

Punjab-Haryana High Court

Chandigarh Administration vs Unknown on 9 June, 2009

CWP No. 8760 of 2009.

::-1-::

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH.

C.W.P. No. 8760 of 2009.

Date of Decision: 9th June, 2009.

Chandigarh Administration Petitioner

Versus

Nemo

CORAM:

HON'BLE MR. JUSTICE SURYA KANT.

HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:Mr.Anupam Gupta, Senior Standing Counsel

for U.T., Chandigarh.

Mr. H.S.Mattewal, Advocate General, Punjab.

Mr. H.S.Hooda, Advocate General, Haryana.

Mr. R.S.Cheema, Sr. Advocate and amicus-curiae with
Ms. Tanu Bedi, Advocate .

SURYA KANT, J.

The Chandigarh Administration has filed this writ petition purportedly in public interest, seeking permission for medical termination of the pregnancy of a mentally retarded girl [the name withheld and here-in-after referred to as the victim], who was previously an inmate of the Nari Niketan, Sector 26, Chandigarh and has presently been shifted to Ashreya - a Home for the mentally challenged, located in Sector 47, Chandigarh. The medical CWP No. 8760 of 2009. ::-2-::

termination of pregnancy of the victim has been sought on the strength of the medical opinion dated 27.5.2009 given by the Multi- disciplinary Medical Board of the Government Medical College and

Hospital, Sector 32, Chandigarh.

[2] The following facts would unfold the pathetic story of physical and mental abuse of a hapless girl in a Government-run Institute:-

[a] The victim, an orphan, was under the guardianship of New Delhi Missionary of Charity till 28th December, 1998. It appears that as per the records maintained by the Missionary of Charity in New Delhi, she was born on 8th December, 1991. As the girl was mentally retarded, the New Delhi Missionary of Charity put her under the guardianship of Missionary of Charity, Sector 23A, Chandigarh and made her join the Government Institute for Mentally Retarded Children, Sector 32, Chandigarh. While studying there, she ran away from the said Institute on 20th March, 2005. She was later on traced by the police and brought to the Nari Niketan, Sector 26, Chandigarh. On 13th March, 2009, the victim was shifted to Ashreya - a newly established Institute. Both Nari Niketan as well as Ashreya are Government institutes, run by the Chandigarh Administration under the administrative control of the Director, Social Welfare and the Director-Principal, Government Medical College and Hospital, Chandigarh, respectively. When shifted from Nari Niketan to Ashreya, the victim was understood to be about 16 years of age. [b] After the victim was shifted to Chandigarh, one Roshan Ara Khatun, wife of Mohammad Farukh, claimed her custody under CWP No. 8760 of 2009. :-3-:

the mistaken belief that she was her lost daughter Reshma but soon thereafter "admitted" her mistake and declined to keep her. According to Roshan Ara Khatun, she was convinced that the victim was not her daughter for the reason that there was no mark of a cut on the waist of her daughter Reshma which is noticeable on the waist of the victim. Consequently, the victim was brought back to the Nari Niketan under the orders of the Sub Divisional Magistrate, who had earlier, even without proper verification, handed-over the custody of the victim to Roshan Ara Khatun.

[c] The petitioner claims that on 16th May, 2009, a Medical Social Worker and a Staff Nurse working in Ashreya observed that the victim had a feeling of nausea and complained of pain in lower abdomen. The victim also disclosed to them that she had missed her last two menstrual periods. The Medical Social Worker and the Staff Nurse, on their own, conducted a pregnancy test from the victim's urine and found it to be positive. The authorities of the Government Medical College and Hospital were immediately informed and the next day being a Sunday, a Medical Board comprising two Gynaecologists and a Radiologist was constituted on 18th May, 2009, who, on clinical examination of the victim, found out that she was 8- 10 weeks' pregnant. The pregnancy was re-confirmed by the Radiologist on the basis of the ultra-sound examination done on the same day and as per the report, the pregnancy was of 9 weeks 1 day +- 3 days of Gestation. Due to the increasing abdominal pain, the victim was admitted to the Gynae Ward of the Hospital and thereafter, an ossification test is said to have been conducted on 20th CWP No. 8760 of 2009. :-4-:

May, 2009, which set her bone age to be between 19-20 years. [d] The pregnancy of an unwed mentally retarded girl having been confirmed, the authorities swung into motion and informed the Chandigarh Police on 18th May, 2009 itself, which led to the registration of FIR No. 155 dated 18th May, 2009 under Section 376 and 120-B IPC at the Police Station, Sector 26, Chandigarh. The FIR

does mention the name of the principal accused as well as the abettor of the heinous offence. The case is stated to be still under investigation by a Special Investigation Team [SIT]. [e] The Director-Principal of the Government Medical College and Hospital, Sector 32, Chandigarh thereafter constituted a Three Member Medical Board on 25th May, 2009, headed by the Chairperson of the Department of Psychiatry to evaluate the mental status of the victim, who in turn opined that she is in the category of "mild mental retardation". It followed yet another order dated 26th May, 2009 by the same authority constituting a four Member Multi- Disciplinary Medical Board "to submit their considered opinion as to the consequences of continuation of pregnancy and the capability of the victim to cope with the same". The Board comprised a Gynaecologist, a Radiologist, a Paediatrician and a Psychiatrist. [f] The aforesaid Board submitted its opinion on 27th May, 2009, recommending medical termination of the pregnancy of the victim, inter-alia, for the following reasons:-

"1.....

2. There is no doubt that this pregnancy is an outcome of the rape. In spite of being upset over mentally challenged, she has earlier communicated to her CWP No. 8760 of 2009. :-5-::

examiners about being upset over this incident and has lost interest in certain activities which were enjoyable earlier indicating that she might be mentally upset about this incident.

3. She has undergone a major spinal surgery during her childhood as she was not able to walk. Although she is not able to elaborate the details further. The cause of mental retardation in presence of bony abnormalities can have a genetic basis and can be inherited by the baby.

4. Continuation of pregnancy in this case can be associated with certain complications considering her age, mental status and previous surgery. There are increased chances of abortions, anaemia, hypertension, prematurity, low birth weight babies, foetal distress and more chances of operative delivery including anaesthetic complications. Babies who are premature and low birth weight may have organs that are not fully developed. This can lead to breathing problems, such as respiratory distress syndrome, bleeding in the brain, vision loss and serious intestinal problems.

5. Being mildly mentally retarded, she is unable to look after herself and can not fend for herself if left to her own devices. She was aware that there is a child inside her, although she had absolutely no idea how it came to be there. She can not mother a child. Motherhood is not only holding the child but it is a complex relationship which is beyond her capability and comprehension.

6. Child of a rape victim who doesn't have family support can have social and emotional problems which can jeopardise his complete physical, mental and social well being later.

7. There is clear cut humanitarian ground as per the MTP Act as pregnancy is a result of rape on the basis of which MTP can be done. The board would like to highlight that CWP No. 8760 of 2009. :-6-::

MTP can also be associated with some complications which are dependent on the duration of pregnancy, expertise of the doctor performing the MTP and the method used for MTP. Immediate complications included haemorrhage and cervical injuries. Delayed complications include post abortal bleeding, incomplete abortion; pelvic infection, peritonitis, and septicaemia. The incidence of these complications is reported in 2.9% of cases, although the incidence of severe complications is very rare. The complications can still be minimized by doing a timely abortion under expert doctor.

Considering all the above points, the board is of the opinion that she will not be able to cope with the continuation of pregnancy which in this case is detrimental for her and the child's health, and so recommends medical termination of pregnancy [MTP]" .

[3]. The Parliament has enacted the Medical Termination of Pregnancy Act, 1971 [in short 'the 1971 Act'] with an awed object to liberalise and permit termination of pregnancy wherever necessary, [i] to protect the mother's health, strength and/or life; [ii] on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic [now replaced by the expression 'mentally ill'] woman etc.; and [iii] on eugenic grounds, namely, where there is a substantial risk, i.e., the child, if born, would suffer from deformities and diseases. Section 2[a] and [b] of the 1971 Act define 'guardian' and 'mentally ill person', whereas Section 3 lays down the circumstances wherein the pregnancy can be terminated and the competence of the Medical Practitioner[s], who can assist. Section 5 of the Act is an exception to Section 3 and 4 of the Act. The aforesaid provisions read as follows:-

CWP No. 8760 of 2009. :-7-::

"2. Definition:- In this Act, unless the context otherwise requires,-[a] "guardian" means a person having the care of the person of a minor or a mentally ill person.

[b] "mentally ill person" means a person who is in need for treatment by reason of any mental disorder other than mental retardation.

[3] When pregnancies may be terminated by registered medical practitioners.-[1] Notwithstanding anything contained in the Indian Penal Code [45 of 1860], a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any, pregnancy is terminated by him in accordance with the provisions of this Act.

[2] Subject to the provisions of sub-section [4], a pregnancy may be terminated by a registered medical practitioner.-

[a] where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or [b] where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that -

[i] the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or [ii] there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped Explanation 1.- Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the CWP No. 8760 of 2009. :-8-:

pregnant woman.

Explanation 2.- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

[3] In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section [2], account may be taken to the pregnant woman's actual or reasonable foreseeable environment.

[4] [a] No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

[b] Save as otherwise provided in clause [a], no pregnancy shall be terminated except with the consent of the pregnant woman.

5. Sections 3 and 4 when not to apply:-[1] The provisions of Section 4, and so much of the provisions of sub-section [2] of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

[2] Notwithstanding anything contained in the Indian Penal Code [45 of 1860], the termination of pregnancy by a person who is not a registered medical practitioner CWP No. 8760 of 2009. :-9-::

shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

[3] Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

[4] Any person being owner of a place which is not approved under clause [b] of Section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years".

[4]. The Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation] Act, 1995 [in short 'the 1995 Act'] is a later Legislation, enacted to give effect to the proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. The laudable object of the legislation is to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of the persons with disability and to create barrier free environment for them as well as to remove any discrimination against them in the sharing of development benefits. The Act is also meant to ensure that the persons with disabilities are not exploited and to make special provisions for their integration into the social main stream. Section 2[i], [q], [r] defines 'disability', 'mental illness' and 'mental retardation' to the following effect:-

"2[i] "disability" means - [i] blindness; [ii] low vision; [iii] CWP No. 8760 of 2009. :-10-::

leprosy-cured; [iv] hearing impairment; [v] locomotor disability; [vi] mental retardation; [vii] mental illness;

[q] "mental illness" means any mental disorder other than mental retardation;

[r] "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence".

[5]. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 [in short 'the 1999 Act'] is yet another recent progressive legislation meant to provide for the constitution of a National level body for the Welfare of the persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities and for matters connected or incidental thereto. Section 2[g], [j], and [m] defines 'mental retardation', 'person with disability', and 'registered organization' to the following effect:-

"2[g] "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence.

[j] "person with disability" means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability.

[m] "registered organization" means an association of persons with disability or an association of parents of persons with disability or a voluntary organization, as the case may be, registered under Section 12".

[6]. Besides constitution of a National Trust for the persons of the above mentioned special categories, sections 13 and 14 of CWP No. 8760 of 2009. ::-11-::

the Act provide for the constitution of the Local Level Committees and the procedure for appointment of guardianship of the disabled persons and read as follows:-

"13. Constitution of Local Level Committees.-[1] The Board shall constitute a Local Level Committee for such area as may be specified by it from time to time.

[2] A Local Level Committee shall consist of -

[a] an officer of the civil service of the Union or of the State, not below the rank of a District Magistrate or a District Commissioner of a District;

[b] a representative of a registered organisation; and [c] a person with disability as defined in clause [i] of Section 2 of the Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation] Act, 1995 [1 of 1996].

[3] A Local Level Committee shall continue to work for a period of three years from the date of its constitution or till such time it is reconstituted by the Board.

[4] A Local Level Committee shall meet at least once in every three months or at such interval as may be necessary.

14. Appointment for guardianship.-[1] A parent of a person with disability or his relative may make an application to the Local Level Committee for appointment of any person of his choice to act as a guardian of the persons with disability.

[2] Any registered organization may make an application in the prescribed form to the Local Level Committee for appointment of a guardian for a person with disability;

Provided that no such application shall be entertained by the Local Level Committee, unless the consent of the CWP No. 8760 of 2009. :-12-::

guardian of the disabled person is also obtained.

[3] While considering the application for appointment of a guardian, the Local Level Committee shall consider-

[a] Whether the person with disability needs a guardian;

[b] the purposes for which the guardianship is required for person with disability;

[4] The Local Level Committee shall receive, process and decide applications received under sub-sections [1] and [2] in such manner as may be determined by regulations.

Provided that while making recommendation for the appointment of a guardian, the Local Level Committee shall provide for the obligations which are to be fulfilled by the guardian.

[5] The Local Level Committee shall send to the Board the particulars of the applications received by it and orders passed thereon at such interval as may be determined by regulations".

[7]. Though no delegation of its powers by the National Trust for constitution of a Local Level Committee has been brought on record, nevertheless, the petitioner - Administration had issued a notification dated 9th June, 2006 reconstituting the Local Level Committee to discharge the functions under the 1999 Act. [8]. The petitioner Administration could have possibly resolved the issue[s] raised herein through its own administrative mechanism, namely, by approaching the Local Level Committee, who is competent to appoint a guardian of the person with disability and who [the guardian so appointed], in turn, can act in the best interests of the disabled person, including giving consent for medical CWP No. 8760 of 2009. :-13-:

termination of the pregnancy in accordance with the provisions of the 1971 Act. The Chandigarh Administration instead opted for approaching this Court to issue appropriate directions as, according to its learned Senior Standing Counsel, the petitioner is unwilling to become a Judge in its own cause.

[9]. Having regard to the fact that prima facie sensitive issues involving the rights of a mentally retarded woman subjected to rape and resulting in an unwanted pregnancy as well as the highly debatable issues relating to interpretation of the Statutes relevant to the situation have arisen for consideration, this Court, therefore, vide an order dated 30th May, 2009 requested the learned Advocates General for the States of Punjab and Haryana to provide assistance and also appointed Sarv Shri R.S.Cheema and M.L.Sarin, learned Senior Advocates as amicus-curiae to assist the Court. [10]. We have accordingly heard at length Shri Anupam Gupta, learned Senior Standing Counsel for the petitioner Administration, S/Shri H.S.Mattewal and Hawa Singh Hooda, learned Advocate Generals for the States of Punjab and Haryana respectively and Shri R.S.Cheema, learned Senior Counsel and amicus-curiae well assisted by Ms. Tanu Bedi, Advocate. We have also been assisted by Shri R.S.Bains and Ms. Ekta Thakur, Advocates. The records have also been perused.

[11]. In our considered view and owing to the very nature of the relief sought by the petitioner, the principal and moot point which requires determination by this Court is as to whether the pregnancy of the victim is liable to be terminated and if so, who shall be the CWP No. 8760 of 2009. :-14-:

competent person to give consent for such termination? In other words, should the consent of the victim be considered mandatory to terminate her pregnancy or, this Court, in exercise of its parens-patriae jurisdiction, can assign such consent by issuing appropriate directions? Ancillary issues of equal importance, like the scope of parens-patriae jurisdiction; pathetic condition of the Government run/ aided Welfare Institutes and to bring transparency in their day-to-day functioning; participation of the NGOs and Social Workers for betterment of such like Institutes etc. have also arisen for our consideration.

[12]. As may be seen, Section 3[1] of the 1971 Act expressly provides that if a pregnancy is terminated in accordance with the provisions of this Act, it shall not constitute an offence under the

Indian Penal Code or any other law. The 1971 Act, thus, is an exception to the general penal laws. Sub-Section [2] of Section 3 authorises the registered medical practitioner[s] to terminate a pregnancy on formation of an opinion in good faith that continuation of the pregnancy would risk the life of the pregnant woman or cause grave injury to her physical or mental health, after taking into account her actual or reasonable foreseeable environment, or if there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation 1 is noticeably significant as it provides that if the pregnancy is alleged to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-Section [4] of CWP No. 8760 of 2009. :-15-::

Section 3, however, obligates that the pregnancy can not be terminated except with the consent of the pregnant woman or of her guardian if the pregnant woman has not attained the age of 18 years or is a mentally ill person. Section 5 of the Act enables termination of the pregnancy if it is immediately necessary "to save the life of the pregnant woman". On a plain reading of the statute and given the literal meaning to its provisions, it can be plausibly inferred that if the pregnant woman is above 18 years of age, the consent of the guardian would be necessitated only if she is a mentally ill person. It would necessarily imply that if the pregnant woman is above 18 years of age and is a mental retardee only, she alone would be competent to accord consent for termination of her pregnancy as mandated by sub-section [4][b] of Section 3 of the Act.

[13]. Mr. Anupam Gupta, learned Senior Standing Counsel for the petitioner, however, has taken us not only to various provisions of different statutes but also to the Medical & Legal Texts and the opinions expressed by renowned subject specialists and experts, to contend that the literal meaning, if given, would render the Act unworkable and senseless besides frustrating the legislative intentment and objects sought to be achieved through the later legislations, the provisions of some of which have earlier been referred to by us. He urged that there is an inherent fallacy in understanding Section 3 of the 1971 Act to construe that howsoever severe may the degree of mental retardation be, the consent of the retardee alone would be required, whereas in the case of mental illness, howsoever mild it may be, that the consent can be accorded CWP No. 8760 of 2009. :-16-::

by a guardian only. Shri Gupta referred to 5th description of Section 375 read with Sections 90 and 92, IPC to impress upon that the "consent" given by a person suffering from unsoundness of mind has no legal sanctity. He urged that the expression "unsound mind" includes "mental retardation" for the purposes of Section 375 IPC as ruled by the Supreme Court in *Tulshi Dass Kalolkar v State of Goa*, 2003[8] SCC, 590 in the following passage:-

"The plea of consent is too shallow to even need detailed analysis or consideration. A mentally challenged girl can not legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is a gulf of difference between consent and submission. Even consent involves a submission but the converse does not follow and mere act of submission does not involve consent.. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving-in when the

faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency can not be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. A girl whose mental faculties are undeveloped, can not be said in law, to have suffered sexual intercourse with consent". [Emphasis applied] [14]. Shri Gupta then referred to Order 32 Rule 15 CPC to canvass that a person of unsound mind can sue or be sued only through his next friend or a guardian to be appointed by the Court.

Relying upon two Division Bench judgments of the Calcutta and Allahabad High Courts in *Amulya Rattan Mukherjee v Smt. Kanak CWP No. 8760 of 2009. :-17-::*

Nalini Ghose, AIR 1950 Calcutta, 30 and AIR 1962 Allahabad, 512 and a judgment of the Supreme Court in Ram Chander Arya vs Man Singh and Another AIR 1968 Supreme Court, 954, he urged that even a court decree against a lunatic without the appointment of a guardian is a nullity.

[15]. Shri Gupta made a passionate reference to the medical reports/opinions on record and urged that having regard to the deficiencies in the areas of self-help grooming and socialisation and the fact that she is unable to look after herself and can not fend for herself if left to her own devices, coupled with the IQ level of the victim stated to be that of a nine years old, especially owing to the major spinal surgery undergone by the victim during her childhood and possibility of bony abnormalities to be genetically inherited by the baby, this Constitutional Court should come to the rescue of the victim and invoke its parens-patriae jurisdiction by granting permission to terminate the pregnancy, which is otherwise also a cause of anguish having been caused by a diabolic act of rape. Shri Gupta has relied upon two judgments of the Madras High Court reported as 1984 Criminal Law Journal, 446 [Allavali v CR Nayyar & Ors.], and 1996 Criminal Law Journal, 3795 [D.Rajeshwari v State of Tamilnadu & Ors.]. The first case is of a detenu who was impregnated while in custody, whereas the second case relates to an 18 years old victim burdened with an unwanted pregnancy caused by rape. In the later case, the Bench after referring to the provisions of the 1971 Act and having held that the petitioner was a major woman who was under great distress causing traumatic and psychological CWP No. 8760 of 2009. :-18-::

shock and grave injury to her mental health due to unwanted pregnancy caused by rape, issued the appropriate directions to conduct medical termination of pregnancy.

[16]. Given the time constraints, but in all fairness to Shri Gupta, we may mention here that with his usual persuasive capability and in-depth study of the case in hand, he took us through series of books and articles of the world renowned authors like the following:-

"[i] Diagnostic and Stastical Manual of Mental Disorders [Fourth Edition];

[ii] Mental Retardation by Mary Beirne-Smith, University of Alabama, Richard F.Ittenbach, University of Mississippi and James R.Patton, Pro-Ed, Austin, Texas;

[iii] Canadian Criminal Law by Don Stuart;

[iv] Medico-Legal Aspects of Reproduction and Parenthood by J.K.Mason; and [v] International Human Rights Text and Materials by Dr. Rebecca Wallace".

While DSM-IV-TR explains the universally accepted and approved methodology of determining the degree of mental retardation, the book MENTAL RETARDATION highlights the inherent disabilities suffered by the mental retarded and how the prejudiced misconceptual theory of 'disablism' is being practised against them by the non-retarded. Some of the books have highlighted the increase in risks to the pregnant woman's health after the first trimester and how in the developed countries like the USA and Canada also the practice of parental consent has gained importance and the Courts also follow the 'judicial bye-pass procedure'.

[17]. Emphasis has also been laid on 25 principles adopted by CWP No. 8760 of 2009. :-19-:

the General Assembly of the United Nations for the protection of persons with mental illness and for improvement of mental health- care, with a special reference to the following clauses:-

"Principal 1: Fundamental freedoms and basic rights:-

6. Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law. The person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it. The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is at issue unless the tribunal is satisfied that there is no conflict of interest. Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law. The person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal a higher court against any such decision".

"Principal 11. Consent to treatment.

1. No treatment shall be given to a patient without his or her informed consent, except as provided for in paragraphs 6,7,8,13 and 15 of the present principle.

2. Informed consent is consent obtained freely, without threats or improper inducements, after appropriate disclosure to the patient of adequate and understandable CWP No. 8760 of 2009.

:-20-:

information in a form and language understood by the patient on:- [a] the diagnostic assessment; [b] the purpose, method, likely duration and expected benefit of the proposed treatment; [c] alternative modes of treatment, including those less intrusive;[d] possible pain or discomfort, risks and side-effects of the proposed treatment.

8. Except as provided in paragraphs 12,13 and 15 of the present principle, treatment may also be given to any patient without the patient's informed consent if a qualified mental health practitioner authorised by law determines that it is urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons. Such treatment shall not be prolonged beyond the period that is strictly necessary for this purpose".

[18]. We may summarise and say that the Medico Legal Literature has been relied upon as an external aid for interpreting Section 3[3] of 1971 Act to mean that in the case of a mentally retarded pregnant woman also the consent of her guardian is essential, as according to Shri Gupta, the persons classified as 'mentally retarded' have more deficits in social and cognitive functioning and have very limited behavioural or decision making abilities including the tendency to go alone or acquiescence in ambiguous situations. The aims and objects coupled with various provisions of the 1995 and 1999 Acts have also been relied upon to urge that in the wider category of 'disabled persons', the persons suffering from 'mental retardation' or 'mental illness' - both have been included and treated at par, especially in the context of appointment of a guardian under Section 14 of the 1999 Act. CWP No. 8760 of 2009. :-21-::

[19]. While pressing into aid the doctrine of parens-patriae and relying upon the Supreme Court decisions in Charan Lal Sahu v Union of India, 1990[1] SCC, 613 and Neel Rattan Kundu & Anr. V Abhijit Kundu, 2008[9] SCC, 413, Shri Gupta urged that while appointing a guardian the Courts in India have consistently exercised the parens-patriae jurisdiction and, therefore, in the peculiar facts and circumstances of this case, where the victim is in the custody of the petitioner State and the decision for medical termination of her pregnancy is also required to be taken by the petitioner itself, it is a fit case for this Court to exercise the parens-patriae jurisdiction and act as guardian of the victim in her best interest.

[20]. Shri H.S.Mattewal, learned Advocate General, Punjab, laid emphasis on the fact that the issue with which this Court is confronted, is a human problem and "humanity is above law". He supported the petitioner's cause and buttressed his contentions by citing two decisions, one by the House of Lords in re: F [Mental Patient: Sterilization], 2 Weekly Law Reports, 1025 and the other, in the case of T. v T and another, 2 Weekly Law Report, 189. [21]. Per-contra, Shri R.S.Cheema, learned Senior Counsel and the amicus-curiae well assisted by Miss Tanu Bedi, Advocate, urged strenuously that there is no ambiguity in the provisions of the 1971 Act, rather the expression "mentally ill person" has been added recently by Act No. 64 of 2002 in substitution of the expression "lunatic" and the legislation was fully conscious and informed of the consequences of excluding mentally retarded persons from the category of 'mentally ill persons'. A pointed reference has been made CWP No. 8760 of 2009. :-22-::

to Section 2[1] of the Mental Health Act, 1987 which too defines "mentally ill person" to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation. According to the learned amicus-curiae, there is no legislative omission while excluding the retarded from the category of mentally ill persons as retardation is only a mental condition distinct from mental disease. Shri Cheema highlighted the medical opinion which is suggestive of the victim's self sustenance; her perception and thinking process being normal; her orientation to time, place and person; her immediate, recent and remote memory being intact and the fact that she is adept in activities of daily living. The learned amicus-curiae expressed his anguish and rightly so against the manner in which the victim has been treated like a subject. He lambasted the petitioner for seeking termination of the pregnancy for the sake of convenience and not for the reason of necessity. Shri Cheema reminded the petitioner of its obligation in terms of Articles 39[f] and 46 of the Constitution as well as the commitment to the UN declaration on Human Rights. In no uncertain terms, argued Shri Cheema, the consent of the victim shall be a condition precedent before medical termination of her pregnancy. Besides making a pointed reference to the Declaration on the Rights of Mentally Retarded Persons proclaimed by the General Assembly Resolution dated 20th December, 1971, re-affirming that the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings, Shri Cheema has also relied upon the Mental Capacity Act, 2005 of UK and the views of several subject-experts to CWP No. 8760 of 2009. :-23-::

contend that with the advancement of Medical Science, universal recognition of the Fundamental Rights of the mentally retarded persons, recent theory of mixing them in the main social stream instead of barricading at a secluded place, that the legislative transformation has also taken place whereby purposefully and knowingly, the competence to give consent for medical termination of a pregnancy in the cases of mentally ill pregnant woman on one hand and mentally retarded pregnant woman on the other hand, has now been distinguished.

[22]. Shri Cheema has made special reference to the following Articles:-

- "1. Sexual abuse of the Mentally Retarded Patient : Medical and legal analysis for the primary care physician;
2. Mental Retardation : Typical Characteristics;
3. MCES Quest - Characteristics of Individuals with Mild Mental Retardation and Psychiatrist Pendulum for Mild Mental Retardation;
4. Center for the Study of Ethics in the profession at IIT. Rights of Mentally Retarded Persons - an official Statement of American Association on Mental Deficiency;
5. Parenting by Intellectually disabled - Perspective of father with intellectual disability;
6. The British Journal of Development Studies on 'Sterilization of Women with learning Disability;'

7. Should mentally retarded be allowed to raise children;

8. An Extract from paper and policy statement by Queensland Advocacy Inc. 'Sterilization of People with disability'."

He also relied upon a judgment of the Canadian Supreme Court in *EVE v Mrs.E* [1986] 2 SCR, 388 and two judgments of the U.S. Appeal's Courts in the matters of *Mary Moe* and *Jane A*, 31 Mass CWP No. 8760 of 2009. :-24-::

App Ct. 473 and 36 Mass App Ct. 236 where the Courts declined consent for medical termination of pregnancy in somewhat similar circumstances.

[23]. The literature including the opinions and articles relied upon by the learned amicus-curiae, does suggest that the individuals with the mental retardation have developmental delays in learning and processing information, yet nearly 85% of them are able to live successfully in the community. People with mild mental retardation account for about 85%; they more or less develop normal language abilities and social behaviour during the pre-school years and their learning disability may never be formally identified; most of them can lead their lives independently in ordinary surroundings, though they may need help in coping with family responsibilities, housing and employment or when under unusual stress.

[24]. Shri Cheema also referred to the research conclusions to show that 90% of mentally retarded infants are born out of non- retarded parents, which completely debunks the eugenics myth. The subject specialists have divided the persons suffering from mental retardation into four categories, i.e., "[i] mild; [ii] moderate; [iii] severe and [iv] profound", based upon the assumption of a number of features, viz:-

Feature	Mild	Moderate	Severe	Profound
IQ	50-55 to appr. 70	35-40 to 50-55	20-25 to 35-40	Below 20-25
Age at death [years]	50s	50s	40s	About 20
CWP No. 8760 of 2009.				:-25-::
%age of mentally retarded population	89	7	3	1
Socioeconomic class	Low	Less low	No skew	No skew
Academic achieved by adulthood	level 6th grade	2nd grade	Below grade general	1st in grade general
Education	Educable	Trainable [self-care]	Un-trainable	Un-trainable
Residence	Communit	Sheltere	Mostly	Mostly living

	y	d	living	in	in	highly
			highly			structured
			structured			and closely
			and closely			supervised
			supervised			settings
			settings			
Economic	Makes	Makes	Can	use	Dependent	
	change,	small	coin		on others	
	manages	change;	machines;		for money	
	a job,	usually	can take		managemen	
	plans	able to	notes to		t	
	income	manage	shop			
	with effort	change	owner.			
	or	well.				
	assistant					

[Reference Article by Jamie P.Morano]

[25]. Shri H.S.Hooda, learned Advocate General, Haryana,

also opposed the petitioner's prayer and argued that in the light of the amended provisions of the 1971 Act, the pregnancy can not be terminated unless consented by the victim. Shri R.S.Bains and Ms. Ekta Thakur, Advocates, also intervened and while questioning the bona-fide of the authorities, broadly supported the line of action chosen by the learned amicus-curiae.

[26]. We now proceed to examine the medical evidence on record recommending termination of pregnancy of the victim, the approval whereof is sought from this Court. The Director-Principal, CWP No. 8760 of 2009. :-26-::

Government Medical College and Hospital, Sector 32, Chandigarh, vide his order dated 25th May, 2009 constituted a Board consisting of an Assistant Professor, Department of Psychiatry, Clinical Psychologist and a Special Educator to "evaluate the mental status" of the victim. The Board met the victim, spent some time with her and submitted an evaluation report which reads as follows:-

"Ms._____ [name withheld] was assessed in ward, where she was sitting up in her bed. She did not wish the committee members but smiled tentatively in response and told her name as '_____'. She was dressed neatly in Hospital Clothes and groomed well. Eye to eye contact was made and maintained. Rapport could be established. Psychomotor activity was within normal range. No odd movements/behaviours could be observed. Ms._____ could not tell whether her mood is sad or happy but reported, over the course of interview that she doesn't enjoy watching TV etc. As she used to earlier, feels bad when she is forced for even watching TV. She also cries almost daily. Her speech is slow and hesitant with mild distortion of sound but is goal directed and coherent. Her perception and thinking processes were normal. She is oriented to time, place and person but is not able to name specific e.g. Could tell the day but not date & month. She knew she is in hospital but could not pin point her location. She could identify persons. Her immediate, recent and remote memory is intact. Her

social judgment and reality contact are intact. She is adept in activities of daily living but functional academics are poor including number concept, money handling and are limited to identification only. During interview her intelligence was assessed as being sub-normal, and screening as well as intelligence tests were administered. Test [VSMS -

Vineland social maturity scale] consisting of self help CWP No. 8760 of 2009. :-27-::

skills showed that she is good at self-help eating and dressing. She can communicate with others. Deficits are present in the areas of self-help grooming and socialization. Marked deficits are present in the area of locus of control. Verbal adult intelligence scale was administered which she could not comprehend. She scored 65 on Coloured Progressive Matrices [CPM] which suggests she falls in the category of Mild Mental Retardation".

The Board thereafter submitted a supplementary report to the following effect:-

"As it is already mentioned in the earlier report submitted on 25.05.2009, Ms. _____ is a person with mild mental retardation. Further detailed testing was done. Performance tests were administered on her. She could not comprehend Bhatia's Battery for Intelligence test when administered. On another test called Seguin Form Board [SFB], her mental age, came out to be 9 years and PO=64 which is suggestive of mild mental retardation. So the mean of the total scores of all the tests shows that she falls in the category of Mild Mental Retardation".

[27]. Having pondered over the rival contentions revolving around the moot point for determination and on a plain reading and a literal meaning of sub-section [4] of Section 3 of the 1971 Act, it appears that the written consent of a guardian for medical termination of pregnancy is needed if [i] the pregnant woman has not attained the age of 18 years; or [ii] she is a mentally ill person. Since the expression "mentally ill person" does not include a person who is in need of treatment by reason of mental retardation, the purposive construction of sub-section [4][a] of Section 3 of the 1971 Act can not CWP No. 8760 of 2009. :-28-::

be stretched to include "mentally retarded persons" also. Similarly, sub-Section [4][b] does not intend to exclude from its ambit the mentally retarded pregnant woman. We say so for the reason that when the words in a Statute are not ambiguous and are capable of bearing one construction only, the principles of casus omissus or external aid need not be applied and the provision has to be interpreted as such regardless of its consequences. Any interpretation which may amount to re-writing of the statute, falls outside the jurisdictional scope of this Court. It further appears to us that the amendment introduced vide Act No. 64 of 2002 is a progressive legislation based upon universally accepted theory that though mental retardedness may be incurable, yet a retardee has a fundamental human right to live and enjoy the main social stream. It means that ordinarily a mentally retarded pregnant woman who is more than 18 years of age has a right of self determination regarding continuation or otherwise of her pregnancy.

[28] The literal interpretation as given above, however, completely falls short of achieving the legislative object of not only the 1971 Act, it may also tinker with the legislative object of the 1999 Act as well as the UN Declaration on the rights of the mentally retarded persons. We say so for the reason that in the context of termination of pregnancy being a penal offence prior to the 1971 Act came into force and one of the objects of the Act being permitting the termination of pregnancy on humanitarian grounds when it is caused by a sex crime like rape or intercourse with a lunatic woman [the expression which has been amended by the Act of 2002 only and CWP No. 8760 of 2009. :-29-:]

which prior to such amendment included mentally retarded pregnant woman also], any interpretation should lean towards liberalising medical termination of pregnancy.

[29]. We are unhesitatingly of the view that such like cases can not be decided on the solitary strength of interpretation of legal provisions. Besides being vested with plenary and inherent jurisdiction to act as a custodian of the fundamental and human rights of the citizens, a writ Court while exercising parens-patriae jurisdiction owes a bounden duty to act in the best interest of the guardee, keeping in view his/her care, protection, health, education, intellectual development, comforts, contentment and congenial environment, along with moral and ethical values, as emphasised by their Lordships of the Supreme Court in Nil Rattan Kundu's case [supra].

[30]. While adopting a holistic approach in interpreting the 1971 Act, we have also kept in view the fact that the 1995 Act though defines "mental illness" and "mental retardation" separately and distinctly, nevertheless both have been clubbed together for the purposes of State's endeavour for their education, employment, affirmative actions and non-discrimination. Similarly, the 1999 Act primarily meant to constitute a National Trust for the welfare of the persons with disability, has also grouped together persons suffering from 'mental retardation' with those suffering from "multiple disabilities" under the 1995 Act [which includes mentally ill persons also]. The 1999 Act has foreseen the necessity of appointment of any person of choice of the 'person with disability' to act as his/her CWP No. 8760 of 2009. :-30-:]

guardian and such person may include even a juristic person like a "registered organization". We are conscious of the fact that the legislative fields of 1995 and 1999 Acts are altogether different and do not have any over-lapping with the provisions of the 1971 Act. What is, however, common in the three legislations is the welfare of the 'mentally ill' as well as the 'mentally retarded' persons in order to secure their social rehabilitation through legislative means. It is in the context of achieving the legislative objects that the 1999 Act visualises the need of appointment of a guardian that may arise even in the case of a 'mentally retarded person'. In our view, the exclusion of mentally retarded persons from the category of mentally ill persons under the 1971 Act is not absolute in the sense that irrespective of the foreseeable environment in which such mentally retarded person is living or the degree and condition of mental retardedness, the Court even while exercising its parens-patriae jurisdiction can not appoint a guardian to determine as to whether or not the continuance of the pregnancy of a mentally retarded major pregnant woman involves risk to her life or can cause grave injury to her physical or mental health.

[31]. The Courts can not be oblivious of the fact that ours is a country inflicted with imbalanced male-female sex-ratio; marred by female foeticide; ashamed of a vast majority of abandoned girls in orphanages; clouded with social evils like dowry; poor literacy rate amongst girls, with alarming increase in dowry deaths and, therefore, the freedom of consent given to a mentally retarded major pregnant woman by virtue of sub-section [4] of Section 3 of the 1971 Act, has CWP No. 8760 of 2009. ::-31-::

to be taken as susceptible and can not be accepted on its face value by a Court while exercising its parens-patriae jurisdiction. Howsoever laudable the legislative object may be, the realities of life including the fact that the "consent" of a person with best of prudence, can be secured by dubious means of undue influence, fraud, misrepresentation etc. etc., we decline to accept the omnibus interpretation of sub-section [4] of Section 3 of the 1971 Act that in the case of a mentally retarded major pregnant woman, the medical termination of her pregnancy shall always depend upon her own decision.

[32]. The system and the society both have been very unfair and cruel to the victim in this case. The material on record does suggest that her bony deformity and the consequential life-long disability might have been the factor which made her parents so cruel that they threw her out to survive all by herself in an unknown and unkind world. After she ran away and was brought back, efforts should have been made to persuade the Missionary of Charity at Chandigarh, to take her back before putting her amidst altogether new surroundings of Nari-Niketn. The casual approach and criminal negligence of the authorities is writ large by the fact that the victim was sent with Roshan Ara Khatun even without verifying the bona- fide of the claimant or an iota of evidence to establish her relationship with the victim. The fact that the victim is alleged to have been ravished by none else than the guard of the institute, is enough for us to form a firm opinion that the victim has been treated like a subject, traumatised to the highest degree and has been made to witness all CWP No. 8760 of 2009. ::-32-::

possible miseries. We are at pains to observe that the mechanical approach and callousness with which the welfare institutions are being apparently run, the victim has been deprived of an environment which could have been conducive to her mental growth, social behaviour and an over-all personality development. [33]. We also hasten to add that the 1971 Act as amended by the Act No. 64 of 2002, fails to take notice of the fact that in majority of the eventualities to seek consent of a mentally retarded major pregnant woman for medical termination of her pregnancy might be of those who have been orphans and have no identified relative to act as their natural guardian. Could they also be placed at the same pedestal and at par with those who are under the direct care, control and guardianship of their parents, kith and kin etc. - is a question to be examined by the Law Makers and not to be commented on by us. [34]. We accordingly hold that notwithstanding the plain and literal meaning of sub-section [4] of Section 3 of the 1971 Act, every Court while exercising its parens-patriae jurisdiction is competent to act or appoint guardian ad-litem of a mentally retarded major pregnant woman for the purpose of deciding the retention or termination of her pregnancy in her best interest, though depending upon the individual facts and circumstances of each case. Such guardian may consult or seek consent of the pregnant woman concerned for the purpose of formation of his final decision as to whether or not the pregnancy be medically

terminated. [35]. In the light of what has been held above, and taking into consideration the medical opinion/evidence on record, which we have CWP No. 8760 of 2009. :-33-::

no reason whatsoever to doubt or disbelieve, and taking notice of the predicament of the petitioner - State and for the absolute satisfaction of this Court in its capacity as a parens-patriae, we are of the considered view that the following vital issues need to be answered by an Expert Body, who should be free from the administrative control and/or influence of the petitioner - the Chandigarh Administration:-

[i] the mental condition of the retardee;

[ii] her mental and physical condition and ability for self-

sustenance;

[iii] her understanding about the distinction between the child born out of and outside the wedlock as well as the social connotations attached thereto;

[iv] her capability to acknowledge the present and consequences of her own future and that of the child she is bearing; [v] her mental and physical capacity to bear and raise a child; [vi] her perception about bringing up a child and the role of an ideal mother;

[vii] does she believe that she has been impregnated through un-

volunteered sex?

[viii] is she upset and/or anguished on account of the pregnancy alleged to have been caused by way of rape/un-willing sex? [viii] is there any risk of injury to the physical or mental health of the victim on account of her present foreseeable environment? [ix] is there any possibility of exerting undue influence through any means on the decision-making capability of the victim? [x] Do the over-all surroundings provide reasonable space to the victim to indulge in independent thinking process and take firm decisions on the issues vital to her life prospects? [xi] What is the possible nature of the major spinal surgery alleged to have been undergone by the victim during her childhood? Does it directly or indirectly relate to the bony abnormalities of the victim? Can such abnormalities have a genetic basis to be inherited by the baby?

CWP No. 8760 of 2009. :-34-::

[xii] Is there a genuine possibility of certain complications like chances of abortion, anaemia, hyper-tension, prematurity, low birth weight baby, foetal distress, including chances of anaesthetic complications, if the victim in the present case, is permitted to carry on the pregnancy?

[xiii] What can be the most prudent course to be followed in the best interest of the victim?

[36]. After due deliberations on the composition of the Expert Body, we are of the view that the Post Graduate Institute of Medical Education and Research, Chandigarh is one of the premier Institutes of national repute and is adorned by renowned subject specialists. No one can have any reason whatsoever to doubt the specialised acumen, the objectivity or the impeccable integrity of its highly qualified professionals that we are inclined to choose to assist us in arriving at a definite conclusion. We also deem it appropriate to include a fairly senior lady Judicial Officer to attach judicial sanctity behind the verdict of the Expert Body. We accordingly request the Director, Post Graduate Institute of Medical Education and Research, Chandigarh to spare one subject specialist each, preferably in the rank of Professor/Additional Professor, from the Departments of Psychiatry, Gynaecology, Paediatrics and General Medicines to perform the arduous and humane duties assigned to them in the larger public interest. We also appoint Smt. Raj Rahul Garg, Additional District & Sessions Judge, Chandigarh as a Member-cum- Coordinator of the Expert Body.

[37]. We direct the petitioner - Chandigarh Administration to approach the Director, PGIMER, Chandigarh to make available the above stated team of Experts as well as the Coordinator of the Expert Body for organizing the meeting of the Expert Body preferably CWP No. 8760 of 2009. :-35-::

at some place in the PGIMER Campus itself. The petitioner - Chandigarh Administration is further directed to produce the victim before the Expert Body at a place to be chosen by the latter and for as much time as may be required by the Expert Body. The Chandigarh Administration shall approach the Director, PGIMER/the Coordinator of the Expert Body within two days. The Expert Body shall submit its opinion on the issues illustrated above but nothing precludes the Expert Body from framing any other additional issue[s] as may be deemed appropriate and give its categoric opinion in relation thereto within ten days from today. The Chandigarh Administration is directed to provide full aid and assistance to the Expert Body to facilitate the formation of the final opinion by it without any delay. We need not emphasise that time is the essence of the issue involved which has prompted us to deliver this judgment today, on 9th June, 2009 after the week long arguments concluded on 6th June, 2009 [Saturday]. Due to constraints of time only that we have not been able to deliberate in detail on some of the issues of vital public importance, though briefly dealt with by us. [38]. If the Expert Body forms a bona-fide opinion that the pregnancy needs to be medically terminated in the best interest of the victim, we in exercise of our parens-patriae jurisdiction, direct the petitioner Administration to admit the victim in the Government Medical College and Hospital, Sector 32, Chandigarh, constitute a team of Medical Experts comprising not less than two Gynaecologists and the other related associates, who shall then terminate the pregnancy of the victim forthwith and without any delay CWP No. 8760 of 2009. :-36-::

as soon as the report of the Expert Body is received. The Authorities of the above mentioned College and Hospital are directed to ensure best of the post-operational medical services to the victim. We further direct that, in such an eventuality, the foetus shall be preserved for the DNA and other scientific tests, especially for the purposes of the criminal case pending investigation. A compliance report to this effect shall be placed on record by way of an affidavit of the Director - Principal of the Government Medical College and Hospital, Sector 32, Chandigarh.

[39]. We clarify that if despite acknowledging the present and future implications/consequences, the victim strongly opposes the termination of her pregnancy, in that event the report of the Expert Body along with the expression of views by the victim shall be placed before us before July 01, 2009 for determining as to whether or not the pregnancy of the victim should be medically terminated.

[40]. Some of the learned counsel have accused and rightly so the manner in which the Institutions like Nari Niketan or Ashreya are being run. The fact that a hapless mentally retarded inmate of one of the petitioner's Institutes has been allegedly raped by none else than one of the guards of the Institute, tells the tale of criminal and administrative negligence, callousness, and an indifferent attitude of those who are at the helm of affairs in these Institutions. We strongly deprecate the manner and mechanism with which the State helped welfare Institutions are being run or managed. If the allegations are found to be true, what more would be needed to be an eye opener for the high echelons of the Administration to introspect and carry out CWP No. 8760 of 2009. :-37-:

sweeping administrative reforms towards the objects sought to be achieved. We, therefore, deem it appropriate to dispose of this writ petition with the following additional directions:- [a] there shall be a notified Medical Board headed by the Director, Health Services, UT, Chandigarh and should also consist of all possible subject specialists, necessarily including a Gynaecologist; a Skin Specialist and a Counsellor etc. as Members, who shall be required to visit, fortnightly and examine each and every inmate of the Nari Niketan, Ashreya or any other Government run/aided institution of this kind. The Medical Board shall submit its periodical report to the Secretary, Department of Health, UT Administration, who shall be required to satisfy himself regarding the adequate medical aid and assistance to the inmates;

[b] the periodical examination of the inmates of the Nari Niketan, Ashreya or any other Institution shall necessarily include their examination as to whether or not the inmate has been subjected to any sexual or digital abuse;

[c] in case the medical Board finds any inmate to be a victim in terms of the direction [b] above, the matter shall be reported to the local police forthwith and further legal action, as per the law, shall follow;

[d] the petitioner Administration is directed to provide the best medical treatment to all the inmates of the Government run/aided Institutes and no plea or pretext of the financial constraints or non-availability of adequate funds shall be entertained in this regard;

[e] we further direct that there shall be constituted a Monitoring Committee consisting of at least five members which shall include not less than three NGOs/Social Workers of high repute in the specialised field and preferably to be headed by an NGO/ Social Worker only, along with two members who shall be responsible officers of the Chandigarh Administration and are CWP No. 8760 of 2009. :-38-:

empowered to accord necessary sanction for the day-to-day expenditure, as may be incurred to provide basic amenities to the inmates of all the Government run/aided Institutes. The composition, administrative and financial structure of the Monitoring

Committee shall be duly notified by the Chandigarh Administration.

[f] there shall be a list duly notified by the Home Secretary of the Chandigarh Administration, within one month of the receipt of a copy of this judgment, of the NGOs, Social Workers, the Human Right Activists, Volunteers including Lawyers inclined to provide free legal aid services, who shall be given visiting rights, not less than once in a week, however preferably between 7 AM to 7 PM, to all the Welfare Institutions including Nari Niketan and Ashreya. We direct that any report submitted by such a visitor regarding poor/mal-functioning or on improvement thereof, shall be considered and acted upon by the Competent Authority of the Chandigarh Administration within one month from the date of its receipt and if found not feasible, to communicate its reasoned decision to the visitor concerned within the above stipulated period;

[g] the description and the particulars of each inmate, along with photographs, if possible, and their latest status of the educational pursuit, shall be displayed on the website of the Department concerned and/or the Chandigarh Administration and shall be updated from time to time. Any suggestions, remarks or views received on the website or otherwise shall also be dealt with and disposed of in accordance with law and within one month from the date of their receipt;

[h] we further direct the petitioner Administration to start community kitchen in all the Government run/aided Institutions and if the inmates include females also, by employing the female staff only. The petitioner Administration, with the approval of the Monitoring Committee constituted above, may also involve the inmates in the cooking process, however, by ensuring that no CWP No. 8760 of 2009. :-39-:

risk is caused to their mental and physical health. It is directed that all the inmates shall be provided nutritious, healthy and adequate food. The Monitoring Committee as well as the NGOs/Social Workers to whom visiting rights shall be provided as directed above, shall be permitted and are expected to test the quality of the food;

[i] we also direct the petitioner Administration not to keep/employ male employees for the internal functioning of the Institutions unless all the inmates are males only. The petitioner Administration shall also explore the feasibility of employing retired Lady Police Officers/Officials or in the alternate Ex-Army Personnel for the outer security purposes of such Institutions; [41]. We record our appreciation for the fair manner in which Sarv Shri H.S.Mattewal and H.S.Hooda, learned Advocate Generals for the States of Punjab and Haryana respectively, especially Shri R.S.Cheema, learned amicus-curiae along with Ms. Tanu Bedi, Advocate, Mr. R.S.Bains and Ms. Ekta Thakur, Advocates, placed all relevant materials and provided best assistance to this Court. [42]. Let one copy each of this order, duly attested by the Bench Secretary, be handed-over to learned Senior Standing Counsel for the Chandigarh Administration and the learned amicus- curiae.

[43]. Be put up on 1st July, 2009 for the purposes of compliance.

(SURYA KANT)
JUDGE

June 09, 2009.

dinesh

CWP No. 8760 of 2009.

[AUGUSTINE GEORGE MASIH]

JUDGE

::-40-::

C.W.P. No. 8760 of 2009.

PRESENT:Mr. Anupam Gupta, Advocate,
for the petitioner.

Ms. Tanu Bedi, Advocate.

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After pronouncement of our order and having regard to the prayer made by learned Senior Standing Counsel for the U.T., Chandigarh and also with a view to ensure a fair, impartial, dispassionate and effective investigation in the criminal case, we further direct that the Senior Superintendent of Police, Chandigarh shall place on record a status report of the on-going investigation along with his affidavit on the adjourned date, i.e., 1st July, 2009.

(SURYA KANT)

JUDGE

June 09, 2009.

dinesh

[AUGUSTINE GEORGE MASIH]

JUDGE