in favour of women's rights. This is clearly captured in Anekwe's case where Ogunbiyi, J.S.C. unequivocally emphasised thus:

I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter claim is hereby outrightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilisation. It is punitive, uncivilised and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over (2014) LPELR-22697(SC) p36).

Ngwuta, J. S. C in the same vein expressed it thus: My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, and the hand that rocks the cradle.

The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realities of today's world. Children, male or female, are gifts from the creator for which parents should be grateful.

The custom of Awka people of Anambra State pleaded on and relied upon by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished (2014) LPELR-22697(SC) p42).

Conclusion

The Supreme Court pronouncements in these cases are commendable and remain a fundamental step in the protection of women's rights in Nigeria. It has provided an unequivocal readiness of the court to protect and safeguard the women's rights in Nigeria. The pronouncements represent a definitive judicial opinion on the status of customary laws and practices that cultivate gender inequality. It has provided a benchmark for the evaluation of customary laws and practices that are considered discriminatory or inimical to the enjoyment of women's right using constitutional parameters and repugnancy principle.

The issue of protection of inheritance rights of women therefore is no more that of want of law as the Supreme Court has cleared the customary law inhibitions. What is needed now is awareness creation in respect of the existence of such rights generally and the peoples readiness to enforce and execute such rights in case of any violation or threat thereof. This involves social policing. This is where some institutions like the churches, the Nigerian Bar Association and the women's rights NGO's may be again relevant.

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The Buyer's right to avoid the contract due to non-conformity of the goods under the CISG

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Abstract

The present article deals with the buyer's right to avoid the contract in case of non-conformity of the goods in the United Nations Convention on Contracts for the International Sales of Goods (CISG). In order to avoid a contract due to non-conformity of the goods a fundamental breach is required. Hence, the article firstly analyses the requirement of fundamental breach of contract defined in article 25 CISG. Secondly, we try to examine the circumstances which permit the buyer to avoid the contract under article 49(1)(A) CISG with referring to the numerous decisions of courts and arbitral panels. Thirdly, the article focuses on the seller's right to cure after the date of delivery and it further examines the interaction between the seller's right to cure and the buyer's right to avoid the contract. Finally, it addresses the declaration and the effects of avoidance within the Convention.

Keywords: CISG, Goods, Non-conformity, Avoidance, Fundamental Breach

1. Introduction

In many international sale of goods disputes the main question is whether the goods delivered conform to the contract. The issue of non-conforming goods has always played a central role in both national and international sales transactions. Indeed, the will to receive a specific product (in return for a given price) is the main reason for the buyer to conclude a sale contract. Due to the importance of the correspondence between the characteristics described in the contract and the final delivered goods, The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG)¹ in its provisions (especially in its article 35) determine when goods are deemed to be in conformity to the contract.²

However, in sales transactions, a party may prefer to avoid the contract where things go wrong. Avoidance in case of non-conforming goods is a remedy for breach of contract which is available when the buyer can no longer be expected to continue the contract. The buyer's right to avoid the contract is governed by article 49 CISG which has been considered one of the most important provisions of the CISG as it has resulted in many cases. However, in order to avoid the contract, the non-conformity of the goods must amount to a fundamental breach. The term "fundamental breach" which gives rise to avoidance of contract, is a unique principle or as some authors stated, a "milestone concept".³ The issue of the ability to avoid the contract in the case of a fundamental breach has received much

attention over the years both from CISG scholars and through reported decisions. In this regard therefore, this article explores the provisions within the CISG dealing with the buyer's right of avoidance of the contract in case of non-conformity. It examines article 25 CISG dealing with fundamental breach that provides the tests for a breach of contract, because certain remedies are only available in cases of a fundamental breach. Additionally, the article analyses the meaning of avoidance in the context of defective performance, provided for in article 49 CISG which includes fundamental breach. Hence, readers should obtain guidance and assistance in order to determine whether there was a fundamental breach in cases of delivery of non-conforming goods.

2. Fundamental Breach of Contract

Avoidance of the contract should only be granted to the buyer as a last resort which is available when the buyer can no longer be expected to conform to the contract. However, the buyer can declare the contract avoided only when breaches are sufficiently serious.⁴ One court held that the phrase fundamental breach must be interpreted respectively, and in case of doubt, fundamental breach should not be accepted.⁵ In order to avoid a contract a fundamental breach of contract is required. The concept of fundamental breach is defined by article 25 CISG that states a breach is fundamental if it substantially deprives the party of what it was entitled to expect under the contract.⁶ The definition intends to separate a non-fundamental and a fundamental breach of contract. The distinction is of vital importance for the system of remedies, because it can determine the life or death of the contract. For

¹ United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, S. Treaty Doc. No. 98-9 (1983), 19 I.L.M. 688-99 (1980) [hereinafter CISG or the Convention], available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>. The CISG has received worldwide acceptance, and nowadays (As of December 29, 2015) has been ratified by 84 countries. For the latest number, see online at: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited on July 10, 2016).

² Villy de Luca, "The Conformity of the Goods to the Contract in International Sales" 27 *Pace Int'l L. Rev.* 6 (2015), available at: <http://ssrn.com/abstract=2393283> (Visited on July 10, 2016).

³ Leonardo Graffi, "Case Law on the concept of fundamental breach in the Vienna Sales Convention" 3 *IBLJ* 341 (2003).

⁴ Ulrich Schroeter, "Article 25" in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* 400 (Oxford University Press, 3rd ed., 2010).

⁵ Schweizerisches Bundesgericht, No. 4A_68/2009, Switzerland, May 18, 2009, available at: <http://www.unilex.info/case.cfm?id=1460>.

⁶ CISG, Art. 25: "a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

example, damages, reduction of price and repair the goods do not require a fundamental breach while avoidance of contract and delivery of substitute goods may only be requested in case of a fundamental breach.

The concept of fundamental breach has been examined in a number of cases. For instance, a German buyer ordered 120 pairs of shoes from an Italian seller through a commercial agent, in accordance with the seller's standard form. The contract contained a clause granting the buyer the exclusive right to distribute the shoes within a specific district. After selling twenty pairs of shoes, the buyer discovered that the seller had sold the same type of shoes to another German company in another district, who distributed the shoes at a lower price. The buyer sent the remaining 100 pairs of shoes back to the seller cancelling its order and promising payment for the 20 shoes. The seller claimed payment of the full price. The German court held that the buyer had not validly avoided the contract in accordance with article 49(1)(a) CISG as it failed to give express notice of avoidance. The court further held that there was no fundamental breach according to article 25 CISG since the seller could not have known where the second buyer's branches were located and that, in the judgment of the court, the seller could not reasonably have foreseen this circumstance.⁷

In another case, the court also addressed non-conformity of goods as a basis for establishing fundamental breach. In this case, a German buyer and an Italian seller concluded a contract for the sale of a stock of women's shoes in 1991. The buyer did not pay part of the price alleging that the seller had not delivered the goods within the agreed time and that the goods did not conform to the contract. The seller claimed payment of the balance of the price. The court stated that the non-conformity entitles the buyer to declare the contract avoided only when it amounts to a fundamental breach of the contract. Because the buyer had not proved that the shoes could not be reasonably used for their original purpose due to their defects, the non-conformity of the goods under the contract did not amount to a fundamental breach.⁸

2.1 Element of Fundamental Breach

Fundamental breach of contract is defined by article 25 CISG. The existence of a fundamental breach enables the aggrieved party, provided certain other conditions are fulfilled, to avoid the contract. The first part of article 25 characterizes fundamental breach as the detriment caused by one party to the other party, which substantially deprives him of what he is entitled to expect under the contract. The second part of article 25 is conditional, and allows the breaching party to prevent the avoidance if he proves that he did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Thus the provision is comprised by two main components that will be discussed in turn: detriment/expectation component relating to the aggrieved party and foreseeability component concerning the breaching party. However, the provision does not mention the correct time at which the consequences of the breach must have been

foreseeable. It has been expressly stated that however, the time of the conclusion of contract is the relevant time.⁹

2.1.1 Detriment/Expectation Component

In order for a breach to be "fundamental", it must cause a "detriment" that substantially deprives the aggrieved party of its reasonable expectations.¹⁰ What then is detriment? What is substantial deprivation? And what are the contractual expectations of the non-breaching party?

2.1.1.1 The Detriment as a Precondition for Fundamental Breach

The CISG, does not define the term "detriment". Nor does it give any example of detriment that rises to the level of a fundamental breach. However, the concept of "detriment" comprises not only actual and future monetary loss, but also any other kind of (actual and future) negative consequences of any possible breach of contract.¹¹ The buyer may be substantially deprived of what he was entitled to expect under the contract by a breach although actual damage was not suffered. Suppose, for instance, where a contract concluded to deliver goods in a fixed date and where it was made clear that time was of the essence. In that case, the buyer by any delay, will be substantially deprived of what he was entitled to expect under the contract.¹²

Detriment must be in existence at the time of the avoidance of the contract. However, it occurs in many instances when the breach of contract continues. Hence, in order to determine when the detriment has become so great that may cause fundamental breach, article 25 CISG turns on the degree of the detriment, namely, substantial deprivation that will be discussed below.

2.1.1.2 Substantial Deprivation

According to article 25 CISG, to constitute a fundamental breach, the non-breaching party must suffer a detriment which must be such as substantially to deprive him of what he is entitled to expect under the contract.¹³ The wording "substantially to deprive" qualifies the detriment within article 25. But how the "substantiality of the deprivation" is judged? For the breach to be fundamental, the detriment must be substantial. In this regard, the major emphasis is clearly laid upon the contractual interests of the aggrieved party: "of what he is entitled to expect under the contract."¹⁴ For example, it has been held that a fundamental breach by the party in breach is established under article 25 CISG if that party "fails to receive the essence of what could have been expected according to the contract."¹⁵

⁷ Landgericht Frankfurt am Main, No. 3/11 O 3/91, Germany, September 16, 1991, available at: <http://www.unilex.info/case.cfm?id=3>.

⁸ Oberlandesgericht Frankfurt am Main, No. 5 U 15/93, Germany, January 18, 1994 available at: <http://www.unilex.info/case.cfm?id=40>

⁹ CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, April, 24 1997].

¹⁰ Michael Will, "Article 25" in Cesare Massimo Bianca and Michael Joachim Bonell (eds.), *Commentary on the International Sales Law* 210 (Giuffrè, Milan, 1987).

¹¹ Franco Ferrari, "Fundamental Breach of Contract under the UN Sales Convention 25 Years of Article 25 CISG" 25 *Journal of Law and Commerce* 495 (2006).

¹² Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* 215 (Sellier European Law Publishers, 2007).

¹³ CISG, Art. 25.

¹⁴ *Ibid.*

¹⁵ District Court Saarbrücken, No. 8 O 49/02, Germany, July 2, 2002, available at: <http://cisgw3.law.pace.edu/cases/020702g1.html>.

In sum, a “detriment” within article 25 can lead to fundamental breach only if a party fails to receive the essence of what he was entitled to expect according to the contract.¹⁶ Thus, the focus is on the judgment of the “contractual expectation” for that purpose which will be discussed below.

2.1.1.3 Contractual Expectations

The aggrieved party’s expectations are qualified by such phrases as “what he is entitled to expect under the contract” in Article 25 CISG. Under the general principle of freedom of contract parties are undoubtedly free to determine when and under which circumstances a breach of the contractual expectation is fundamental.¹⁷ This is supported by judicial authority which declares that the buyer should make use of the opportunity to expressly state in the contract which obligations it considers essential.¹⁸ However, the question arising here is: whether the language of the contract is the only source in defining the contractual expectations of the aggrieved party? It has been stated that the wording “under the contract” refers to all the terms of the contract whether express or implied. In other words, it is not only the express contractual terms that determine the particular expectations, other sources can be discerned from additional provisions of the CISG, usages, or established practices and negotiations.¹⁹

It is important to note that according to article 25 the expectation test is objective rather than subjective. Because it does not really matter what the aggrieved party actually expected, but what he was entitled (reasonably) to expect, i.e. what a reasonable third party would have expected under the circumstances.²⁰ However, the expectation test is limited by foreseeable deprivation which makes clear that where the damaged party is deprived of a benefit which the breaching party could not foresee and could not reasonably be expected to foresee, the breach is not fundamental. This understanding is further supported by the foreseeability test, which will be discussed below.

2.1.2 Foreseeability Component

The second part of article 25 is its foreseeability component. Even if the breach of contract has substantially deprived the aggrieved party of what he was entitled to expect under the contract, as discussed above, the breach will not be fundamental if that result was not foreseeable. Therefore, in order to prevent the other party from avoiding the contract, the breaching party has to show that it did not foresee the detrimental consequences, nor would a reasonable person of the same kind and in the same conditions have foreseen these consequences.²¹ Since it is improbable that the breaching party would admit to foreseeing the detriment in question, the

standard of the “reasonable person” was introduced.²² Thus, the foreseeability test is both subjective and objective in that it depends not only upon whether the breaching party actually foresaw the result, but also on whether a reasonable person of the same kind in the same condition would have foreseen it. It is asserted that since in international sales transactions parties are presumed to be merchants,²³ a “reasonable person” is considered to be a reasonable merchant. The phrase “of the same kind” refers to a merchant in the same trade, doing the same operations or functions as the breaching party.²⁴ The requirement that the reasonable merchant be “in the same circumstances” refers to both regional and world-wide market conditions.²⁵

In my view, if the buyer actually was deprived of his expectations under the contract, there will automatically be a “detriment” and it will be very hard for the seller to show that this result could not have been foreseen by a reasonable person of the same kind in the same circumstances. Therefore, the practical relevance of the foreseeability requirement in article 25 CISG will be limited.

3. Avoidance for Non-Conformity of Goods under Article 49(1)(A) CISG

Under article 49(1)(a) CISG avoidance is possible “if the failure by the seller to perform any of his obligations under the contract or this convention amounts to a fundamental breach of contract.”²⁶ However, as already mentioned the notion of avoidance for fundamental breach must be understood in conjunction with article 25 CISG. In case of delivery of non-conforming goods by the seller (where amounts to a fundamental breach), the ability for a buyer to avoid the contract is an important feature of the CISG. It is asserted that the delivery of non-conforming goods is the most difficult area within the fundamental breach doctrine,²⁷ and one of the most recurrent topics in CISG litigation.²⁸

4. Seller’s Right to Cure after the Date of Delivery

Article 48 CISG deals with the seller’s right to cure a breach after the delivery date.²⁹ It specifies that the right to cure may

¹⁶ See supra note 12 at 340.

¹⁷ See discussion at chapter 4.1; Ingeborg Schwenzer, “The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents” 36 *VUWLR* 795-801 (2005).

¹⁸ Bundesgerichtshof, No. VIII ZR 51/95, Germany, April 3, 1996, available at: <http://www.unilex.info/case.cfm?id=182>.

¹⁹ See CISG, Art. 30: “The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention”.

²⁰ Supra note 12 at 215.

²¹ Supra note 10 at 206.

²² Alexander Lorenz, “Fundamental Breach under the CISG”, available at: http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html#fn_Cesare_31 (Visited on July 11, 2015).

²³ Supra note 10 at 218.

²⁴ Cesare Massimo Bianca and Michael Jochin Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* 219 (Giuffrè, Milan, 1987). It has been argued that the reasonable merchant’s business practices, socio-economic background, religion, and language should also be considered.

²⁵ *Ibid.*

²⁶ CISG, Art. 49(1)(a).

²⁷ Supra note 12 at 227.

²⁸ Supra note 3 at 341.

²⁹ CISG, Art. 48: (1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention. (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller. (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision. (4) A request

arise in two situations, the first is the application of the requirements of article 48(1), and the second is an implied agreement between the parties under article 48(2). These requirements along with the interaction between the seller's right to cure and the buyer's right to avoid the contract will be discussed below.

4.1 Right to Cure under Article 48(1) CISG

According to article 48(1) CISG, under certain circumstances, the seller has a right to remedy at his own expense "any failure" to perform his obligations.³⁰ However, practically the delivery of non-conforming goods will be its main field of application.³¹ The seller's right to cure depends on two conditions: that the contract has not rightfully avoided by the buyer and that he will not suffer unreasonable inconvenience. Unreasonable inconvenience concept cannot be specified in general terms. It varies from case to case depending on the circumstances.³² It is stated that it refers to the disturbances that cure would bring to the buyer's business. The seller must be able to effect cure without unreasonable delay.³³ There are three kinds of delay caused by curing: a delay which amounts to a fundamental breach of contract and is governed by article 49(1)(a) CISG; a delay which does not constitute a fundamental breach but still appears unreasonable; and finally a delay which is not unreasonable. The seller's right to cure is only possible in the last kind of delay.³⁴

According to the second sentence of article 48(1), the buyer's right to claim damage under the Convention is retained even if, the seller performs its obligations by his cure. In this regard, however, two points must be considered. First, the provision states that cure does not exclude a claim for damages if such a claim exists.³⁵ Secondly, the provision only refers to those damages which result from the original breach and which cannot be removed by the cure.³⁶ The buyer, for example, may claim damages for any loss of profit occurs due to delivery of a machine one week after the agreed time, because he could not use the machine during that period. The same would be true where the defective machine delivers in time but the repair of which took the seller one week. However, if all conditions are fulfilled, the exercise of the seller's right to cure depends on the nature of the goods and on the type of its failure to perform. Usually he will cure by substituting conforming goods for defective goods or by repairing or replacing a defective component part.

4.2 Right to Cure under Article 48(2) CISG

Under article 48(2) and (3) CISG, the seller must indicate to the buyer that he is willing to perform within a certain period and request him to make known whether he will accept the cure or whether he is likely to reject it.³⁷ According to article 48(3) a notice by the seller that he will perform within a

or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

³⁰ CISG, Art. 48(1).

³¹ Supra note 12 at 218.

³² Ibid.

³³ Unreasonableness depends on the circumstances of each case, including the nature of the goods and their intended use.

³⁴ Supra note 10 at 252.

³⁵ The buyer will only be able to claim damages, if the general requirements for such a claim (Art. 45(1) lit. (b), Art. 74 et seq. CISG) are met.

³⁶ Supra note 12 at 220.

³⁷ Id. at 221.

specified period of time is assumed to include such a request. It is noteworthy however that, under article 48(4) CISG, the seller's request or notice is effective only if received by the buyer. This is one of the exceptions to the dispatch principle as laid down in article 27 CISG stating the duty of a party is discharged through dispatching a notice "by means appropriate in the circumstances"³⁸; according to this rule the risks of error, delay or loss in transmission of a request or notice fall on the addressee. However, if the aggrieved buyer dispatches his objection to the seller's proposed cure by appropriate means of communication and the message does not arrive or is delayed or contains errors in transmission, the buyer's right to rely on the communication is authorized by article 27. In sum, the exception to the general "dispatch" rule under article 27 CISG applies only to the seller's request (the party who is in breach of contract).³⁹

According to article 48(2) CISG, upon the seller's request if the buyer does not reply to that within a reasonable time, the seller will have a right to cure irrespective of whether the requirements of article 48(1) CISG.⁴⁰ Moreover, the buyer may not exercise any remedies inconsistent with performance by the seller during the period of time to cure the defect.⁴¹ Inconsistent remedies, as in article 46(1) CISG, are avoidance and price reduction.⁴² If, however, the buyer rejects the seller's request within a reasonable time, article 48(2) will have no effect on the existence of a right to cure.

4.3 Interaction between Right to Cure and Avoidance

Article 48(1) CISG stipulates that the seller's right to cure is expressly subjected to article 49 which provides the buyer's right to avoid the contract. Consequently, a controversial question here arises regarding the interaction between right to cure and avoidance; which right shall prevail, the seller's right to cure or the buyer's right to avoid? There are diverging interpretations concerning the relationship between the seller's right to cure and the buyer's right of avoidance. Most courts have held that a lack of conformity will not amount to a fundamental breach if the seller offers and effects speedy repair and replacement without any inconvenience to the buyer.⁴³ In an illustrative case, for instance, no fundamental breach was found where repairable parts of a hanger were defective.⁴⁴

In practice, the possibility of cure has often been considered as a factor in determining a fundamental breach of contract. In Germany, for instance, the Court of Appeals of Koblenz stated that in order to determine a fundamental breach the nature of non-conformity and the willingness of the seller to cure the lack of conformity without any inconvenience to the buyer

³⁸ CISG, Art. 27: unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

³⁹ The Secretariat Commentary on article 44 of the 1978 Draft, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-48.html> (Visited on July, 13, 2015).

⁴⁰ Supra note 12 at 221.

⁴¹ CISG, Art. 48(2).

⁴² CISG, Art. 50, second sentence,

⁴³ Handelsgericht Zürich, No. HG920670, Switzerland, April 26, 1995, available at: <http://www.unilex.info/case.cfm?id=166>.

⁴⁴ Cour d'Appel de Grenoble, No. RG 93/4879, France, April 26, 1995, available at: <http://www.unilex.info/case.cfm?id=109>.

should be taken into account.⁴⁵ Thus, the seller's breach may not be regarded as fundamental if it can be (and finally is) cured in accordance with article 48(1) CISG. However, if the buyer has a specific and legitimate interest in immediate avoidance, the possibility of cure shall not be taken into account.

In the author's opinion, when there is a fundamental breach, the buyer is entitled for avoidance the contract without being obliged to do so. Therefore, in the absence of the buyer's declaration of avoidance, cure should be permitted. This is supported by the ideas of good faith and the contract preservation.

5. Declaration of Avoidance (Article 49(2) CISG)

According to article 49(2) CISG, if the seller has delivered the goods, the buyer must declare avoidance within a reasonable time. The contract is not automatically terminated; there must be a declaration of avoidance.⁴⁶ No particular form is required for the declaration.⁴⁷ Neither is it necessary to start legal proceeding to make the declaration.⁴⁸ It must, however, clearly state that the aggrieved buyer now treats the contract as at an end.⁴⁹

The buyer's reasonable period of time to declare the contract avoided differs depending on whether the breach is related to late delivery or other breaches. In the case of late delivery, the time begins when the buyer becomes aware that delivery has been made.⁵⁰ In the case of other breach, the starting point of time is when the buyer becomes aware or ought to have been aware of the breach.⁵¹ It has been held too late for the buyer's declaration of avoidance made eight weeks after he became aware of the breach.⁵² Furthermore, eight months after the latest time the buyer knew or ought to have known the seller's alleged breach has been deemed untimely to constitute a reasonable time for avoidance declaration under article 49(2)(b).⁵³ On the other hand, a declaration of avoidance given within 48 hours upon late delivery of an instalment was found to be timely.⁵⁴ Furthermore, three weeks after notice of non-conformity under article 39 CISG was considered timely for a declaration of avoidance.⁵⁵

Regarding revocation of the avoidance declaration, a tribunal held that if the seller has unjustifiably refused the avoidance,

the buyer can revoke his declaration.⁵⁶ In a similar way, it was held that the contract existed even after the declaration of contract, because the buyer later accepted the goods and resold them.⁵⁷

6. Effects of Avoidance and its Special Rules

Articles 81 to 84 CISG are concerned with effects of avoidance of the contract. The general rules are governed by article 81, while the duties of the seller and buyer are specified by articles 82, 83, and 84. Article 81(1) provides that "avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due." The most important consequence of avoidance is that the seller need not deliver the goods and the buyer is under no longer obligation to take delivery and pay for the goods. However, avoidance does not terminate the seller's duty to pay any damage occurred by his failure to perform or any method for settlement of disputes in the contract.⁵⁸ Although, in some legal systems, by avoiding the contract all rights and obligations which arose out of the existence of the contract are eliminated, the second sentence of article 81(1) provides that: "avoidance does not affect any provision of the contract for the settlement of disputes or any other provisions of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract." Therefore, damage claims for its breach, clauses in the contract for settlement disputes, determining penalties, and choice of law and forum, etc., are not affected by avoidance of the contract. However, under article 81(2), if one of the parties has performed the contract, wholly or in part, it may claim restitution from the other party of whatever the first party has supplied or pay under the contract.⁵⁹

According to article 82(1) CISG, if it is impossible for the buyer to make restitution of the delivered goods substantially in the same condition in which he received them, he loses his right to declare the contract avoided.⁶⁰ The impossibility to make return of the goods must be determined as of the time of the buyer's declaration of avoidance.⁶¹ The principle of article 82(1), however, is substantially restricted by article 82(2) stating that in the three circumstances, the buyer will not lose the right to declare the contract avoided. First, if the impossibility of making restitution is not due to the act or omission of the buyer, his right to avoid the contract will not be lost.⁶² However, the seller bears those risks which are under his control or he could have foreseen them.⁶³ Secondly, the buyer is exempted from those deterioration arose from his obligation to examine the goods provided for in article 38 CISG.⁶⁴ Finally, if the impossibility of making restitution is due to use of goods in the normal course of trade (consumption, transformation or resale) before the buyer knew or ought to

⁴⁵ Oberlandesgericht Koblenz, No. 2 U 31/96, Germany, January 31 1997, available at: <http://www.unilex.info/case.cfm?id=223>.

⁴⁶ Landgericht Frankfurt am Main, No. 3/11 O 3/91, Germany, September 16, 1991, available at: <http://www.unilex.info/case.cfm?id=3>.

⁴⁷ Kantonsgericht Zug, No. A3 2006 79, Switzerland, August 30, 2007, available at: <http://cisgw3.law.pace.edu/cases/070830s1.html>.

⁴⁸ Appellate Court Navarra, Spain, December 27, 2007, available at: <http://cisgw3.law.pace.edu/cases/071227s4.html>.

⁴⁹ Supra note 47.

⁵⁰ CISG, Art. 49 (2)(a).

⁵¹ Schweizerisches Bundesgericht, No. 4A_68/2009, Switzerland, May 18, 2009, available at: <http://www.unilex.info/case.cfm?id=1460> (if attempts at repair are finally unsuccessful, the period starts when the buyer knew or should have known that fact).

⁵² Oberlandesgericht Koblenz, No. 2 U 31/96, Germany, January 31 1997, available at: <http://www.unilex.info/case.cfm?id=223>.

⁵³ Bundesgerichtshof, No. VIII ZR 18/94, February 15, 1995, available at: <http://www.unilex.info/case.cfm?id=107>.

⁵⁴ Audiencia Provincial de Barcelona, November 3, 1997, available at: <http://www.unilex.info/case.cfm?id=313>.

⁵⁵ Hanseatisches Oberlandesgericht Hamburg, No 1 U 31/99, Germany, November 26, 1999, available at: <http://www.unilex.info/case.cfm?id=450>.

⁵⁶ Højesteret [Supreme Court], No. U.2006.2210H, Denmark, May 3, 2006, available at: <http://cisgw3.law.pace.edu/cases/060503d1.html>.

⁵⁷ Commercial Court Zürich, No. HG 050430/U/ei, Switzerland, June 25, 2007, available at: <http://cisgw3.law.pace.edu/cases/070625s1.html>.

⁵⁸ Art. 66(1), draft counterpart of CISG Art. 81(1).

⁵⁹ CISG, Art. 81(2).

⁶⁰ CISG, Art. 82.

⁶¹ Appellate Court Frankfurt, No. 5 U 164/90, Germany, September 17, 1991, available at: <http://cisgw3.law.pace.edu/cases/910917g1.html>.

⁶² CISG, Art. 82(a).

⁶³ Supra note 12 at 212.

⁶⁴ CISG, Art. 82(b).

have known the non-conformity, the right to avoid will not be lost.⁶⁵

It is important to note that the aggrieved buyer who has lost his right to declare the contract avoided retains all other remedies available in the contract and under the provisions of the CISG such as the right to damages (article 45), to repair the goods (article 46), or to price reduction (article 50).⁶⁶

Under the CISG, like many legal systems, the parties are obliged to return all benefits of possession. Article 84 CISG states that if the seller is obliged to refund the price, he must also pay its interest⁶⁷ from the time on which the price was paid.⁶⁸ But the buyer is only bound to return all benefits that he actually derived from using the goods or part of them.⁶⁹ However, according to article 84(2), this duty on the part of the buyer would apply in two situations: (1) if he must return the goods or part of them, and (2) if it is impossible for him to return all or part of the goods or to return all or part of the goods substantially in the same condition in which he received them, "but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods."⁷⁰

7. Conclusion

Avoidance is a remedy for breach of contract which cancels the contract and releases the parties from their obligations under the contract. However, in light of the requirements of international trade, avoidance should not be granted easily. It should only be granted to the buyer as a last resort (for the most exceptional cases) when the buyer can no longer be expected to continue the contract. Since the preservation of the contract and the obligations of the parties is one of the main purposes of the CISG, the notion of fundamental breach makes it extraordinarily difficult to avoid the contract. Moreover, although the doctrine of a fundamental breach is the main requirement of avoidance and is very vital and necessary to satisfy the needs of international trade but it seems difficult for the parties to establish it. The matter of avoidance for non-conforming goods is riddled with uncertainty and differences of opinion. In the end, a buyer's interest, a seller's interest and economic reasons such as costs and risk of transportation or storage must be balanced to determine whether a certain feature of the contract must be considered fundamental under the circumstances.

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⁶⁵ CISG, Art. 82(c).

⁶⁶ CISG, Art. 83.

⁶⁷ The interest rate is usually defined by the parties in the contract. In the absence of the agreement, the court applies private international law to define the interest rate.

⁶⁸ CISG, Art. 84(1).

⁶⁹ CISG, Art. 84(2).

⁷⁰ CISG, Art. 84(2)(a) and (b).