

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

RIT PETITION NO. 6065 OF 2020

.. Petitioners

Vs.

The State of Maharashtra
(Through the Inspector-in-charge of
Malad Police Station)

.. Respondent

.....

Mr. A.M. Saraogi i/b Mr. Siddharth Jaiswal for the petitioners
Ms. M.H. Mhatre, A.P.P for Respondent-State

CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 14th SEPTEMBER, 2020
PRONOUNCED ON : 24th SEPTEMBER, 2020.
(Through Video Conferencing)

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JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the petitioners and the learned APP for the State.

2. At the outset, it is worthwhile to mention herein that the petitioners are victims in connection with a crime registered by the Police under the Immoral Traffic (Prevention) Act, 1956 (for short “the said Act”), who are alleged to have been compelled to involve themselves in prostitution, their identity, therefore, needs to be concealed. The petitioners, therefore, shall be referred to as “victims (A), (B) and (C)”. The Registry is directed to maintain the record accordingly.

3. This petition takes exception to an order dated 19.10.2019 passed by the Metropolitan Magistrate, Mazgaon under Section 17(2) of the said Act as well as an order dated 22.11.2019 passed by the Additional Sessions Judge, Dindoshi in Criminal Appeal No. 284 of 2019 which upheld the order dated 19.10.2019.

4. The facts in brief can be summarized as follows.

5. The complainant-Rupesh Ramchandra More, Police Constable attached to Social Service Branch, approached the office of the Social Service Branch, Mumbai where he was informed by P.I. Mr. Revle about the secrete information that a person by name Mr. Nijamuddin Khan, a pimp (for short “pimp Nijamuddin”) having mobile _____ provides women for prostitution at a guest house in Malad.

6. One Mr. Shahbaz Shoukat Mapari was summoned to act as a decoy. He was supposed to call pimp Nijamuddin from his mobile no. _____. Accordingly, two panchas were summoned. The decoyer called pimp Nijamuddin from his mobile number, upon which pimp Nijamuddin informed the decoyer that it would cost Rs.7,000/- for a victim girl *inter alia* directing the decoyer to come near Chincholi Bandar signal, Malad (W), Mumbai where the victims would be shown to the decoyer from amongst whom he was supposed to select one victim girl and pimp Nijamuddin will thereafter book a room in a nearby guest house.

7. Accordingly, a trap was arranged and the raiding team left for the spot. A rickshaw came and stopped near the decoy and panch no.1. The rickshaw driver spoke to the decoy. The decoy had paid money to rickshaw driver for prostitution. Thereafter, two victim girls came out of the rickshaw. The decoy along with one victim girl and panch no.1 left in the same rickshaw.

8. PI. Revle, asked other pancha and few officers of the team to keep a watch on the remaining two victim girls; whereas he along with rest of the members of the raiding team followed the rickshaw carrying the first victim and the decoy. The rickshaw stopped in front of a metal gate of a building near

The rickshaw driver, victim girl and panch no.1 went inside the building. After some time, the driver came out and went back towards Chincholi Bandar, Malad (W) to bring remaining two victims. As per the direction of PI. Revle, members of the raiding team who were keeping vigil over the two victims, arrested the rickshaw driver and the victims and took them in their custody.

9. PI. Revle, entered into 1st floor of the building named as 'Madhuban'. There was one "Yatri Guest House". The first panch was standing near the cash counter. When a raid was conducted the decoy and the victim girl were found in room no.7. The victim was taken into custody from room no.7 of "Yatri Guest House". The accused and the other two victims were also arrested and taken into custody.

10. The victim (A), (B) and (C) were produced before the Metropolitan Magistrate on 13.09.2019. There were no complaints of ill-treatment at the hands of Police. The learned Magistrate, for the purpose of verification of the age of the victims as well as to ascertain as to whether they are infected with any sexually transmitted disease, referred them for medical examination. The learned Magistrate, *inter alia*, called for a report from the Probation Officer in respect of antecedents, character and suitability of relatives of the Victims (A), (B) and (C) for taking their charge. The Probation Officer has been directed to submit a report on or before 07.10.2019. Intermediate custody of victims (A), (B) and (C) had been given to *Navjeevan Mahila Vasti Griha*,

Deonar, Mumbai. The learned Magistrate had allowed victim girls to contact their family members/parents. The learned Magistrate also thought it fit to direct a NGO, *Justice and Care* to give primary education to victims (A), (B) and (C) during their stay in “*Navjeevan Mahila Vasatigruha*” as well as “*Kshamata NGO*” to make an inquiry in respect of victims and submit a report by 07.10.2019.

11. Subsequently, victims (A), (B) and (C) were produced before the learned Magistrate on 19.10.2019 along with their medical reports. No sexual transmitted disease has been detected in respect of any of the victims. The learned Magistrate, it appears, had also personally inquired with victims (A), (B) and (C). The Magistrate declined custody of the victims to their mothers as the victims were found involved into sex work having age group of 20 to 22 years.

12. It revealed from the report of the Probation Officer, the concerned police personnel as well as from the inquiry by the learned Magistrate that the victims (A), (B) and (C) belong to

“Bediya” community. A custom prevails in the community wherein a girl, after attaining puberty is sent for prostitution. The parents of the victims were aware that the victims are engaged in prostitution, meaning thereby, the parents themselves are allowing to indulge in prostitution as a profession for their daughters’ and, therefore, the learned Magistrate observed that it would not be safe to hand over the custody of the victims to their mothers. The learned Magistrate, having perused the report of the Probation Officer, NGO and the Medical Officer, observed that the victims need care and protection.

13. Since the victims were not safe with their parents as the parents have no objection for the victim girls to live their life as prostitutes, the victims were directed to be detained in the shelter home wherein the Counsellor would counsel the victims to restrain from prostitution. It is further observed by the learned Magistrate that the victims need to be counseled and trained so that they can earn in a dignified manner after getting adequate vocational training.

14. The learned Magistrate had observed that victims (A), (B) and (C) are originally from Kanpur, Uttar Pradesh and, therefore, they need to be sent to their original place of native.

15. Having taken into consideration all the facts and circumstances and after going through Sections 17(1), (2), (3), (4) and (6) of the said Act, the victims (A), (B) and (C) were detained for a period of one year from 19th October, 2019. The victims were directed to be sent to “*Nari Niketan Prayag Vastigruha*, Fultabad, Ilahabad, UP or any State run institution of Uttar Pradesh for one year for the care, protection, shelter and vocational training in the subject of their liking.

16. The Superintendent of *Navjeevan Mahila Vasahatigruha* has been directed to take necessary steps in shifting the victims (A), (B) and (C) to “*Nari Niketan Prayag Vasahatigruha*, Khultabad, Dist. Ilahabad, Uttar Pradesh or any other State institution of Uttar Pradesh at the earliest, in the escort that would be provided by Malad Police Station.

17. The said order was challenged by way of an appeal bearing No. 284 of 2019 in the Court of Sessions Judge at Dindhoshi. The learned Additional Sessions Judge dismissed the appeal by confirming the order passed by the learned Magistrate on 19.10.2019.

18. I heard Mr. Saraogi, the learned Counsel for the petitioners. He contends that both the Courts below have ignored the ambit and scope of the said Act, more particularly Section 17, which is not a penal provision, as the victims herein are not accused nor being prosecuted under Sections 3 to 9 of the said Act. He submits that both the Courts below have failed to appreciate the factual matrix of the matter, which they took it in a very casual, cavalier and mechanical manner while passing the impugned orders.

19. Thus, according to him, the impugned orders came to be passed without application of mind. According to the learned Counsel, the victims are major enough to take their own decision in respect of their lives. My attention is drawn by the learned

Counsel to the impugned order passed by the learned Magistrate under Section 17(2) of the said Act, which according to him, is *void ab initio* as well as bad in law as the mandate created by the statute has not been followed by both the Courts below. Sections 15 and 16 of the said Act are always subjected to the provision of an inquiry under the provision of Section 17 of the Act. He drew my attention to the fact that during the alleged raid conducted by the Investigating Agency, no customer was found with the victims-petitioners in order to involve the petitioners into any immoral activities like prostitution as defined in the said Act.

20. Since the victims, according to the learned Counsel, are not being prosecuted, there is no question of continuing their detention in the custody of *Navjeevan Mahila Vastigruha*, Deonar, Mumbai or with any other institution. Even otherwise, the said Act does not empower the Magistrate to hold the custody of the victims beyond the period of 3 weeks without their being any final order to that effect after following due process of law.

21. The learned Counsel has, therefore, strenuously urged to quash the impugned orders passed by the Metropolitan Magistrate, 54th Court, Mazgaon, Mumbai and the Additional Sessions Judge, Dindoshi.

22. Mrs. Mhatre, the learned APP though supported the impugned orders, submitted that in view of the arguments advanced by the learned Counsel for the petitioners, necessary orders can be passed as regards further detention of the victims.

23. Inherent jurisdiction of this Court under Section 482 of the Criminal Procedure Code as well as jurisdiction under Article 227 of the Constitution of India has been invoked by the petitioners to meet the ends of justice. This Court in its supervisory jurisdiction as well as under Section 482 of the Cr.PC. can entertain a petition and after examining the facts and the material placed on record, pass necessary orders or give directions. There are certain glaring discrepancies in the impugned orders. The first order of the learned Metropolitan Magistrate, 54th Court, Mazgaon, Mumbai under the said Act dated 30.09.2019 indicates that as per order of

holiday remand Court dated 28.09.2019, the victims were produced before her on 30.09.2019. Neither the first order of the remand Court dated 28.09.2019 is produced on record nor there is any observation in the order dated 30.09.2019 by the Magistrate as to where the victims were placed from 28.09.2019 to 30.09.2019. Perusal of this order clearly manifests non-application of mind by the learned Magistrate as regards necessity or requirement of keeping the victims in safe custody. In fact, the learned Magistrate passed an order under sub-section (2) of Section 17 calling for a report from the District Probation Officer. The serious lacuna in not ascertaining the custody of the victims from 28.09.2019 to 30.09.2019 would go to the root of the matter. The learned Magistrate seems to have not ascertained from the victims as to where they were kept from 28.09.2019 to 30.09.2019, meaning thereby whether the victims were placed in a safer custody as provided in sub-Section (1) of Section 17 of the said Act. There are no charges qua the victims that they were carrying prostitution in public. The inquiry as contemplated under Section 17(2) of the said Act appears to have been carried in a very casual manner. The impugned orders, therefore, can be

quashed only on this ground itself.

24. Be that as it may. Section 17(4) of the said Act provides that after completion of such inquiry, if the Magistrate is satisfied, he may subject to the provisions of sub-section (5) make an order that the victims be detained for such period, being not less than one year and not more than three years, as may be specified in the order, in a protective home for which the Magistrate shall give reasons in writing. It is pertinent to note that that the provisions of Section 17(4) of the Act are subjected to the provision of sub-section (5), which provides that the inquiry shall be conducted by the panel of at least 5 persons, to be appointed in the manner as contemplated in the said sub-section (5). No such inquiry as contemplated under the statute has been conducted. The interpretation of the provisions of Section 17(2) and Section 17(5) of the said Act have been considered by the High Court of Delhi in the decision reported in the case of *Kumari Sangeeta Vs. State of Delhi and Ors. 1996, Criminal Reporter, P-129, (Delhi)*. The relevant extract of the said judgment is reproduced herein below :-

“15. It thus as a corollary whereof rendered nugatory the entire proceedings before the learned Magistrate since a duty has been cast on the shoulders of the Magistrate to have the assistance of the panel of respectable persons while discharging his functions under Sub-section (2) of Section 17. Thus, the learned Magistrate was left with no option but to seek the assistance of the said panel comprised of five persons as provided under Section 17 (5) while discharging his functions under the said Section. The learned PPs, on the other hand, have contended that it was not incumbent on the Magistrate to seek the assistance of a panel of five persons as spoken of under Section 17 (5) of the Act inasmuch as the word used therein is ‘may’ which gave an ample option and latitude to the Magistrate and left to his judicious discretion to have the services of those five persons or to ignore the same. Since we are concerned with the construction of Section 17 of the Act it would be just and proper to examine the provisions of the said Section before embarking upon a detailed discussion. In view of the above I am inclined to reproduce Section 17 of the Act in extensor. It is in the following words:- “17. (1) When the Special police officer removing a person under sub-section (4) of Section 15 or a Police Officer rescuing a person under Sub-section (1) of Section 16, is for any reason unable to produce him before the appropriate Magistrate as required by Sub-section (5) of Section 15, or before the Magistrate issuing the order under

Sub-section (2) of Section 16, he shall forthwith produce him before the nearest Magistrate of any class, who shall pass such orders as he deems proper for his safe custody until he is produced before the appropriate Magistrate, or, as the case may be, the Magistrate issuing the order: Provided (i).... (ii) (2). when the person is produced before the appropriate Magistrate under Sub-section (5) of Section 15 or the Magistrate under Sub-section (2) of Section 16, he shall, after giving him an opportunity of being heard, cause an inquiry to be made as to the correctness of the information received under Sub-section (1) of Section 16, the age, character and antecedents of the person and the suitability of his parents, guardian or husband for taking charge of him and the nature of the influence which the conditions in his home are likely to have on him if he is sent home, and, for this purpose, he may direct a Probation Officer appointed under the Probation of Offenders Act, 1958, (20 of 1958), to inquire into the above circumstances and into the personality of the person and the prospects of his rehabilitation. (3)... Provided...Provided (4) Where the Magistrate is satisfied, after making an inquiry as required under Sub-section (2) (a) that the information received is correct; and (b) that he is in need of care and protection, he may, subject to the provisions of Sub-section (5), make an order that such person be detained for such period, being not less than one year and not more than three years, as may be specified in the order, in a protective home, or in such other custody as he shall, for

reasons to be recorded in writing, consider suitable: Provided that such custody shall not be that of a person or body of persons of a religious persuasion different from that of the person and that those entrusted with the custody of the person including the persons in charge of a protective home, may be required to enter into a bond which may, where necessary and feasible, contain undertakings based on directions relating to the proper care, guardianship, education, training and medical and psychiatric treatment of the person as well as supervision by a person appointed by the Court, which will be in force for a period not exceeding three years. (5) In discharging his functions under Sub-section (2), a Magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women to assist him and may, for this purpose, keep a list of experienced social welfare workers, particularly women social welfare workers, in the field of suppression of immoral traffic in persons. (6)....”.

25. Mr. Saraogi, the learned Counsel for the petitioners would argue that the interpretation of the word “may” used in sub-section (5) of Section 17 shall be construed as “shall” insofar as summoning a panel of 5 respectable persons is concerned, 3 of whom shall, wherever practicable, be women to assist him and may for this purpose keep a list of experienced social welfare

workers. In view of the judgment in case of *Kumari Sangeeta* (supra), the word “may” and the word “shall” are interchangeable terms. It cannot be deducted *ipso facto* from use of word “may” in a particular statute that it has been used in the sense of directly conferring an ample discretion on the part of the Authority to take recourse to board intercourse of action are not, much will depend upon the context in which the word “may” has been used and the intention of the legislature which they intend to convey through a particular enactment.

26. Section 17(4) implies that an order under the said Section can only be passed subject to the provision of sub-section (5) of Section 17 of the said Act. As already stated, sub-section (5) contemplates that while discharging the function under sub-section (2), the Magistrate will have to summon a panel of 5 respectable persons, 3 of whom shall, wherever practicable, be women to assist him in that regard. It can, therefore, be safely inferred that the legislature while using the word “may”, wanted to use it in a mandatory sense otherwise they would not have subjected to exercise powers under Sections 17(2) to 17(5) of the

said Act.

27. It is interesting to note the relevant provisions of the said Act, which go to show that the purpose and the object of the Act is not to abolish the prostitution or the prostitute. There is no provision under the law which makes prostitution *per se* a criminal offence or punishes a person because he indulges in prostitution. What is punishable under the Act is sexual exploitation or abuse of person for commercial purpose and to earn the bread thereby, except where a person is carrying on prostitution in a public place as provided in Section 7 or when a person is found soliciting or seducing another person in view of Section 8 of the said Act. The record does not reveal nor there is a charge against the victims – petitioners that they were indulged in prostitution as defined in Section 2(f) of the said Act. There is nothing on record to show that the petitioners were seducing any person for the purpose of prostitution nor there is any material to show that they were running a brothel. It seems that the learned Magistrate has been swayed away while passing the impugned order by the fact that the petitioners belong to a particular caste. It is equally important

to note that the petitioners victims are major and, therefore, have a right to reside at the place of their choice, to move freely throughout the territory of India and to choose their own vocation as enshrined in Part III of fundamental rights of the Constitution of India. The learned Magistrate, before passing the impugned order ought to have considered the willingness and consent of the victims before ordering their detention in the protective home. The orders impugned dated 19.10.2019 by the Metropolitan Magistrate, Mazgaon and the order dated 22.11.2019 passed by the Additional Sessions Judge, Dindoshi therefore, need to be quashed as the same are bad in law.

28. Clause (1) of Article 19 of the Constitution of India contemplates that all citizens shall have following rights, which read as under :-

- “(a) to freedom of speech and expression;*
- (b) to assemble peaceably and without arms;*
- (c) to form association or unions (or co-operative societies);*
- (d) to move freely throughout the territory of India;*
- (e) to reside and settle in any part of the territory of India,*
and
- (g) to practice any profession, or to carry on any occupation, trade or business.”*

29. There is no doubt that the State Government within its power under the said Act, keeping in mind the interest of the victims, can seek appropriate directions from the Court to send the victims to corrective institution. However, it cannot be lost sight of the fact that the fundamental rights conferred upon the citizen of India in part III of the Constitution of India are with reasonable restrictions mentioned in each Article. The fundamental rights of the citizens enshrined in this part of the Constitution stand on the higher pedestal *vis-a-vis* statutory right or any other right conferred by the general law.

30. In view of this position of law, the victims being major, their fundamental rights to move from one place to another place or to reside at a place of their choice and choose their vocation has to be considered. They cannot be subjected to unnecessary detention contrary to their wish and should be asked to reside in the corrective institution. There is no material on record suggesting that the victims are suffering from any disability or any diseases so that reasonable restrictions can be placed. It is not the case of the

Police that setting the victims free would cause some danger to the society. It is nearly one year that the victims have been detained in the corrective home against their wish and, therefore, for the reasons stated herein, they need to be released forthwith.

31. As regards the reports of the Probation Officer, which were sent in a sealed cover to this Court, it is noticed that the reports in respect of the victims (A), (B) and (C) are stereotype, of which two reports are undated while one report in case of victim (A) is dated 30.07.2020. The reports are so casual and cryptic which simply indicate that in view of indulgence of the victims in prostitution, they need to be sent to *Naariniketan Prayag Mahila Vasahatigruha*, Uttar Pradesh for a period of one year for training and counseling. These reports, according to me, not worth consideration since they appear to have been prepared at the eleventh hour only for the sake of fulfilling the formality of submitting the reports.

32. There is one more glaring discrepancy which is apparent from the face of the record that the alleged two panchas said to

have accompanied the raiding team, have not been named anywhere. There is even no mention of name of woman panch witness in the record. A reasonable doubt, therefore, creeps in one's mind whether any such persons were in fact called and had acted as panch witnesses. At least the record submitted before this Court does not reveal anything in that regard.

33. The second glaring discrepancy is that no inquiry qua pimp Nijamuddin with the victims appears to have been made by the learned Magistrate as to whether the said pimp–Nijamuddin was running a brothel or was responsible for procuring the victims or inducing them for the purpose of prostitution. There is even no statement of the decoy indicating any conversation with the victim girl. Admittedly, pimp Nijamuddin is being prosecuted under Section 370(3) of the Indian Penal Code and Sections 4 and 5 of the said Act.

34. Having considered the entire facts of the case and submissions made by the learned Counsel for the petitioners and the learned APP, the impugned orders need to be quashed and set aside.

35. Consequently, to secure the ends of justice, following order is expedient :-

ORDER

(i) The impugned order dated 19.10.2019 passed by the learned Metropolitan Magistrate, Special Court for ITPA, 54th Court at Mazgaon, Mumbai and confirmed by the Additional Sessions Judge, Dindoshi in Criminal Appeal No. 248 of 2019 are quashed and set aside.

(ii) The petitioners be enlarged and set at liberty from *Navjeevan Mahila Vastigruha*, Deonar, Mumbai forthwith.

(iii) Before setting the petitioners at liberty, their wishes be ascertained whether they desire to continue their stay in *Navjeevan Mahila Vastigruha*, Deonar, Mumbai for remaining period or otherwise.

If they do not wish to continue their stay in *Navjeevan Mahila Vastigruha*, Deonar, they be released forthwith.

(iv) The petitioners shall remain present before the trial Court during the course of trial at the time of recording their evidence, if summoned.

(v) The Special Magistrate shall ensure that the victims are

given adequate protection and are not influenced by any one at the time of recording their evidence.

(vi) The petitioners shall furnish their permanent address to the Investigating Officer as well as their mobile numbers, if any.

36. With the aforesaid directions, the Petition stands disposed of.

37. Rule is made absolute in the aforesaid terms.

38. This order shall be digitally signed by the Private Secretary of this Court. All concerned shall act on production by fax or e-mail of a digitally signed copy of this order.

(PRITHVIRAJ K. CHAVAN, J.)